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*Inquirer, N. Y.*







**A NEW**  
**ABRIDGMENT OF THE LAW.**

**BY MATTHEW BACON,**  
**OF THE MIDDLE TEMPLE, ESQ.**

**WITH**  
**LARGE ADDITIONS AND CORRECTIONS,**  
**BY SIR HENRY GWYLLIM,**  
**AND**  
**CHARLES EDWARD DODD, ESQ.**

**AND WITH**  
**THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED**  
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**BY BIRD WILSON, ESQ.**

**TO WHICH ARE ADDED**  
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**DECISIONS,**  
**BY JOHN BOUVIER.**

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## ADVERTISEMENT.

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To render this work worthy the patronage of the bar, the editor has added such of the English decisions, which have been made since the publication of the last English edition, as appeared applicable.

The reference to these, in addition to the American decisions, will, it is hoped, make the work as complete as possible.

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## CURTESY OF ENGLAND.

TENANT by the curtesy is he, who after his wife's death (having had issue by her inheritable) is introduced into her inheritance, and has an estate for life therein; and he is so called from the favour or curtesy of that law which made this provision for him, to which he had no natural right, nor to which any other nations, (a) except those of Great Britain and Ireland, admitted him.

Dr. & Stud. lib. 1, c. 7; Co. Lit. 30, a; Cowell, tit. *Curtsey*; it began in England and Ireland in the time of H. 1, Seld. Jan. 65; and in Scotland in the time of Malcolm. Macan. 56. Both by a positive institution. β Four things are requisite to constitute a tenancy by the curtesy, namely, marriage, seisin of the wife, issue, and death of the wife. It is not, however, indispensable that seisin and issue should concur at the same time. Jackson v. Johnson, 5 Cowen, 74. γ (a) [This is a mistake; it was known in other countries, though not under this name. By the rescript of Constantine it is established, *ut hæreditatis maternæ pater usum fructum, filii proprietatem haberent*. Crag. j. f. dieg. 22, § 40; Cod. l. 6, le. 1. And the laws of the Almaines define the estate almost in the very terms used by the laws of England. Lindembrog, L. Aleman. 1, 99. We find it in the feudal system, not indeed as a necessary consequence of the feudal tenure in its original purity, but arising from the express terms of the investiture. The language of the feudal law is *maritus uxori non succedit in feudum, nisi sit specialiter investitus*. Wright's Ten. 193, n. c. β This estate was not unknown to the ancient Germans and Normans; and in France there were several customs, which gave a somewhat similar estate to the surviving husband out of the wife's inheritances. Bouv. L. D., *Estate by the Curtesy*; Merlin, Répert. mots Linotte, et Quarte de Conjoint pauvre. γ Sir W. Blackstone inclines to think, that tenancy by the curtesy of England was so called, as signifying an attendance upon the lord's court or *curtis*, (that is, being his vassal or tenant,) not as denoting any peculiar favour belonging to this island. 3 Comm. 126. The contrary, however, is maintained by one of his successors in the Vinerian chair. 2 Wooddes. 18.]

[The words of this law, as they are found in a writ of 11 H. 3, ordaining the reception of it in Ireland, are, *Si aliquis desponsaverit aliquam mulierem, sive viduam, sive aliam, hæreditatem habentem, et ipse postmodum ex eâ prolem suscitaverit, cujus clamor auditus fuerit inter quatuor parietes, idem vir, si super vixerit ipsam uxorem suam, habebit totâ vitâ suâ custodiam hæreditatis uxoris suæ licet ea fortè habuerit hæredem de primo viro suo qui fuerit plenæ ætatis*.

Rot. Claus. 11 H. 3; Wright's Ten. 193, n. 9; Hale's Hist. C. L. 180.

The right of a husband to retain the land of his deceased wife was confined, according to Glanville, (b) to such estates as were given with the woman *in maritagium*. But in Bracton's time the claim had extended itself; for he says, (c) the husband should have the land if he married a woman *habentem hæreditatem vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land.

(b) Lib. 7, c. 18. (c) Lib. 5, c. 30, § 7.

It appears from both these writers, that the second husband was equally entitled to be tenant by the curtesy with the first. But this doctrine was combated by one Stephanus de Segrave, whose name is found among the justices itinerant in the reign of Henry the Third, as founded on a misconception of the meaning and design of this sort of estate. He thought there

## (A) What Persons may be Tenants, &amp;c.

was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage. And this opinion of Stephanus de Segrave was afterwards established by the statute *de donis* in respect of conditional estates.

1 Reeves's Hist. 298. Among the statutes which are classed under the denomination of *statuta incerti temporis*, we find the *statutum de tenentibus per legem Angliæ*, which must evidently have been written before the statute *de donis*, inasmuch as it declares that the second husband shall inherit. Again, as it confines the curtesy to estates given in *maritagium*, according to Glanville, without including all inheritances, as Bracton does, it must have been written before the latter author penned his book. But, if this was a statute before Bracton's time, that author, where he examines the question of the second husband claiming by the curtesy, and mentions Segrave's opinion against it, (lib. 5, c. 30, § 7,) could not be supposed to omit noticing any statute that had been made so decisive as this is. 2 Reeves's Hist. Law, 315.] ¶ In Rastall's Collection of the Statutes, 1603, the following note is subjoined to this statute: "but this seemeth to be no statute, but only one man's opinion."¶

- (A) What Persons may be Tenants by the Curtesy; what not.
- (B) Of what Sort of Inheritances this Estate is allowable; of what not.
- (C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy: And herein,
  - 1. The descendible Quality of such Estate.
  - 2. The Seisin of the Wife thereof.
  - 3. When this Estate and Seisin is to begin and how long it must continue.
- (D) Of the Husband's Title being initiate by having of Issue, and to what Purposes: And herein,
  - 1. What Sort of Issue this must be.
  - 2. When it must be born.
  - 3. What it must do to entitle the Husband to be Tenant by the Curtesy.
- (E) The Nature and Quality of such Tenancy by Curtesy:
  - 1. With respect to the Estate itself.
  - 2. With respect to the Privy between him and the Heir.
- (F) By what means this Title may be prevented and destroyed.

## (A) What Persons may be Tenants by the Curtesy; what not.

1. THE words of this law are general, and seem to extend to all sorts of persons without distinction; therefore (a) idiots and lunatics, and (b) villains, may be tenants by the curtesy.

(a) [But the marriage of persons in this unhappy state is merely void, by reason of their incapacity to contract, and one of the circumstances necessary to the completion of their title to the estate is therefore wanted.] (b) The lord, if he will, may enter and hold those lands against the villain and his issue forever. Co. Lit. 118, 123, a.

2. Persons convict only of (c) felony or treason, persons (d) outlawed in any civil action, may be tenants by the curtesy.

(c) For they forfeit only their goods and chattels absolutely, for of their lands the king gains but a pernamency for the profits. 5 Co. 110; Co. Lit. 92, b, 391, a; Stanf. 192. (d) Bro. tit. *Outlawry*, 26, 36, 59; Co. Lit. 128. For such process of outlawry might be easily superseded, and thereby the king's pernamency of the profits discharged.

3. But persons attainted of (e) felony or treason shall not be tenants by the curtesy; for they being thereby *extra legem positi*, and their persons forfeited to the king, they are thenceforth become incapable of our laws in general, and, by consequence, of this in particular, which intended to give the inhe-

(B) Of what Sort of Inheritance this Estate is allowable.

ritance only to those who were capable of holding it *tota vita sua*: also, persons attainted in (f) a *præmunire* are excluded the benefit of this law, and also (g) *aliens*, be they friends or enemies; and in these cases their title shall never arise, even for the benefit of the king, but the wife's estate shall be discharged of it forever.

(e) Bro. tit. *Curtsey*, 15; Staundf. 196; Godb. 323. {Though the husband have issue, and afterwards commits treason, of which he is attainted during the life of his wife, his curtesy estate is not forfeited by his attainder, but the wife's estate is discharged from the curtesy. 1 Bin. 1; Pemberton's lessee v. Hicks, 3 Dall. 479; 4 Dall. 168. S. C.} (f) Co. Lit. 391 a; 3 Inst. 43. (g) But if the alien be made denizen, or the person attainted pardoned, and have issue after, they may be tenants by the curtesy, in respect to that issue had after, but not in respect of any issue had before. 7 Co. 25.—Popish recusants were disabled from being tenants by the curtesy, 3 Ja. 1, c. 5, § 13.

(B) Of what sort of Inheritance this Estate is allowable; of what not.

1. OF a use at common law, or what is now called a trust, it is expressly resolved, that a man shall not be tenant by the curtesy; (a) and Doctor and Student assigns this as one reason why so much land was put in use to prevent this title; and the 27 H. 8, c. 10, in the preamble, recites this as one of the mischiefs that statute intended to remedy. The reason seems, that of a use there was neither tenure nor wardship, nor any escheat nor benefit to the lord, and, therefore, not within the reason of this law; besides that the feoffees were tenants to the lord, and the land in their hands the proper subject of such titles, and there could not be double out of the same lands. Another reason may be, that the use consisting merely in privity between the feoffor and feoffees, and being in the nature of a thing in action, for which no remedy lay but by *subpcena* in Chancery, and, therefore, none could have any remedy for it but those who were parties or privies to the feoffment, or within the words or plain meaning thereof, and, consequently, the husband could not be tenant by the curtesy, nor his wife be endowed thereof, they being strangers and collaterals to the feoffment; and the denying them the rents and profits could be no breach of trust in the feoffees, they not being originally trusted for any such purpose, nor compellable to account to them.

Dr. & Stud. c. 29; Perk. 457, 463; Dyer, 9, pl. 25; 1 Co. 123; 4 Inst. 87. (a) [But curtesy of trusts is now allowed in equity, though dower is refused. Otway v. Hudson, 2 Vern. 583; Williams v. Wray, Ib. 681; Chaplain v. Chaplain, 3 P. Wms. 229. And, therefore, of money to be invested in land. Sweetapple v. Binden, 2 Vern. 536. Cunningham v. Moody, 1 Ves. 174; Dodson v. Hay, 3 Br. Ch. Rep. 404.] *β* Houghton v. Hapgood, 13 Pick. 154.

2. A man shall not be tenant by the curtesy of a copyhold, unless there be a special custom to warrant it, for the freehold and inheritance being in the lord, and the copyhold being only a customary right of taking the profits time out of mind at the will of the lord, this custom, like all others, must be a law to itself, and all estates derived thereout are so far good as they are warranted by that law, and no farther. If, therefore, there be no custom for a man to be tenant by the curtesy of his wife's estate, there is no law by which he can claim it; and if there be no law, he can have no more right than to another man's property. And this statute cannot operate upon copyhold, since this statute, like other statutes, was made within time of memory, and so falls short of any share in the original constitution, or governing of copyholds; and, for this reason, where such custom of holding by the curtesy has prevailed, it has yet been taken literally

(B) Of what Sort of Inheritance this Estate is allowable.

strict, and not extended in the least beyond those bounds the custom has allowed of.

4 Co. 22; Hob. 216; Cro. Eliz. 361.

3. As, where J S set forth, that within such a manor there was a custom, that if one took to wife any customary tenant of the said manor in fee, and had issue by her, if he outlived such wife he should be tenant by the curtesy; and the case was, that J S married a woman, who, at the time of the marriage, had not any copyhold, but, afterwards, during the coverture, a copyhold descended to her; it was adjudged, that he should not be tenant by the curtesy by this custom, for that his wife was not a customary tenant at the time of the marriage, which, by the strict and literal meaning of the custom, she ought to be.

Sir John Savage's case, 2 Leon. 109, 208, S. C. cited. [But this case was denied to be law by Holt, C. J., and Powell, J., in the case of Clements v. Scudamore, 1 P. Wms. 62, and 2 Lord Raym. 1028; and in 1 Salk. 243, S. C., it is said to have been denied by the whole court.]

4. Of an annuity to a woman and her heirs, after a writ of annuity brought, a man shall not be tenant by the curtesy any more than a woman shall be endowed thereof, for thereby it becomes a personal inheritance.

Co. Lit. 144 b; Poph. 87.

5. A man may be tenant by the curtesy of lands held in *ancient demesne*, and a woman may claim dower of such lands: also, of lands in *Borough-english*.

Alden's case, 5 Co. 105; Cro. Eliz. 826, [S. C.; 2 And. 178, S. C.; but this point does not appear in any of the reports.]

6. Of lands in *gavelkind*, (a) a man may be tenant by the curtesy without having issue by his wife, by the custom, and herewith our statute has nothing to do, since custom, a law of much longer standing, had already provided for him, and prescribed the terms of his enjoying of it.

Co. Lit. 30 a; Dav. 50; L. P. R. 627. (a) But of such lands of the wife the tenancy by curtesy extends only to a moiety, and it ceaseth if the husband marries again. This at least is the custom of gavelkind in Kent. Robins. Gav. b. 2, c. 1.]

7. There are some kinds of inheritances whereof a man may be tenant by the curtesy, though a woman, in such case, shall not be endowed; as, if lands holden of the king by knight's service descend to a woman, and after office found she intrude and take husband, and have issue, in this case the husband shall be tenant by the curtesy; yet, if the heir male, after office found in the like case, intrude, and take a wife, she shall not be endowed, by the express provision of Prærogat. Regis, c. 13. But this statute doth not alter or abridge the statute that gives a man a title by the curtesy.

Prærog. Regis, c. 13; 4 Co. 55.

8. So, if a man marry the nief of the king, by his license, (which amounts to an enfranchisement, at least during the coverture,) and after lands descend to the wife, and the husband have issue by her, and then she die, the husband shall be tenant by the curtesy: but, if a woman marry the villain of the king, by his license, she shall not be endowed; for, notwithstanding the license, he still remains a villain to the king, who may enter at his pleasure, and defeat the wife's title of dower by his own title paramount.

Co. Lit. 30 b.

9. A man shall be tenant by curtesy of a castle, of a (a) house that is

(C) What Estate the Wife must have, &c.

*caput baroniae*, or *comitatûs*, because able to defend the realm, and of a common without number; but of these a woman shall not be endowed.

Co. Lit. 30 b. (a) But for this, vide head *Dower*, and that by a late resolution a woman shall be endowed of such a house.

10. Of offices of profit a husband shall be tenant by the curtesy.

Plow. 379. My Lord Coke cites some ancient records, wherein tenancy by the curtesy was allowed of dignities and offices of honour, as to carry a sword before the king at his coronation, to be his carver upon that day; to be Earl of Salisbury, by the curtesy; but these being offices, as appears, annexed to particular dignities, or being dignities themselves, and capable of being entailed, may, without any inconvenience, be allowed the privilege of this law. Co. Lit. 29. But see note (1), in the 13th edit.

[11. Where a testator directed his trustees to convey a fourth part of his freehold lands to the use of his daughter for her natural life, so as she alone should take the rents, her husband not to intermeddle therewith; and, after the performance of several other trusts, in trust for the heirs of the body of the daughter, Lord Hardwicke held, that in this case the trust was merely executory, that the wife took an estate for life only, and, therefore, the husband was not entitled to be tenant by the curtesy.

Roberts v. Dixwell, 1 Atk. 607.]

¶ But it has been held, said his lordship, in a case of a trust estate for payment of debts, and in the case of an equity of redemption, that a husband may be tenant by the curtesy; for in the case of a trust for payment of debts, it is only a chattel interest in the trustees, and the first taker has a freehold over.

Roberts v. Dixwell, 1 Atk. 607.]

(C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy.

1. LITTLETON acquaints us, that it must be an estate either in fee-simple or fee-tail general, or where the wife has it as heir of the special tail; (a) and my Lord Coke says, for the husband to be tenant by the curtesy is one of the incidents to an estate-tail, which to restrain by condition were repugnant, &c.; and therefore if a woman, tenant in tail general, marries and hath issue, which issue dieth, and then the wife dies, so that the estate is thereby determined, yet the husband shall be tenant by the curtesy. The same law if the limitation had been to the woman and the heirs of her body, upon condition, that if she die without issue then to remain to another; for this is not a condition, but a limitation, and no more than what the law saith.

Lit. § 35; Dyer, 148; 6 Co. 41; 8 Co. 36; Co. Lit. 227; 8 Co. 34; Leon. 167; Pain's Case, Co. Lit. 30 a. (a) [But the wife must be sole tenant both of the freehold and the inheritance. Co. Lit. 183 a.]

2. So, if one, seised of a rent in fee, makes a gift in tail general, or if a rent *de novo* be granted in tail general to a woman, who marries and hath issue, the issue dieth, and then the wife dieth without other issue, yet the husband shall be tenant by the curtesy of the rent, though the estate-tail therein be determined and spent; for this being an incident to such an estate at the time of its creation, whenever the husband has issue, his title is initiate, and shall not be lost after by failure of issue, which, being the act of God, ought not to turn to his prejudice. And this is within the words of our law *hæreditatem habentem*, without fixing its continuance.

Co. Lit. 30 a, note (2), 13th edit. [As the statute *de donis* does not extend to husbands claiming curtesy, or wives claiming dower, it is for this reason, probably, that a husband may have curtesy, and a wife dower of a rent reserved upon a gift in tail. For

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## (C) What Estate the Wife must have, &amp;c.

though, as between the donor and his heirs and the donee and his heirs, the rent is incident to the reversion in consequence of the statute *de donis*, yet, as against a husband claiming curtesy, or a wife claiming dower, the donor must, to warrant the positions of Lord Coke, have a rent in gross, that is distinct from any estate, as he had before the statute *de donis*. Preston on Estates, c. 6, note.]

[[It is stated by the learned editors of Coke upon Littleton, as the result of the several cases cited below, that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that where the fee is originally devised in words importing a fee-simple, or fee-tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which they are annexed. A different doctrine, however, as to cases of the latter description, seems to have been laid down in the case of *Buckworth v. Thirkell*. There Joseph Sutton devised his estate to trustees, upon trust to pay the rents and profits for the maintenance and education of Mary Barrs, till she arrived at twenty-one, or was married; and from and after the said Mary Barrs should have attained her age of twenty-one years, or should be married, he gave and devised all the said land and premises to the said Mary Barrs, her heirs and assigns forever. But in case the said Mary Barrs should happen to die before she arrived at the age of twenty-one years, and without leaving issue of her body lawfully begotten, then, from and after the decease of the said Mary Barrs, without issue as aforesaid, he gave and devised all his said estates unto his grandson Walter for life, with several remainders over. Mary Barrs married Solomon Hansard, and had issue a son, who died in her life; and afterwards Mary Barrs died under twenty-one. In this case the Court of King's Bench were unanimously of opinion, that on the decease of Mary Barrs, her husband became entitled to be tenant by the curtesy for his life, and that, subject thereto, the devisees over became entitled by way of executory devise.

Co. Lit. 241, n. (4), 13th edit.; F. N. B. 149, G, note; *Flavell v. Ventrice*, Ro. Abr. 676; *Sammes v. Payne*, 1 Leon. 167; 1 Anders. 184; 8 Co. 34; Gouldsb. 81; Tr. 25 G. 3, B. R.; Co. Lit. 241 a, note (4), 13th edit.; 1 Collect. Jurid. 332, S. C.; 3 Bos. & Pull. 652, note, S. C. See the observations of the learned editors of Co. Lit. (*ubi supra*) on this case. See also the case of *Doe v. Hutton*, 3 Bos. & Pull. 643, and Preston on Estates, c. 6.]

But to understand the nature of the wife's estate, we must consider farther,

1. *The Descendible Quality of such Estate.*

1. The rule herein to be observed is, that the issue of such husband may by possibility inherit.

This rule seems to have been formed after the statute *de donis*, and by virtue thereof; for our statute requires no such property in the inheritance, neither did the common law; but for this vide 2 Inst. 336; 8 Co. 35, 36; Co. Lit. 29 b; Perk. 465. β See *Houghton v. Hapgood*, 13 Pick. 154.

2. Therefore, if lands are given to a woman and the heirs male of her body, and she has issue a daughter, and dies, the husband shall not be tenant by the curtesy. The same law if they are given to her and the heirs female of her body, and she has issue a son.

8 Co. 35; Co. Lit. 29 b.

3. But, if a woman seised in fee marries, and hath issue, and then the

(C) What Estate the Wife must have, &c.

husband dies, and she takes another husband, and hath issue by him, and dies; though the first issue be living, yet the second husband shall have it by the curtesy, because his issue, by possibility, may inherit; as if the first issue die without issue, whereby it comes to the uncle, &c.

Bro. tit. *Curtsey*, 8; Perk. 466; 8 Co. 34; Lit. § 52.

[It is essential to this estate, that the issue should take as heir to the wife; that they should take by descent; for if they take by virtue of a remainder over, their birth will not entitle the husband. The tenancy by curtesy is an excrescence out of the inheritance.

8 Co. 34; Sumner v. Partridge, 2 Atk. 47.]

2. The Seisin of the Wife thereof.

1. That the wife must be *seised* of the estate, is required by the very words of the law, which says, *aliquam hæreditatem habentem*, so that there must be a possession of such inheritance by the very words of the law; and therefore if a man die seised of lands in fee-simple or fee-tail general, and those lands descend to his daughter, and she marry, and have issue and die, before any entry made by her and her husband, or any other for them, the husband shall not be tenant by the curtesy. But here we must understand seisin in a twofold sense, viz., seisin in fact and seisin in law; and where a seisin in fact may be had, as in the above case, there a seisin in law will not do; nay, though the husband doth all he can to get possession in his wife's lifetime, and as soon as he heareth of her father's death, goeth towards the land to take possession, and before he can come there the wife dies, yet he shall not be tenant by the curtesy, and therefore one \*book says, he should have spoken to some neighbour, being near the lands, to have entered for his wife, as in her right, immediately after the father's death. And the reason of this is from the words of the law, which require that the wife should have actual possession of the inheritance; and of things lying in livery the wife hath not actual possession till the entry of the husband.(a)

Dr. & Stad. lib. 2, c. 15; Perk. 464; Co. Lit. 29 a, 90; 8 Co. 34, 36; F. N. B. 143; Keilw. 2 a; Bro. tit. *Curtsey*, 7. β The rule which requires seisin applies, it seems, only to cases where it is not complete till entry, as where the estate comes to the wife by descent or devise; not where it comes by purchase, and is transferred into possession by the statute of uses. Jackson v. Johnson, 5 Cowen, 74. In Pennsylvania, actual seisin is not requisite. 8 S. & R. 75; Chew v. Commissioners of Southwark, 5 Rawle, 160. γ \*Perk. 470. (a) [But entry is not always necessary to give seisin in fact; for if the land be in lease for years, curtesy may be without entry, or even receipt of rent, the possession of the lessee for years being deemed the possession of the husband and wife. De Grey v. Richardson, 3 Atk. 469.] β Some qualifications of the letter of the rule requiring a seisin in fact of the wife have been made in this country; where the wife is the owner of waste or wild lands, not held adversely, she is considered as seised in fact, so as to entitle the husband to curtesy. Green v. Leter, 8 Cranch, 249; Davis v. Mason, 1 Pet. 503; Jackson v. Sellick, 8 John. 262; Clay v. White, 1 Munf. 162; Smoot v. Lecatt, 1 Stewart, 590. In Connecticut, it is sufficient if the wife has title to the land, though she be not actually seised nor deemed to be so. Bush v. Bradley, 4 Day, 298; Kline v. Bebee, 6 Conn. 494. γ

[Where a man agreed to give a cottage to his grandson on his marriage, but no conveyance was executed, and the grandson entered, fitted it up at his own expense, and lived in it several years; and then the grandfather died intestate, leaving one child only, (the mother of the grandson,) who never entered on the cottage, or received or demanded any rent for it; and the mother died leaving a husband, and an only son, (the above-named grandson;) the husband was holden not to be entitled to be tenant by the

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curtesy; for the wife never reduced the estate into possession; she never had a seisin in fact.

Rex v. Inhabitants of Great Farringdon, 6 T. R. 679.

Where a woman, tenant in tail, by lease and release previous to her marriage, conveyed to trustees, to the use of herself till marriage, then to the intended husband for life, then to herself for life, then to the first and other sons of the marriage, &c., and the marriage took effect, and the wife died in the lifetime of the husband, leaving issue; the husband could not take as tenant by the curtesy, for there was not a moment during the coverture when the wife was seised of an estate-tail in possession.

Doe v. Rivers, 7 T. Rep. 277.] In Pennsylvania, the husband is not entitled to curtesy, where the wife has a mere naked seisin as trustee of the freehold, although she holds a beneficial interest in the reversion. Chew v. Commissioners, &c., 5 Rawle, 160.g

||A died, leaving a wife, a son, and a daughter: the widow entered upon the estate, and was seised as tenant in dower of one part, as tenant in common with her son of another part, and as guardian in socage of her son of a third part. The son went beyond sea, and died under age, whereby the daughter became entitled, who during her infancy married the plaintiff, and together with him applied to the mother to be let into possession of the son's part, which the mother refused, imagining that the son was still alive, and therefore insisting upon holding the land for him. Upon this they filed a bill in Chancery against her for an account, which was accordingly directed. After this the daughter died, and upon further application to the court by the husband, one question was, whether the seisin of the mother, (after the son's death,) being tenant in common with the daughter, was, under the circumstances, the seisin of the daughter, sufficient to make the husband tenant of the curtesy of her part. And the court held, that it was sufficient. Where indeed one tenant in common *enters, claiming the whole for himself in exclusion of his companion*, this may not serve as the entry of his companion, being made directly against him: but that is not this case; for it appears that the mother's keeping possession of the whole against the daughter and her husband was entirely owing to a mistake, in imagining that her son was still living, and not with an intent to exclude the daughter from her right; and therefore no inference can be drawn from it.

Sterling v. Penlington, Vin. Abr. tit. *Curtsey* (A), pl. 11; S. C. tit. *Jointenants*, (P. a), pl. 5.¶

2. But now of such inheritances, whereof there cannot possibly be a seisin in fact, a seisin in law is sufficient; and, therefore, if a man seised of an advowson,(a) or rent in fee, hath issue a daughter, who is married and hath issue, and he dieth seised, and the wife dieth likewise before the rent becomes due, or the church becomes void, this seisin in law in the wife shall be sufficient to entitle her husband to be tenant by the curtesy, because, say the books, he could not possibly attain any other seisin, as indeed he could not, and then it would be unreasonable he should suffer for what no industry of his could prevent. But the true reason is, that the wife hath these inheritances which lie in grant, and not in livery, when the right first descends upon her; for she hath a thing in grant when she hath a right to it, and nobody else interposes to prevent it.

Co. Lit. 29; Perk. 468, 469; 7 Ed. 3, 66; Keilw. 104; Co. 97; 6 Co. 68; F. N. B. 149; Bro. tit. *Curtsey*, 5, 9; 2 Sid. 110. (a)[But, if the advowson be appendant to a manor, and the wife die before entry into the manor, Lord Hale thought the hus-



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band would not be entitled to be tenant by the curtesy of the advowson. Hal. MSS. Hargr. notes on Co. Lit. 29 a.]

[So, of lands mortgaged in fee by the wife previously to the marriage, the husband shall be entitled to be tenant by the curtesy. For his neglect in not paying off the mortgage is not similar to the case of laches in a husband, viz., as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and an objection of this kind holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is attended with many delays.

Casborne v. Scarfe, 1 Atk. 603; Vin. Abr. *Curtsey*, E. pl. 23, S. C., more fully reported.

In copyholds where the custom allows of this estate, the entry of the husband in the right of his wife in her lifetime, though she dies before admittance, will, it seems, be a sufficient seisin.

Ewer v. Astwike, 1 Anders. 192; Moor, 272.

With respect to trusts or equitable estates, the wife must have such an interest that her husband may have a seisin or possession in nature of a seisin in her right. Therefore, where a father devised estates to trustees in trust to apply the profits for the sole and separate use of his daughter (a *feme covert*) during her life, and not to be subject to the debts or control of her husband, with power to dispose of them by will, notwithstanding the coverture; Lord Hardwicke held, that the husband had no seisin either in law or in equity, and therefore was not entitled to be tenant by the curtesy: that the legal estate was in the trustees: that the father had made the daughter a *feme sole*, giving her the profits for her life, but not subject to the control of her husband; the husband then had no seisin in equity during the coverture: and further, the tenancy by curtesy in this case would be directly contrary to the intent of the testator.

Hearle v. Greenbank, 3 Atk. 695; 1 Ves. 298. See Mr. Preston's observations on this case in his chapter upon this title. Prest. on Estates. See also 1 Atk. 609.] *β*A husband was entitled to curtesy in Ohio, where the wife, before marriage, granted a term of seventy-five years to a trustee, in trust for her during the coverture. Lowry v. Steele, 4 Ohio, 171.*g*

3. *When the Estate and Seisin is to begin, and how long it must continue.*

1. The estate and seisin of the wife ought to begin some time during the coverture; so the words of the law import, *si aliquis desponsaverit aliquam hæreditatem habentem*, &c., and therefore if a woman be disseised and marry and die, leaving issue before any re-entry made, the husband shall not be tenant by the curtesy; for here she had no inheritance, but only a right to an inheritance, which is out of the words of this law; but if the husband or wife had entered during the coverture, there, after the wife's death, he should have it by the curtesy, because she had *hæreditatem* during the coverture.

Co. Lit. 29 a, 30 a; Perk. 458.

2. If a woman seignores intermarry with the tenant, and have issue and die, the husband shall not be tenant by the curtesy of the seignory, because by the intermarriage the seignory was in suspense, and so she could not be said to have it, or if she had, it is like the seisin of an instant, whereof a woman shall not be endowed.

3 Leon. 347; Perk. 460; Co. Lit. 29 b.

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3. A woman tenant in tail, *apres* possibility, &c., takes husband, and hath issue, and the fee-simple descends upon the wife, be it before or after marriage, the husband shall be tenant by the curtesy, because by the descent of the fee the other estate was merged and gone, and she became tenant in fee-simple executed.

Bro. tit. *Curtsey*, 4.

4. In trespass, the defendant says, that one A. was seised of those lands in her demesne as of fee, and that he took her to wife, and they had issue between them, and after A. died, and he held himself in as tenant by the curtesy, and (*inter alia*) it was moved, that he did not show that after the marriage he was seised in his demesne as of fee in right of his wife; and though it was answered, that his showing that A. was so seised, and that he took her to wife was sufficient, since it could not be intended but that the defendant was seised in fee, as in right of his wife; yet, says the book, the defendant, *videns opinionem curiæ*, amended his plea according to the exception taken by the plaintiff.

Keilw. 2, which plainly shows, that seisin in the wife, some time during the coverture, is essential to make the husband tenant by the curtesy.

5. If a woman seised in fee makes a lease for life, or endows her mother, and after has issue and dies, leaving the lessee or mother, the husband shall not be tenant by the curtesy of the reversion.

But in the case of the lease, if a rent were reserved to her and her heirs, *qu.* if the husband shall not have the rent during its continuance; and after the death of the lessee, the land itself, as tenant by the curtesy; and vide Perk. 467; Co. Lit. 29 a; Bro. tit. *Curtsey*, 10; Co. Lit. 15 a, 32 a; Keilw. 104, pl. 12.

6. In a *quare impedit* by the king against divers, the defendant makes title that the advowson descended to three coparceners, who made partition to present by turns, the eldest to have the first, the middle the second; and that he married the youngest, and had issue by her, and she died, and the church became void, and so it belonged to him to present, and doth not allege that ever his wife presented; yet he was allowed tenant by the curtesy by the seisin of the others; the reason of which case seems to be, that the advowson being in its nature entire and indivisible, and descending upon all the daughters as coheirs, though they agree to share the fruits of it in such proportions among themselves, yet the inheritance remains entire in them all, and they all have a seisin in law before presentment by either, which, according to the rules before laid down, is sufficient to entitle the husband to be tenant by the curtesy.

Bro. tit. *Curtsey*, 121.

7. A rent-charge is granted to a woman and her heirs, payable at two feasts of the year; the first payment to begin at such of the two feasts as shall happen after the death of J. S. The feme takes husband, and hath issue and dies; then J. S. dies; and one question was, if the husband should be tenant by the curtesy of this rent.

2 Sid. 110, 117, *Dethick v. Bradburn*. In this case no judgment is given, but the opinion of Glyn, Ch. Just., was, that he should; for though this begins *in futuro*, yet it is grantable over presently, which proves it to be *in esse*, and then she may be well said *habere hereditatem*, and the seisin is not material, especially in the case of a rent.

The time when this estate and seisin in the wife is to begin, whether before or after marriage, is not material; and therefore if a woman marries, and hath issue, which dies, and after lands descend to the wife, and the husband enters, and then the wife dies without other issue, yet the husband shall be tenant by the curtesy, for the time of the descent is not material, so

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it be during the coverture. The same law is, if lands had been conveyed to the wife *mutatis mutandis*.

As to the continuance of this estate and seisin in the wife, in some cases it is necessary it should continue in her till issue had, and in some not; and in some cases continuance both before and after will not serve: for the first, if a woman seised in fee of lands hath issue, and after commits felony, and is attainted thereof, yet the husband shall be tenant by the curtesy, in respect of the issue had before, and which by possibility might have entered; *aliter*, if the wife had been attainted before issue: but in the other case, the husband's title by the having of issue was so far initiate, that the lord might avow upon him for homage without the wife, and then her crimes after shall not defeat him of it; besides, this is within the letter of our law, &c.

Co. Lit. 40 a, 351 a; Bro. tit. *Curtsey*, (3). But *qu.* If in this case after issue had, the feme had been attainted of treason, if the husband's initiate title shall prevail against the king? *Qu.* Also, in the case of the felony, if the husband may enter presently upon the attainer during the wife's life, who is thereby *civiliter mortua*, as he might, if the wife had abjured the realm, which is one kind of attainder; for which, vide Co. Lit. 133. And that the abjuration is an attainder, vide Co. Lit. 13 a, 390 b.

In some cases it is not necessary that the seisin should continue till issue; and therefore, if a man, seised of lands in fee in right of his wife, is disseised before issue, and afterwards he hath issue, and the wife die before any re-entry made, yet the husband may re-enter, and hold the land as tenant by the curtesy, for the disseisin left a right in him to be tenant by the curtesy, if he had issue, as it did in the wife and her heirs to the inheritance.

Perk. 472; Co. Lit. 30 a.

So, in such case, if a recovery had been had against the baron and feme by erroneous process, or by false swearing, and after execution sued thereof they have issue, and the wife dieth, yet the husband shall have error or attainder, and upon reversal shall enter and hold as tenant by the curtesy, for being party to the record he may well have these writs; and when the recovery is reversed, it is so *ab initio* as to him.

Perk. 475.

In some cases continuance of seisin before and after issue will not do; therefore, if a woman makes a gift in tail, reserving rent in fee, and marries and hath issue, and then the donee dies without issue, and then the wife dies, the husband shall not be tenant by the curtesy of the rent, for that is determined and gone, but he shall have the land.

Co. Lit. 30 a.

If a woman marries and hath issue, and lands descend to the wife, and the husband enters, and after the wife is found an idiot, by office, the land shall be seised for the king; for when the title of the king and a common person begin at one instant, the title of the king shall be preferred; *a fortiori*, in this case, if the woman had lands before issue, and after issue had been found an idiot.

Plow. 263; Co. Lit. 30 b, 55. But *qu.* of this case, because the king's title can continue no longer than during the idiot's life.

If a daughter inheritrix marries and hath issue, and after a son is born, who enters upon the husband and wife, and then the wife dies, the husband's title is defeated; but if after the son had died without issue, and the husband had re-entered, it seems he should be tenant by the curtesy, whether he had issue by his wife after or not, and though such first issue was dead before his re-entry: so, if the daughter in such case after issue had en-

## (D) Of the Husband's Title.

dowed her mother, and after the mother dieth, and the husband re-enters, and his wife dieth without other issue, yet it seems reasonable the husband should have it by the curtesy: otherwise, in these cases, if the son or the mother had not died till after the death of the wife, for their title in both cases was paramount to the wife's, and disaffirms her title *ab initio* from the death of the father; but when the son or the mother dies, living the wife, then the estate comes to her again, and whether it come before or after issue, so there be an entry made, is not material, as before appears.

Bro. tit. *Curtsey*, (10, 13.)

If a woman tenant in tail generally makes a feoffment in fee, and takes back an estate in fee, and marries, and hath issue and dies, yet the issue may recover in a *formedon* against his father, and then he shall not be tenant by the curtesy; for the estate-tail he cannot have, that being discontinued during the whole coverture; the fee he cannot have, that being defeated and gone, and the issue restored to his right *per formam doni*; and as the estate of the wife, during the coverture, was tortious, so must the husband's be too after her death, and liable to be defeated by the issue.

Co. Lit. 29 b.

(D) Of the Husband's Title being initiate by the having of Issue, and to what Purposes: And herein,

1. *What Sort of Issue this must be.*
2. *When it must be born.*
3. *What it must do to entitle the Husband to be Tenant by the Curtesy.*

As to the first, if a woman be delivered of a monster, which hath not the shape of mankind, this is no issue in law; but however deformed it may be, or if it be born deaf and dumb, or an idiot, yet this is such issue as will entitle the husband to be tenant by the curtesy.

8 Co. 35; Pain's case, Co. Lit. 29 b, S. P.

2dly. It must be born during the life of the wife; therefore if the wife die in child-bed, and the issue is ript out of her womb, the husband shall not be tenant by the curtesy, because he had no issue during the marriage, and therefore he cannot be said *ex eâ prolem habere*, and in pleading he must allege that he had issue during the marriage.

8 Co. 35; Co. Lit. 29 b. *ſ* Marsellis v. Thalhimer, 2 Paige, 35. As to what shall be considered a birth, see Bouv. L. D. *Birth*; 5 C. & P. 329; S. C. 24 E. C. L. R. 344; 6 C. & P. 349; 24 E. C. L. R. 446. *ſ*

3dly. The statute says, *cujus clamor auditus fuerit*; but this is put but for an instance; for if it be born alive, though dumb, and could not cry, it is within the meaning of this statute; and there are other signs of life besides crying, as motion, &c. But some books seem to incline that it ought to be baptized, and if it be not, through the husband's neglect, he shall not be tenant by the curtesy; but the statute requires no such thing, and therefore it seems no essential part of his title.

8 Co. 34; Co. Lit. 29 b; Dyer, 25, pl. 159; Bendl. 21; Perk. 471; Keilw. 2 a. But in Scotland they require that the child should cry.

As to what purposes this title is initiate in the husband by the having of issue, it appears before, that after issue had he shall do homage alone, and receive homage alone during the life of his wife, and avowry shall be made only upon him; for the statute says, *si ex eâ prolem habuerit, &c., habebit tota vita sua custodiam hæreditatis*; but homage done by the husband before issue shall not bind the wife.

Co. Lit. 30 a, 67 a; 2 Inst. 145.

(E) The Nature and Quality of such Tenancy by Curtesy.

Therefore, if an estate be made to two women, and the heirs of their two bodies, and one of them marry and have issue and die, the husband shall be tenant by the curtesy of her moiety; for this statute severs the jointure between them by giving the husband the custody of it in the life of the wife; but, if such limitation had been to two men in this manner, their wives should not be endowed, for the jointenancy takes place of the dower.

17 Ed. 3, 51; Co. Lit. 30 a, 183 a, accord; 2 Roll. Abr. 90; Co. Lit. 183 a, cont.

If the husband, after issue, makes a feoffment in fee, and the wife dies, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not, during his life, avoid it by *sur cui in vita*, for it could not be a forfeiture, because the estate of tenant by the curtesy was but initiate, and not consummate; and now since 32 H. 8, c. 28, the issue shall not enter in such case till after the husband's death, which shows, that in this feoffment his interest and title to be tenant by the curtesy are involved, and pass by it to the feoffee, though not to such purpose as to make him tenant by the curtesy, which none but the husband himself can be. For the same reason, it seems, that after issue he may lease the lands for his own (a) life.

Co. Lit. 30 a, 326 a; Dyer, 363, pl. 26; 8 Co. 72. (a) But *qu.* if such feoffment or lease before issue shall be made good for his life by issue had after.—[In answer to this question, another may be asked, viz., Who is to avoid the lease, if the tenant chooses to hold the lands?]

Baron and feme have issue, and after join in suffering a recovery, the feme was within age and appeared by attorney, yet after her death it seems the heir could not assign this for error till after the husband's death.

Hob. 324, Darcy v. Lee.

(E) The Nature and Quality of such Tenancy by Curtesy.

1. *With respect to the Estate itself.*

2. *With respect to the Priority between him and the Heir.*

As to the first, this estate, in several respects, is looked upon as a continuance of the estate of the wife, and therefore if three coparceners are of an advowson, and they agree to present by turns, the eldest first, and so on, and the eldest die, her husband, tenant by the curtesy, shall present as she should have done; and so of any of the other sisters.

3 Co. 22; Co. Lit. 166 b, 186 a; 2 Inst. 365; Cro. Eliz. 19; F. N. B. 34; Bro. tit. *Curtsey*, (2).

So, a writ *de partitione faciendâ* lies against tenant by the curtesy, because he is in continuance of the estate of coparcenary, though, not being a coparcener in fact, he cannot have such writ.

Co. Lit. 174 b, 175 a; Keilw. 118.

If baron seised of an advowson in right of his wife presents, and after hath issue, and the wife dies, and then the church becomes void, the husband shall not have assize *de darrein presentment*, because he is in of another estate than that upon which he presented before; for before he had no estate but in right of his wife, and now he is seised for his own life, as tenant by the curtesy.

2 Roll. Abr. 38; Keilw. 118. *Qu.* But it seems clear, if the first presentment had been after issue, he should have had this writ.

The wife's heir shall not be in ward during the life of tenant by the curtesy, because by his continuance of his wife's estate, the descent to the heir is interrupted.

F. N. B. 143.

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(F) By what Means this Title may be prevented and destroyed.

If a woman, tenant in tail, acknowledge a statute and marry, and have issue and die, the land may be extended in the hands of her husband, tenant by the curtesy.

Dyer, 51, *in margine*.

So, the entry of the disseisee is congeable of the tenant by curtesy, but not on the heir after his death.

9 H. 7, 24.

If tenant by the curtesy alien in fee, in tail, or for life of the lessee, he in the reversion shall have a writ of entry *in casu consimili* presently, by the statute of Westm. 2, c. 24.

2 Inst. 309.

If tenant by curtesy grant his estate with warranty, and come in as vouchee, he shall have aid of him in the reversion for the weakness of his estate; so, if he himself be impleaded.

Hob. 21; 2 Jones, 8; Roll. Abr. 167.

As to the privity between him and the heir, this is so inseparable, that at common law, although both had, as it were by consent, granted away their estates, yet no action of waste lay against any other than the tenant by the curtesy, nor against him by any other than the heir at law; but now by the statute of Gloucester, c. 5, remedy is provided for the grantee of the reversion against tenant by the curtesy, so long as he continues his estate, or against his assignee, if he assign it over; but still so long as the heir keeps the reversion, tenant by the curtesy is liable to his action of waste notwithstanding any assignment, that statute having provided no remedy for this case; and the same law of tenant in dower.

3 Co. 23; 9 Co. 142; 11 Co. 83; 4 Co. 62; Co. Lit. 54; 2 Inst. 301; F. N. B. 56; Cro. Car. 430; Dr. & Stud. lib. 2, c. 1.

(F) By what Means this Title may be prevented and destroyed.

If the husband before issue make a feoffment in fee, and retake an estate to him and his wife, by which the wife is remitted, and after he have issue, and the wife die, yet he shall not be tenant by the curtesy, for the law gives him *custodiam hæreditatis*: and if he part with it in fee, so that it is once out of him, there is no law that gives it to him again, since he hath extinguished it by his unjust alienation; *a fortiori*, if after issue he hath made this feoffment.

Bro. tit. *Curtsey*, (6); Co. 111; Hob. 338; Moor, 31, 32. But *qu.* as to the first case, because the feoffment being before issue, the husband hath not title either initiate or consummate, but his title began wholly afterwards by the having of issue, and then the wife was in actual seisin by the remitter.

So, if after issue he make a feoffment in fee upon condition, and re-enter for the condition broken, and then the wife die, yet he shall not be tenant by the curtesy, for that title was inclusively past and given away by the livery, and the condition was not annexed to his title, but to the feoffment; and yet if such feoffment were before issue, one (a) book makes a *qu.* of it; but it seems clear in this case he shall not, because upon his re-entry for the condition broken, he is not in of an estate in right of his wife, but of the tortious estate gained upon the discontinuance of his wife's right.

Co. Lit. 30 b; (a) Perk. 474.

A woman, tenant in tail general, marries; she and her husband levy a fine, and take back an estate to them and the heirs of their two bodies, and have issue, the husband dies, she marries another, and hath issue and dies,

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and the husband claims to be tenant by the curtesy, upon pretence, that by the estate taken back upon the fine his wife was remitted to her general tail, and so every issue inheritable, and he tenant by the curtesy; but *optima opinio*, that as his wife was estopped, so shall the second husband who claims by her.

Bro. tit. *Curtsey*, (1).

Baron and feme seised of lands in right of the feme (whereof the husband was entitled to be tenant by the curtesy) levy a fine, which was after reversed as to both, for the nonage of the feme, the husband shall have it again, as tenant by the curtesy, because the fine was utterly avoided.

Cro. Ja. 482; Cro. Eliz. 128; Charnock and Worsley, adjudged.

[The husband leaving his wife, and living in adultery with another woman, does not forfeit his tenancy by the curtesy.

3 P.Wms. 269, 276, 277. ¶ In Indiana the husband loses his curtesy by leaving his wife and living in adultery, but he is restored to his rights by condonation. Ind. R. L. 211.¶

If by articles previous to marriage a woman grants to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, to maintain the house, &c., this does not abridge his legal rights, but he is entitled to curtesy both in such real estates as she had at the time of the marriage, and in what came afterwards.

Steadman v. Palling, 3 Atk. 423.]

¶ A tenant in tail, with power to lease, remainder to B the wife of C, made leases exceeding his power. By will he devised some benefits to B, but B elected to take her estate tail in opposition to the will. After her death C claimed as tenant by the curtesy, though he also derived and had accepted benefits under the will; and he brought ejectments against the lessees, some of whom had laid out large sums. It was holden, that the lessees could not raise an equity against C taking under B's election of her estate tail, the tenancy by the curtesy being an emanation of her estate, and that estate by her election remaining entire, must take place with all its legal effects.

Earl of Darlington or Lady Cavan v. Pulteney, 2 Ves. Jun. 544; 3 Ves. 384.¶

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CUSTOMS.

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- (A) Of the Commencement and Length of Time necessary to establish a Custom.
- (B) What persons are affected with, or bound by a Custom.
- (C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the Conveniency of them, bind in particular Places.
- (D) Where, from the Benefits accruing from them, they shall bind.
- (E) Where, from the Certainty or Uncertainty of them, they shall be deemed good, or void.
- (F) How to be construed; and to what Things a Custom shall be said to extend.
- (G) Custom, how destroyed.
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## (A) Of the Commencement and length of Time necessary to establish a Custom.

THE frequent repetition of an act, which at first was (a) assented to by the people of a certain place (b) for their mutual convenience and advantage, is called a custom, and every such custom, being certain and reasonable in itself, and commencing time immemorial, and always continuing without interruption, has obtained the force of a law, and in such places shall prevail, though (c) contrary to the general laws of the kingdom.

Co. Lit. 110 b; Dav. 32. *§*A custom among merchants is at first established by their testimony; but when courts have decided that such a custom exists, it becomes a part of the law of the land, of which the courts and all parties are to take notice. *Branch v. Burley*, 1 Call, 159; *Pet. C. C. R.* 230; 1 *Harr. & Gill*, 239; *Cunningham v. Fonblanque*, 6 *Car. & Payne*, 129. *§*(a) That all laws bind by the assent of the people, and such assent may be expressed as well by facts as by writing or word. 44 *E. 3*, 19; *Dav. 32*. (b) The difference between custom and prescription is, that custom is local, as prevailing in a certain province, county, hundred, &c., but prescription is for the most part personal, being made in the name of a certain person and his ancestors, or those whose estate he has, or of a body politic, and their predecessors. *Co. Lit.* 13 b; 6 *Co. 60*; 8 *Co. 62*, and vide 2 *Bulst.* 206; *Roll. Rep.* 46. [But a prescription may be laid by way of custom, where the necessity of the case requires it; as, in case a copyholder claims a right of common out of the manor, he must lay a prescription in the lord; but where he claims common in the waste of the lord, as he hath strictly no inheritance in the land, but is only tenant at will, and as a prescription must always be laid by way of a *que estate*, which he cannot allege, not being tenant in fee, for in strictness the fee-simple is in the lord; therefore, the law allows him to allege it as a custom in the occupiers of such an estate. 6 *Co. 60* b; *Ca. temp. Hardw.* 293. So, where a man claims only a discharge in his own soil, or a mere easement in the soil of another, he may lay it by way of custom. *Ibid.* *§*[*Grimstead v. Marlowe*, 4 *T. Rep.* 717; *Hardy v. Hollyday*, *E. 5*, *G. 3*, *C. B.* there cited.] So matters of personal privilege or exemption may be laid generally to express the nature and extent of such privileges; either as having respect to place, as all the citizens of London, *Hob.* 86, or to condition, as all serjeants at law, all attorneys, &c., 1 *Ventr.* 386.—Another difference to be remarked between custom and prescription, is, that the latter must always have a legal origin; it must be of such things as may be created by grant, reservation, or deed: whereas it is not always necessary that the cause or consideration on which the former is founded should appear. 6 *Co. 60* b; 1 *Ventr.* 387; *Cowp.* 47; *Dougl.* 126. Hence, the corporation of London having a customary duty on corn imported, it was holden to be a good custom, that factors free of the corporation shall receive to their own use that part of the duty which arises from corn consigned to them as factors; though neither the commencement nor consideration of such custom could be traced. *Cocksedge v. Fanshawe*, *B. R.* *Dougl.* 119, affirmed in the Exchequer Chamber, and afterwards in the House of Lords. Printed cases of the Lords, 15th June, 1783.] (c) *Consuetudo ex certa causa rationabili usitata privat. communem legem.* *Lit.* § 37.—[But no man can allege a custom or prescription against an act of parliament; as, that every pound of butter sold in a particular market shall weigh eighteen ounces. *Noble v. Durell*, 3 *T. Rep.* 271. However, a man may prescribe against an act of parliament, when his prescription or custom is saved or preserved by another act of Parliament. *Co. Lit.* 115 a. *§*The usage of trade cannot be given in evidence to show that a transaction within the statute of usury is not usurious. *Bank of Utica v. Smalley*, 2 *Cowen*, 770; *Bank of Utica v. Wager*, 2 *Cowen*, 712; *Dunham v. Dey*, 13 *Johns.* 40, 16 *Johns.* 367; *New York Firemen Insurance Company v. Ely*, 2 *Cowen*, 678. No usage can be sustained which is in opposition to established principles of law. 1 *Watts*, 363; 3 *Watts*, 179; 2 *W. C. C. R.* 24; 1 *Hall*, 602; 10 *Mass.* 29; 2 *Johns.* 335. *§* And Lord Coke makes a difference between acts in the negative and in the affirmative; for a statute made in the affirmative without any negative expressed or implied, doth not take away the common law. 2 *Inst.* 200. And he observes a difference likewise between statutes that are in the negative; for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against the common law. *Co. Lit.* 115 a. See Mr. Hargrave's annotations on this part of Lord Coke's commentary. See also 2 *Mod.* 39.] *§*In New Jersey, a custom to do acts on a prescription in a *que estate* is void. *Ackerman v. Skelp*, 3 *Hals.* 125. *§*

Time and usage are essential parts of a custom, and therefore no custom



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is (d) allowable but such as hath been used by title of prescription, viz., time out of mind.

Co. Lit. 110 b. (d) The continuance of a usage from the reign of R. I., which is the time of limitation in a writ of right, is said to be a good title of prescription. Co. Lit. 113. The laying a custom for forty years is naught, though it was said that it might have been for more years, and so time out of mind. Skin. 108.—That customs may be time out of mind, though not coeval. Salk. 203. A usage of trade must be proved by instances, and is not supported by evidence or opinion. *Cunningham v. Fonblanque*, 6 Carr. & P. 44. See *Leuckhart v. Cooper*, 7 Carr. & P. 119.

Hence it is, that though a lord of a manor may have waifs and strays by prescription, yet he cannot have the *bona felonum & fugitivorum* without grant from the king, because no man can prescribe for them; for every prescription must be immemorial, and the goods of felons and fugitives cannot be forfeited without record, (a) which presupposes the memory of that continuance.

46 E. 3, 16; Bro. *Estray*; 5 Co. 109; Co. Lit. 114. (a) [This doctrine is controverted by a late writer. 2 Wooddes, 51.]

When rights are claimed by prescription, the jury ought to be directed, that from modern usage they are authorized to presume that the right claimed is immemorial, unless they are satisfied to the contrary by other evidence.

*Jenkins v. Harvey*, 1 C. M. & R. 877; S. C. 2 C. M. & R. 393.

A custom that the town crier of a corporate town shall have the exclusive privilege of proclaiming, by ringing a bell, the sale of all goods brought in the town to be sold at auction, is a good custom.

*Jones v. Waters*, 1 C. M. & R. 713; 1 Gale, 5; 5 Tyr. 361.

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THE king only, by his prerogative, can make a corporation, conservator of the peace, &c., therefore in these, or in other things which (b) highly touch the king's prerogative, no title can be gained by custom or prescription, as consuance of pleas, to have a sanctuary, to make a corporation, coroner, conservators of the peace, &c.

Co. Lit. 114; Roll. Abr. 566. (b) A custom that exalts itself above the king's prerogative is void. Dav. 33. [The objection to a custom, that it interfered with the king's prerogative, was grounded on the maxim "*nuslum tempus occurrit regi*," and as that maxim is now abrogated by st. 9 G. 3, c. 16, the objection seemeth to be at an end.]

But treasure-trove, waifs, estrays, wreck, to hold pleas, courts-leet, hundreds, infangthef, outfangthef, a park, warren, royal fish, fairs, markets, frankfoldage, keeping of a jail, toll, &c., may be claimed by prescription, without any matter of record; and a county palatine may be claimed by prescription, and, by reason thereof, *bona felonum*, &c. Also, a corporation may be by prescription.

Co. Lit. 114 b.

Also, customs that bind private persons do not extend to the king; therefore, if lands in gavelkind descend to the king and his brother, the king shall take one moiety, and his brother the other; but, if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*; therefore it shall attend the crown, and, consequently, go to the eldest son.

Plow. 205 a; Co. Lit. 15 b; Raym. 77; Sid. 138.

So, the custom of London, as to retaining goods mortgaged till satisfaction be made of the money lent on them, extends not to the king's jewels.

35 H. 6, 26; Dav. 33 b; Roll. Abr. 566; 2 And. 152.

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So, if a man hath toll, or wreck, or strays, by prescription, this extends not to the king's goods.

Dav. 33 b.

A custom may extend to and give an (a) infant a power of doing that which by the rules of the common law he could not do; as, an infant at the age of fifteen may make a (b) feoffment of lands of the nature of (c) gavelkind. But this, like all other customs, is to be construed strictly, and in such manner as that no prejudice may accrue to the infant thereby; and therefore such feoffment must be for (d) valuable consideration; must be made in (e) person, and not by attorney; cannot be with (g) warranty; must be of lands which (h) descended to him in gavelkind, and not of lands by purchase; and must be of lands in (i) possession, not in remainder or reversion.

(a) Dr. & Stud. 21; 5 H. 7, 41; Fitz. *Custom*, 9; 9 Co. 76 a. (b) By the custom of a town an infant may bind himself apprentice. 9 H. 6, 7, 8; Bro. *Custom*, 63. (c) Lamb. 624. (d) And. 193; Lamb. 625. (e) Lamb. 628. (g) Roll. Abr. 568. (h) Bendl. 33, pl. 52; Lamb. 627. (i) Bendl. 33, pl. 52; Lamb. 627.

It is a good custom in a copyhold manor, that a feme covert, with or without the consent of her husband, may devise (k) her copyhold land to her husband, or whom she pleases.

Moor, 123; Godb. 14, 143; 3 Leon. 81, 83; 2 Brownl. 218. [Vide *supra*, vol. i. 726.] (k) But of such a custom as to freehold lands, *qu.* and vide 4 Co. 61 b; And. 152; Roll. Abr. 563, pl. 6.

(C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the Conveniency of them, bind in particular Places.

EVERY custom ought to appear to have had a reasonable commencement, and that at first it was voluntarily agreed to, for the better promoting of trade and commerce, the suppression of fraud, the greater security of men in their estates and possessions, &c., and in such cases, though the custom be contrary to the common law, or against the interest of a particular person, yet it shall be good.

Dav. 32 b. *§* See *Newbold v. Wright*, 4 Rawle, 195; *Stæver v. Whitman*, 6 Binn. 417; *Bolton v. Colder*, 1 Watts, 360; *Brown v. Jackson*, 2 Wash. C. C. R. 24; *Westfall v. Singleton*, 1 Wash. 227; *Bryant v. Commonwealth Insurance Company*, 6 Pick. 131. *§* Vide of the Customs of Gavelkind, Borough-English, Copyholds, Regulations of Corporations, Commons, choosing constables, churchwardens, &c., the several heads.

As, a custom, that a man, in ploughing his own ground, may turn the plough on the ground of his neighbour; for this is for the general good, being in favour of husbandry and tillage, although a particular person receive prejudice thereby.

21 E. 4, 28; Bro. *Custom*, 51; Roll. Abr. 560; Dav. 32 b, S. C.

So, a custom to dry nets upon the land of another; for this is in favour of fishing and navigation.

5 Co. 84.

So, a custom to build bulwarks on the lands of another for the safety of the kingdom, is good.

Dav. 32 b; Dyer, 60 b.

So is a custom to pull down the house of another, to prevent the spreading of fire.

Dav. 32 b.

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[It is a good custom, that tenants, whether by parol or deed, (a) shall have the way-going crop after the expiration of their term; for it is for the benefit and encouragement of agriculture.

Wigglesworth v. Dallison, Dougl. 201.  $\beta$  By the custom of Pennsylvania, a tenant for a term certain, is entitled to the way-going crop, whether such right be recognised by the contract or otherwise. Diffendorfer v. Jones, cited 5 Binn. 289; 2 Binn. 487; Stultz v. Dickey, 5 Binn. 285; Biggs v. Brown, 2 S. & R. 14; Comfort v. Duncan, 1 Miles, 231; Derni v. Bossler, 1 Penna. 224; and the same custom prevails in New Jersey, Van Doren v. Everitt, 2 South. 460; and in Delaware, Templeman v. Biddle, 1 Harring. 522.  $\gamma$  (a) For the custom in such case does not alter or contradict the agreement in the deed; it only superadds a right which is consequential to the taking. Wigglesworth v. Dallison, Dougl. 201. In Doe v. Snowden, 2 Bl. Rep. 1225, it is said by the court, that if there is a taking from old Lady-day, (15th April,) the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2d Feb.) to prepare for the Lent corn, *without any special words for that purpose* in the lease.  $\beta$  By custom and necessity, it seems that in Delaware an incoming tenant has a right to enter before his term commences, and fill the ice-house on the demised premises. State v. M<sup>c</sup>Clay, 1 Harring. 520.  $\gamma$

So, a custom that a tenant may leave his way-going crop in the barns, &c., of the farm for a certain time after the expiration of the lease, and his quitting the estate, is good.

Lewis v. Harris, Cor. Skynner, C. B. Hereford Summer Assizes, 1778; Beavan v. Delehay, 1 H. Bl. 5.  $\beta$  In a demise between a landlord and tenant, matters in which the parties are silent may fairly be explained by the general usage and custom of the country where the land lies. 2 Pet. 148. A local custom that a lease from the first day of May of one year, to the first day of May of another year, is to expire at noon of the last day, may be given in evidence. Wilcox v. Wood, 9 Wend. 346.  $\gamma$

A custom, that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, shall hold over till the Michaelmas following, seemeth to be good.

Eastcourt v. Weekes, 1 Lutw. 799.]

It is a good custom in a manor, that the homage have used yearly to choose two surveyors, to take care that corrupt virtuals are not sold within the manor, and to destroy such as they find exposed to sale there; for the preservation of men's health is designed thereby, and it is at the peril of the surveyors if they destroy any meat that is not so.

Mod. 202, Vaughton and Atwood; 2 Mod. 56, S. C.

A custom in Ipswich to choose yearly two burgesses, who used yearly to make a feast, and to fine those who, being elected, refused to make a feast, and to imprison them till paid, was allowed a good custom, upon a *habeas corpus*, and the prisoner remanded.

Cro. Ja. 555, Wallis's case.

It is a good custom, that every man of the town that hath a house next adjoining, and abutting to the high street, may sell all merchandises in his shop within the said house in the time of the market, which is held in the high street.

Roll. Abr. 560. But vide 8 Co. 127.  $\beta$  See 1 C. M. & R. 713; 1 Gale, 5; 5 Tyr. 361.  $\gamma$

A custom in Exeter, that every woman taken in adultery shall be (b) whipped, is good.

8 Co. 126. [No mention is made of such custom in the book referred to.] (b) That a skimmington, or riding, where a woman cuckolds her husband, is a custom against law; vide 3 Keb. 578; Raym. 401.

A custom, that a feoffment by tenant in tail with warranty shall not be a

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discontinuance, is good ; although this is against the (a) rule and maxim of the common law.

30 Ass. pl. 47. (a) So, that a woman shall not have dower where she has received, during the coverture, part of the money for the sale of the land. Bro. *Customs*, 53.—So, that a widow, who marries, shall not have dower. Roll. Abr. 562.—But a custom that the wife of a tenant in fee shall not have dower, is void. Dav. 46 b.—So, that the wives of Irish lords shall, during coverture, have the sole property of certain goods, to dispose of them without the assent of the husband. Dav. 50 b ; Roll. Abr. 563.

|| A custom in a manor, that the grantee of a customary estate (which will pass either by surrender, or deed and admittance) must be admitted during the life of the grantor, is good.

Fenn v. Mariott, Willes's Rep. 430.||

But every custom which appears to have been unreasonable in (b) itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to a particular person ; or to owe its commencement to the arbitrary will and oppression of a powerful lord, (c) and not to the voluntary agreement of the parties, is void ; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation.

Dav. 32 b ; 6 Mod. 124 ; Salk. 203. (b) That a custom against the law of reason is void, vide Moor, 588 ; Bridg. 11, 12 ; 1 Leon. 217, 314 ; 3 Leon. 41. (c) [Upon this principle, a custom for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals upon the land near such pits, such land being customary tenement, and parcel of the manor, there to continue, and to lay and continue wood there, for the necessary use of the pits, and to take coals so laid away in carts, and to burn and make into cinders coals laid there, at their pleasure, was adjudged to be void. It was also adjudged void for uncertainty, the word *near* being too vague and loose to support such a claim. Broadbent v. Wilkes, Willes's Rep. 360 ; affirmed in B. R. 1 Wils. 63 ; 2 Str. 1224.]

A custom within a parish, that all lambs fallen and bred upon one tenement in the same parish, though belonging to several owners, shall be reckoned together, as if but one man's, and the tenth, so counted together, paid for tithes, is void and unreasonable ; for by this means it might happen that a man might have but one lamb, and that should be taken for tithe ; and he that had more should pay nothing.

Hob. 329, Barker and Cocker, adjudged.

A custom to elect a supernumerary before any vacancy, to be admitted upon the death of the next prebendary, is ridiculous and void.

Owen v. Stainoe, Skin. 45 ; 2 Jon. 199, S. C.

|| A custom, that every man inhabiting within the parish of A, who marries by license in another parish, shall pay 5s. to the rector of A, for and in regard of the said marriage, as if it had been solemnized in A, is bad.

Richards v. Dovey, Willes's Rep. 622.

A custom, that a person shall pay the churching fee, though the ceremony be not performed, is bad.

Naylor v. Scott, 2 Ld. Raym. 1558.

But a custom, that every inhabitant of a parish of the age of 16 (of whatever religious sect) shall pay 4d. yearly as an Easter offering, is good.

Fuller v. Say, Willes's Rep. 629.||

A custom that no commoner shall put his cattle into the land before the lord, is void ; for a custom that leaves it to the arbitrary will of the lord, whether the tenant should ever enjoy any benefit by the common or not, can never be presumed to have had a reasonable commencement.

Roll. Abr. 560 ; Dav. 32.

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So, a custom that the lord of the manor shall detain a distress taken upon the demesnes till a fine at his will is paid for the damage, is void.

Lit. § 46; Dav. 33 a.

A custom, that every tenant of a manor that marries his daughter without the license of the lord, shall pay a fine, is against reason, and void; for every (a) freeman may marry his daughter to whom he pleases.

Lit. § 209. (a) But that every tenant (though his person be free) that holds in bondage, the freehold being in the lord, shall pay such fine, is good. Co. Lit. 140 a.

β A custom to enter into particular houses on occasion of perambulating parish boundaries, is not good.

Taylor v. Dewey, 7 Ad. & Ell. 400; 2 N. & P. 469.

A custom for all victuallers to erect booths on a fair, from one day certain to another, paying 2d. to the lord, held good.

Tyson v. Smith, 1 N. & M. 784; 6 Ad. & Ell. 745; 1 Per. & Dav. 307.

Evidence is admissible of a custom fixing the construction of the words "inevitable dangers of the river" in a bill of lading for the transportation of goods.

Gordon v. Little, 8 S. & R. 533.

Evidence may be given of the course of a particular trade, but not to show what the law is.

Ruan v. Gardner, 1 Wash. C. C. 145.

Evidence is inadmissible of a custom of a particular place, different from the law, as to the right of the landlord to re-enter for a forfeiture incurred for the non-payment of rent.

Stoever v. Whitman, 6 Binn. 417.g

If the lord of a copyhold by custom claims to have a fine of the copyholder, upon every alteration of the lord, be it by alienation or otherwise, this is a void custom as to the alteration or change of the lord, by the act of the lord himself; for by such means the copyholders might be oppressed by the multitude of fines by the act of the lord.

Co. Lit. 59 b. But for this vide tit. *Copyhold*.

A custom, that the lord shall have common in all the lands of his tenants for life or years lying fresh, is void; for it is against law that the lessor shall have common against his own lease, because it is part of the thing demised. *Aliter*, of a heriot, which is collateral.

Palm. 211; White and Sayer, adjudged.

A custom that the lord may take for his heriot (b) the beast of a (c) stranger, levant and couchant upon the land of the tenant, is not good.

Roll. Abr. 561; 2 And. 153. (b) So, where the custom was laid, that if the tenant hath none, or the best beast is esloigned, the lord has used to take the best beast levant and couchant upon the land. Moor, 16; N. Bendl. 112, adjudged. But that the cattle of a stranger may be distrained for a heriot, but not seized, vide N. Bendl. 302, pl. 294; Dals. 61; Ow. 146; March, 165. (c) A custom that the lord shall have the best beast of every person dying within his manor, which is found there, is naught; for between the lord and a stranger it could have no lawful commencement, though between the lord and his tenants it may be good. Cro. Eliz. 725, adjudged; Roll. Abr. 266.

A custom, in a town, for a lord to enter into the (d) lands of his tenant till an agreement made for the arrears, when the tenant ceases for two years, is not good; for it is an ill usage to oust a man of his inheritance without action or answer.

43 E. 3, 32; 2 Inst. 56. (d) But, if this custom had extended itself into many towns, it had been good. 43 E. 3, 32; Roll. Abr. 559.

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(C) Such as are against the Rules of the Common Law.

A custom that the lord of the manor shall have 3*l.* for every pound-breach, of every stranger, is not good; (a) but it is good against the tenants of the manor.

Roll. Abr. 561; Dav. 33. (a) So, of a custom, that if a tenant makes a rescous, or drives his cattle off the land when the lord comes to distrain, that he shall be amerced by the homage, &c. Godb. 135.

[A custom, that the inhabitants of a manor shall grind all their corn, grain, and malt, which by them, or any of them, shall be used or spent ground within the manor—at certain mills, is good. But if it were, that they should grind—all their grain whatsoever by them spent or sold—at certain mills, it would be void.

Cort v. Birkbeck, Dougl. 218. || Higges v. Gardener, 1 R. Abr. 559, pl. 4, S. P.; 2 Bulstr. 195, S. C.; Drake v. Wigglesworth, Willes's Rep. 654, S. P.; Harbin v. Grene, Moor, 887, S. P.; Hob. 189, S. C. ||

A custom in a parish, that every parishioner shall bury his relations in the churchyard as near as possible to their ancestors, is bad.

Fryer v. Johnson, 2 Wils. 28.]

β A custom to charge for the insertion of an advertisement in a newspaper, when it appears on its face that the object for which it was inserted has ceased, is bad, although no discontinuance of it had been ordered.

Thomas v. Graves, 1 Rep. Const. Ct. 310; see Thomas v. O'Hara, 1 Rep. Const. Ct. 303.

A custom for all victuallers to erect booths on a fair, from a certain day to a certain day, paying 2*d.* to the lord, was adjudged to be good.

Tyson v. Smith, 1 Nev. & M. 784; 1 Perr. & Dav. 307.*g*

As to particular customs relating to the proceedings in inferior courts, such as have prevailed time out of mind, and are in furtherance of justice, seem to be good; but such as are in delay of justice, and tend to oppression and injustice, and are against the general rules of law and reason, have always been held void.

Roll. Abr. 564; Cro. Eliz. 185.

Hence it is, that a custom in an inferior court, that when any man comes to the grand distress in any plea, and it is returned that he is distrained by his goods, *et quod nihil habet ulterius per quod distringi potest*, that his goods shall be delivered to the plaintiff, finding security, that if the suit passes for the defendant, that he shall have again his goods; and that if it passes for the plaintiff, that he shall have them, has been held good.

Roll. Abr. 564, in Maidstone, in Kent.

So, a custom in the county palatine of Chester, that if judgment be given in a base court there, and thereupon a writ of error be brought before the chief justice there, and he reverse the first judgment, costs shall be given to him at whose suit it is reversed, is good.

Roll. Abr. 564.

So, it is a good custom in an inferior court, that in an action of debt, if the defendant does not deny the debt, but *petit quod inquiretur de vero debito secundum consuetudinem*, that a jury may be returned that shall try it, and if they find it to be a true debt, that the plaintiff shall have judgment thereupon.

Roll. Abr. 564; Cro. Eliz. 894; Roll. Rep. 193; Mod. 96, S. P. adjudged, and said by Hale, Ch. Just., that this cause prevented a suit in Chancery.

But a custom in an inferior court, upon a judgment in the same precept,

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in the nature of a *capias ad satisfaciendum*, to give a warrant to the bailiff to take the principal in execution, if he may be found, and in his default to take the bail, is not good; for it is (a) against the law to take the bail before a *capias* returned against the principal, and (b) a *scire facias* against the bail.

Roll. Abr. 563. (a) For this reason a custom in an inferior court, which is not within the statute of 32 H. 8, to grant a *tales de circumstantibus*, is void. Roll. Abr. 463, 564. So, to award a *capias* in debt before any summons. Roll. Abr. 563, 780. (b) That the custom of London to take the bail without a *scire facias*, is void. Cro. Car. 561; Palm. 567; Cro. Eliz. 185; 2 Leon. 29.

A custom in an inferior court to try issues by six jurors, is not good, though many courts have used it, and many judgments depend thereupon.

Roll. Abr. 564; Tredinwick and Peryman, adjudged, in a writ of error upon a judgment in Bodmyn in Cornwall. Cro. Car. 259, S. C. adjudged; and said by Jones, that although in some parts of Wales there be such trials by six only, it is by reason of the statute of 34 & 35 H. 8, c. 26, which appoints, that trials may be by six only, where the custom hath been so. 1 Sid. 233, S. P. *per Cur.*

A custom in a leet, that if the petit jury make any (c) false presentment, and it is found false by the grand inquest, that the petit jury shall be amerced, is void; for this is against common right and extortion.

9 H. 6, 44 b. (c) But a custom that, if they conceal any thing that ought to be presented, they shall be amerced, is good. 9 H. 6, 44; Roll. Abr. 560.

If there be a custom in an inferior court, that if a man brings an action against another there, and the defendant appears and pleads to issue, and, at the day of trial, the defendant, being solemnly called, does not appear, nor find pledges *qui eum manucapere voluerint*, to have his body from court to court, at every court thereafter to be held, till the plea be determined, as he ought by the custom, but in contempt of the court *recessit et defaultum fecit*; and judgment is thereupon given: yet this is not a good custom, but utterly unreasonable; but they ought according to law to take the inquest by default; for if he had appeared and stayed in prison without finding pledges, yet they ought not to have given judgment against him if he would have pleaded to issue.

Roll. Abr. 564, Burges and Spark, adjudged; and such judgment given in Plymouth reversed accordingly.

It is no good custom in Sandwich, that, if the goods of a freeman of Sandwich come into the hands of a freeman of London, the mayor of Sandwich shall write to the mayor and aldermen of London, to call the party before them, and take order for the restitution; and if they refuse, or return no answer to the mayor and jurats, the mayor of Sandwich shall write *alias et pluries*, and after give judgment of withernam against the mayor and commonalty of London; which shall be signified to the mayor of London: and if he make not restitution in fifteen days, then those of Sandwich may retain the body of any Londoner that comes there, till restitution.

Moor, 603, pl. 834; Paramour and Veral, 2 And. 151, S. C.; and vide Moor, 588; Palm. 56; 2 Inst. 204; Sid. 355.

A custom in an inferior court, to give a day to one that hath (d) made default, is void and against law.

Cro. Ja. 357, adjudged. (d) So, a custom to give judgment in a personal action upon four defaults before appearance, is void. Style, 124.

A custom for the churchwardens of a parish to set up monuments, &c., in a church, without consent either of the rector or the ordinary, is illegal.

Beckwith v. Harding, 1 Barn. & A. 508.

(D) Where from their Benefits they shall bind.

A custom that the owners of ancient messuages, &c., within a manor have had assigned to them, by the moss-reeve, certain portions of the common, to be held by them in severalty, for digging turves, &c., called moss-dales, and have enclosed and improved such moss-dales, (after clearing them of turves,) and held them so enclosed in severalty discharged from all right of common, is good in law.

Clarkson v. Woodhouse, 5 Term R. 412, n.

A custom in a borough, forming a portion of a parish, to appoint separate churchwardens and overseers, and make separate rates for the borough and for that portion of the parish without the borough, was holden invalid.

Rex v. Gordon, 1 Barn. & A. 524.

A custom that none but a freeman, or the widow or partner of a freeman, should sell by retail in a city or the suburbs, is valid in law.

Mayor of York v. Walbank, 4 Barn. & A. 439.

A usage of trade cannot be set up in contravention of an express contract; therefore, where A agrees with B to buy a quantity of *prime* bacon, which B weighs and examines, and pays for by a bill at two months, but before the bill becomes due, gives notice to A that the bacon does not answer the contract, A cannot give in evidence a custom that the buyer is bound to reject the contract, if at all, at the time of examining the goods.

Yates v. Pym, 6 Taunt. 446; 3 Marsh R. 141.

A custom in an inferior court, to declare against a defendant before appearance, is bad in law; and *semble* also a custom to issue a summons and attachment at the same time.

Williams v. Lord Bagot, 3 Barn. & C. 772.

Keeping up a capstern and rope in a cove, to assist boats in landing, and without which they could not safely land in bad weather, held a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstern or not; and the custom to exact the toll held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shown to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.

Held, that a fisherman frequenting the cove was not a competent witness for the party resisting the toll.

Falmouth v. George, 5 Bing. 286.

A custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members, made by itself and not by the parishioners, is valid in law.

*Semble*, that it must be part of such custom that there should always be a reasonable number, and that the reasonableness must be decided with reference to long-established usage, and to the population of the parish, such a custom having existed from time immemorial in a parish.

Golding v. Fenn, 7 Barn. & C. 765.

(D) Where from the Benefits accruing from them they shall bind.

WHEREVER the party bound by a custom has some benefit by it, or the party, who claims the advantage of it, is at some charge thereby, the custom is good.

6 Mod. 124.



(D) Where from their Benefits they shall bind.

Hence it is, that a custom, that the parson of the parish should find a bull and a boar for the use of the parish, and in consideration thereof should have the tenth of the increase, has been held good.

Cro. Eliz. 569; Moor, 355; Roll. Abr. 559, S. C.

So, a custom, that whereas J S is seised in fee of the manor of T., and all the tenements in the said town are held of the said manor, that he and all those, &c., have had, time out of mind, &c., a bakehouse, parcel of the said manor, maintained at their charge, and that this bakehouse was sufficient to bake bread for all the inhabitants, and for all passengers through the said town; and the bread there baked had used, &c., to be sold at reasonable prices, and that no other person within the said town had used to bake any bread to sell to any person; this is a good (a) custom, though it restrains other men to exercise their trades within a certain place, for this might have a reasonable beginning to bind his own tenants, as it only does.

Cro. Eliz. 203, Sir George Farmer and Brook, adjudged; Leon. 143, S. C. debated; Owen, 67, S. C. adjudged, cont.; 8 Co. 125; 3 Bulst. 61; 2 Bulst. 195; Roll. Abr. 559, S. C. cited. (a) A custom in Winchester, that none shall exercise a trade there who is not free of the city, or brought up apprentice there; *qu.* if good. Salk. 203, and vide 8 Co. Wagonner's case. \* It may be good if founded on some consideration. Vide Mod. 349; Sty. 111; 2 Lev. 210; 3 Lev. 241.—A custom, which restrains trade *sub modo*, may be good; and therefore the custom of foreign bought and foreign sold, whereby a man not free of a city, &c., will be restrained from buying or selling goods to other foreigners within such city, &c., is good. Dy. 279 b; R. Jon. 162, Adm.; 2 Roll. Abr. 202, c. 45.—A custom, that none shall use a trade there, unless he be free of the guild R. in London, 8 Co. 125. *Dub.* Whether good in another city. 1 Salk. 204; Mod. Ca. 21.—[In the case of the city of Oxford, it was ruled, upon the authority of Wagonner's case, 8 Co. 25 b, that a custom in that city, by which every person not being a freeman of the city, who exposes goods to sale in the city, except in fairs or markets, is liable to a penalty, is good, notwithstanding there were no exception of victuals; and that a custom to distrain for the penalty was also good. *Moir v. Munday*, Say. Rep. 181.]—A by-law, that no one shall use a trade in a borough, not free there, where the by-law is founded upon a custom to such intent, though the custom be not confirmed by parliament, is good. Adm. Lot. 564; Adm. Godb. 254; 8 Co. 125 a. Now, every day's experience warrants this doctrine.\* *β* Evidence may be given of a custom or usage in Philadelphia, that the seller of cotton is answerable to the buyer for any latent defect, though there be no fraud, and the seller have given no warranty. *Snowden v. Warden*, 3 Rawle, 101. It is a general usage in Charleston to weigh cotton on its arrival at the wharf in public scales, mark the bags, and enter the weight in the wharfinger's books; and by the custom of the trade, sales of such cotton are always made with reference to these weights, unless there is a stipulation for reweighing. *Connor v. Robinson*, 2 Hill, 354. By the custom of Charleston, landing cotton on a wharf is not, it seems, a delivery. *Galloway v. Hughes*, 1 Bailey, 553.*g*

A custom, that every inhabitant of an ancient messuage held of the bishop in the city of S., have ground at the bishop's mill all their grain spent in their houses, and that the bishops, in consideration thereof, have time out mind kept servants to grind and carry, &c., is good, because mutual considerations and mutual actions will lie.

Roll. Abr. 561. But for this vide F. N. B. 271; Reg. 153; Hob. 189; Moor, 887; Style, 421; Roll. Abr. 559; 2 Bulst. 195, 196; Hard. 67; Lev. 15; Vent. 168; 2 Saund. 117; 2 Lev. 27; Carth. 193.

A custom, that the corporation of Litchfield have had a market there time out of mind, &c., and that the corporation ought to repair the way to it, and to appoint a bellman, who ought to sweep the market-place, and in recompense thereof, the said bellman, time out of mind, &c., from those that brought their grain to the said market, and untied their sacks there to sell it, had used to take a pint of grain, if it was but one bushel or under, but if it was above a bushel, then a quart, to the use of the said corporation; this

(D) Where from their Benefits they shall bind.

is a good custom, for the men that are charged by it have a reasonable benefit thereby.

Roll. Abr. 561, Hill and Hawks; Moor, 835, S. C. adjudged, and that the custom was good, though the corn was not sold, but brought in to be sold. 2 Bulst. 201, 206; Roll. Rep. 1, 2, 44, 46, S. C. adjudged.

It is no good custom, that the city of Norwich hath time out of mind maintained a quay for unlading goods brought up the river to the city, and that every vessel passing through the river by the quay hath paid a certain sum; for the vessels that unlade not at the quay or other place in the city, have no benefit from the maintenance of the quay.

Vent. 71; Mod. 47; Haspart and Wills, S. C., that there would have been some reason for it, if it had appeared that they cleansed the river. Sid. 454.

If a lord of a manor, which extends itself upon the banks of part of a river only, hath time out of mind maintained a quay for the lading and unlading of goods, and there kept a bushel within the manor for the measuring of salt and other merchandises; he cannot prescribe *ratione inde* for a bushel of salt of every ship sailing in the river; for the repairing of the quay and keeping a bushel within the manor cannot warrant the taking of toll out of the manor, for goods not brought to the quay within the manor, though brought to another place upon the same river.

2 Lev. 96, 97; Prideaux and Warn, Raym. 232; Mod. 104, S. C. adjudged.

It is a good custom, that the mayor and commonalty of London have had of every master of a ship 8*d.* per tun, in the name of weighage, for every tun of cheese brought from any place in England to the port of London; for the liberty of bringing it into the port, which is a place of safety, is a sufficient consideration; and the mayor and commonalty have the view and correction of the river Thames.

3 Lev. 37.

The lord of a manor may prescribe to keep and repair a wharf within the manor, *et ratione inde* to have toll of all goods landed within the manor, though not upon the wharf; for the landing upon the soil is an easement; and all the lands in the manor were the lord's originally, and this is in nature of a (a) toll traverse.

3 Lev. 424, [Crisp v. Bellwood; Colton v. Smith, Cowp. 47, S. P.] (a) For this vide 2 Roll. Abr. 522.

[The corporation of Malden, in Essex, prescribed in a *que estate* "that they and all those, &c., time whereof, &c., had used to repair the port, in consideration whereof, they had used time whereof, &c., to receive for all lands sold within the precinct of the borough, a certain rate of 10*d.* in the pound out of the purchase-money:" it was adjudged a good custom; and this is what they call *land-cheap*; for the landholder reaps a benefit by the trade coming to the town, by reason of the port.

Cited by Holt, C. J., 1 Ld. Raym. 386.]

It is a good custom within a manor adjoining to the sea, that in case of any shipwreck of any ship cast upon the manor *inter fluxum et refluxum maris*, the lord shall take care of the sick and wounded, and burial of the dead, and keep the goods there cast for the use of the proprietors; and in consideration thereof, shall have the best anchor and cable of the ship; for though charity obliges the lord so to do, yet it is not unreasonable that he should have a recompense of his charity and charge:—But *qu.*

3 Lev. 307, Simpson and Bithwood, adjudged.

(E) Where they shall be deemed good, or void.

For where in trover the jury found a special verdict, that within the manor of Beeching in Sussex, adjoining upon the sea, there was this custom, that if any ship navigating and floating upon the sea should happen to strike upon the land, parcel of or within the manor, and should there happen to perish; or, if a ship so striking should happen to get off, that in both cases the lord of the said manor used to have the best anchor and cable belonging to the said ship; and the custom was held unreasonable in both cases; for there is no consideration to ground such a custom upon; for if there be a trespass upon the lord's soil, it is involuntary, and by the act of God, where it is by stress of weather; and therefore not to be punished as a voluntary trespass; as, if the house of my tenant for years be burnt with lightning, I shall never have an action of waste against him, for it is the act of God, which does no man an injury. Besides, it is very unreasonable for so (a) small a damage done to the lord, as striking upon his soil, that he should have so great a satisfaction as the best cable and anchor.\*

Hil. 34 Car.; Bear and Ballingsham, 3 Lev. 85, S. C. (a) That a custom alleged by a lord, that whoever broke his pound should pay him 3*l.*, is a void custom as to strangers; for this, among other reasons: because there is no proportion betwixt the damage and the recompense. 11 H. 7, 13, 14; 21 H. 7, 40.—But a custom alleged in Bucks, that if any swan cometh upon the land of any man adjoining upon the Thames, or upon any water running into the Thames, and there lays and hatches cygnets, that the owner of the land shall have one, was held a good custom; and yet the damage which the owner of the land sustains is but very small. 2 R. 3, 15, 16; 7 Co. in the case of swans.—\*This case is very different from the preceding. β A custom to take fish, or to take sand to mix with lime for the purpose of making mortar, *in alieno solo*, is unreasonable and void. Waters v. Lilley, 4 Pick. 145; Perley v. Langley, 7 N. H. Rep. 233.*g*

By special verdict it was found, that by a custom in Newcastle, time out mind, &c., a toll of five pence for every chaldron of coals there shipped off, was due to the corporation, in consideration of their charge in maintaining the port, which they were bound to do, and had done time out mind; and that the custom was to distrain (for non-payment of this duty) any goods of the owner of such ships, which were distrainable by law; and it was held, that the charge of maintaining a port was a sufficient consideration, and that the finding that the corporation are bound to repair, &c., was sufficient, without finding that it was then in repair.

Carth. 357; Vinkinston v. Ebdon, adjudged; 5 Mod. 359; Salk. 248, S. C.; 1 Ld. Raym. 384, S. C.; 12 Mod. 216, S. C.

(E) Where, from the Certainty or Incertainty of them, they shall be deemed good, or void.

EVERY custom ought to be certain, or such as may be reduced to a certainty, for an uncertain thing cannot be supposed to have had a reasonable commencement; and the uncertainty of a custom destroys the supposition of its continuance and duration time out of mind.

Roll. Abr. 565; Dav. 33; Skin. 249. β See Collins v. Hope, 3 Wash. C. C. R. 150; United States v. Duval, Gilpin, 356; Consequa v. Willing, Pet. C. C. R. 230; Davis v. New Brig, Gilpin, 486; Rapp v. Palmer, 3 Watts, 178; Trott v. Wood, 1 Gallis. 443; Buck v. Grimshaw, 1 Edw. Ch. R. 147; Somerby v. Thompson, Wright, 573; Touro v. Cassin, 1 N. & M. 176; Smith v. Wright, 1 Caines, 45; Lewis v. Thatcher, 15 Mass. 433; Chastain v. Bowman, 1 Hill, 270; Thomas v. O'Hara, 1 Rep. Const. Ct. 303; Thomas v. Graves, 1 Rep. Const. Ct. 308.*g*

Hence it is, that a custom that when an infant is of such an age that he

(E) Where they shall be deemed good, or void.

can count twelve pence, or measure an ell of cloth, that he may make a feoffment, is void for the uncertainty.

Dav. 33 a; 4 Leon. 82; Hob. 225, S. C., cited, and said, that such custom is not good, but that it ought to be at a certain age, that it may appear to be an age of discretion.

So, a custom, that the tenant of the manor who first comes to such a place, &c., shall have all the windfalls there, is void for uncertainty.

Roll. Abr. 565; Dav. 33 a.

So, of the custom of *tannistry* in Ireland, which was, that the lands of that nature of which a man died seised, should descend *seniori et dignissimo viro sanguinis et cognominis* of him that died so seised; it was held void, both for the uncertainty of the person and the estate.

Dav. 28 b, to 42.

So, a custom alleged and found by verdict to pay ten pence to *the vicar at the usual time of churching women*, was held void for uncertainty.

Fitzgib. 55; 2 Ld. Raym. 1558.

So, of a custom for twenty-four parishioners, &c., to make a rate, and a certain proportion to be levied on such a hamlet.

2 Stra. 1145.

[A custom for *poor and indigent householders* living in A. to cut and carry away rotten boughs and branches in a chase in A., is bad, the description of *poor householders* being too vague and uncertain.

Selby v. Robinson, 2 T. Rep. 758.

A custom, that "when a tenant took a farm, in which there was any open field, more or less, for an uncertain term, it was considered as a holding from three years to three years," was holden to be void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100 acres of land enclosed.

Roe v. Lees, 2 Bl. Rep. 1171.

But a prescription for so much money for setting up a stall in a fair, and for ground *near* the stall, is certain enough, for the quantity of ground near a stall may be determined by the usage of the fair.

Bennington v. Taylor, 2 Lutw. 1517. See Wilkes v. Broadbent, *supra*.

So, a prescription to take "three Winchester bushels of barley *out of and* for every ship's cargo of barley brought upon a quay to be exported *in any ship*," is sufficiently certain, for the word *cargo* is a mercantile term, and very intelligible when referred to a ship.

Sargent v. Reed, 2 Str. 1228; 1 Wils. 91. The prescription in Mr. Nolan's MSS. report omits the words in italics. See Nolan's edit. of Sir J. Strange's Reports.]

¶ A custom for all the inhabitants of a town for the time being to have and enjoy the liberty and privilege of playing at any rural sports or games in a particular close every year, at all times of the year, at their will and pleasure, was objected to, 1st, as too general and uncertain, in not specifying what rural sport or game: 2dly, as illegal and unreasonable, not being confined to reasonable or legal times of the year: and, 3dly, because there could have been no consideration for it, and it could not have had a legal commencement. The court were of opinion that the custom, as extending to any rural sports, was too general and uncertain: but they thought that there was not much weight in either of the other objections; for that "all times of the year" must be taken to mean "legal and reasonable

(F) How to be construed, &c.

times of the year;" and that this did not take away all the profits of the land; and that it might have had a legal commencement.

Millechamp v. Johnson, Willes's Rep. 205, note.

But a custom for all the inhabitants of a parish "to play at all kinds of lawful games, sports, and pastimes in the plaintiff's close, at all reasonable times of the year, at their will and pleasure," was holden to be a good custom.

Fitch v. Rawling, 2 H. Bl. 393.

A custom (a) for all the inhabitants of a town to dance at all times of the year, for their recreation, in the plaintiff's close, was holden to be good.

Abbot v. Weekly, 1 Lev. 176. (a) It is stated in the pleadings as a prescription, though the court in judgment speak of it as a custom.

A custom, that all the customary tenants of a manor *having gardens, parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, digged, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, *for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required,* is bad in law, as being indefinite and uncertain, and also destructive of the common. And so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences* of such customary tenements.

Wilson v. Willes, 7 East., 121.]

(F) How to be construed; and to what Things a Custom shall be said to extend.

EVERY particular custom, that is derogatory from the common law, is to be construed strictly, because as far as the particular custom hath not derogated from the law, the general custom of the whole kingdom ought to prevail; and we are not to presume that the particular custom goes further than by notorious facts may appear.

Roll. Abr. 567, 568; 11 Mod. 160. §2 Sumner, 377.g Vide tit. *Gavelkind*.

If the inhabitants upon a common have used, time out of mind, &c., to dig clay in the said common of their lord, for the reparation of their houses standing upon the said common, and a stranger digs clay in the common, the inhabitants cannot take this clay from him, for this is not (b) within their custom.

Roll. Abr. 567; Cro. Eliz. 434; Moor, 411, S. C. adjudged. (b) Where inhabitants have used to have common to their houses, this extends not to a new house. Owen, 4.

If the custom of a manor be, that if any copyholder in fee surrenders out of court, and he to whose use it is surrendered does not come in at the court to take his copyhold, after three proclamations made, that then the lord may seize the copyhold as forfeited; and a copyholder in fee surrenders to the use of another for life, the remainder over in fee, and the tenant for life does not come into court to take his copyhold, after three proclamations made, according to custom, upon which the lord seizes the copyhold as forfeited, and after *cestui que use* for life, dies, he in the remainder shall not be bound by the not coming in of the lessee; for the custom being in destruction of an estate shall be taken strictly, and shall be intended of tenant in fee in possession, and not of him in remainder, as in this case.

Roll. Abr. 568; Cro. Eliz. 789; Yelv. 1; Noy, 42; Raym. 404.

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## (G) Custom, how destroyed.

If there be a custom in London, that none ought to intermeddle with the art of a weaver there, but only those who are free of the guild; if a stranger receive silk in London, and carry it to Hackney, and weave it there, and then bring it back again to London, and receive his pay for it, this is not any intermeddling in London against the custom, though the contract was made in London.

Cro. Eliz. 803, adjudged.

If there be a custom in the town of Newcastle that the owners of houses in fee-simple there may devise them by parol, but not tenants in tail, and a man be seised of a house there in tail, remainder to himself in fee-simple, he may devise the remainder; for the word *owner* is general, and comprehends all ownerships.

Style, 409, debated, but no resolution; and vide Roll. Abr. 609.

If there be a custom within a manor, that the wife shall be endowed of the moiety of all such copyhold lands as her husband was seised of, and a copyholder die, and his wife be endowed of a moiety, and his son and heir having the other moiety die, the wife of the son shall be endowed of the moiety of this moiety; for this is directly within the custom.

Raym. 58, Baker and Berisford.

If there be a custom within a town to have 2*d.* for every hide of every sheep, cow, or ox, that is killed or sold within the said town, and for non-payment thereof to seize the hides, &c., the party that is to have the 2*d.* cannot by this custom justify the tanning the hides and converting them into leather.

Cro. Eliz. 783; Roll. Abr. 569.

\*General customs may be extended to *new things*, which are *within the reason* of those customs.

Ld. Raym. 499; 12 Mod. 271; 5 Co. 82. See 2 Jon. 204, *β* and 5 East, 2*g*

It is a general rule, that customs are *not to be enlarged beyond the usage*, because it is the usage and practice that makes the law in such cases, and not the reason of the thing.

11 Mod. 160; Fitzgib. 243.\*

## (G) Custom, how destroyed.

A TITLE gained by prescription or custom cannot be lost by interruption of *possession* ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of a rent or common and the land charged therewith, of an estate equally high and perdurable in both.

Co. Lit. 114 b.

If gavelkind lands are held in socage, and the tenure is after changed into knight's service, yet the custom is not altered, for that goes with the land and not with the tenure.

Dals. 23; Sid. 138; Style, 476.

Lands in Kent were disgavelled by 31 H. 8, c. 3, and a private act made 2 & 3 E. 6, enacted, that the lands of Sir Henry Isles amongst others, should be from thenceforth to all intents, constructions, and purposes, as lands at the common law, any custom to the contrary notwithstanding; and the question was, whether these lands lost by these statutes all their other qualities or customs belonging to gavelkind, as well as their partibility; and it was resolved that they lose only their partibility.

Raym. 59, 76, 77; Sid. 77, 135; Lev. 79; 2 Keb. 288; Hard. 325, Cotton and Wiseman. For the reasons hereof, vide tit. *Gavelkind*.

(H) Of the Manner of alleging and pleading a Custom.

If lands of the nature of gavelkind, or borough-english, escheat to the crown, and are enjoyed in several descents, and are afterwards granted out by the crown in knight's service, yet they descend in gavelkind, or borough-english; for the law of those places cannot be controlled by the king's charter, or altered without an act of parliament.

|| Where a rectory in Kent, which formerly belonged to one of the dissolved monasteries, had been granted by Henry VIII. to a layman to be holden in fee by knight's service *in capite*; it was determined that the lands were descendible according to the custom of gavelkind, but the tithes according to the common law; the ancient custom not attaching upon the tithes, because incapable of descent till the time of the dissolution of the monasteries.

Doe v. Bishop of Landaff, 2 N. R. 491.

Where a custom obtains that all the householders in a parish shall grind at a particular mill all their corn, which shall be used ground within the parish; an occupier of one of such houses is not discharged of this obligation by the accident of one of our kings having been formerly *seised in his demesne as of fee* of such house and of the mill at the same time. But *quare* whether the obligation would not have been extinguished if the king had *inhabited* the house.

Drake v. Wigglesworth, Willes's Rep. 654.||

(H) Of the Manner of alleging and pleading a Custom.

A custom of devising lands, borough-english or gavelkind, may be alleged in a city, borough, or manor, but not in an upland town, that is neither city nor borough; but a custom to have a way to the church, and to make by-laws for the reparation of the church, and well-ordering of the commons, and such like things, may be alleged in an upland town, that is neither city nor borough.

Co. Lit. 110 b; Hargr. n. (2). But as to the manner of laying a custom, and the difference between alleging a thing by way of custom, or by way of prescription, vide 6 Co. 60; Hob. 113; Cro. Eliz. 441; Poph. 201; Style, 477; Lev. 176; Vent. 386; 3 Lev. 160; Carth. 192; 4 Mod. 342; 2 Lutw. 1317; *Supra*, (A).

|| A custom, being in derogation of common right, cannot be alleged generally within the whole kingdom, or for all persons, for then it would be the common law. Hence, a custom for all executors to be sued by action of debt in the Mayor's Court in London, was adjudged to be bad. So, of a custom for *all persons* for the time being, *being in a particular parish*, to play at all kinds of lawful games, sports, and pastimes in the close of A at all seasonable times of the year, at their free will and pleasure.

Shersom v. Bostock, Fitzg. 51; Fitch v. Rawling, 2 H. Bl. 393.||

A custom for a way was laid *quod talis habetur consuetudo quod quilibet inhabitans haberet*, &c., and the court held it naught, for it should be laid by way of fact triable, viz., *tempore cujus contrarium*, &c., *usi fuerunt habere*.\*

Sid. 237; Keb. 836. \*The former way would do in a declaration. The latter is proper in a plea, &c.

The law takes notice of the (a) customs of gavelkind and borough-english, and therefore it is sufficient to allege generally that the lands are of the nature of gavelkind, &c. But other private customs must be set forth in pleading, that the judges may be apprized of them, and where they obtain, and so give their decisions with a proper regard to them.

Co. Lit. 175 b. (a) But as to such customs as are no part thereof, but merely colla-

## Customs of London.

teral, they must be shown in pleading, as that the lands are devisable. Lev. 80; Raym. 77; Sid. 77, 138; Cro. Car. 562.—So, if a man would entitle himself to be tenant by the curtesy, without having issue, or a woman to have dower of a moiety, it ought to be shown specially, that time out of mind, &c.; Sid. 77; 2 Sid. 154.

One prescription or custom may be pleaded against another, where they are not inconsistent, but a prescription pleaded against another is not good without a traverse.(a)

Godb. 183; 2 Mod. 104. But for this vide Roll. Abr. 558, 565; Yelv. 215; Bulst. 115; 8 Co. 127; Cro. Car. 432; Jones, 375. (a)[One custom may be pleaded to another without a traverse, where the latter is not inconsistent, but only a qualification of the former. Kenchin v. Knight, cited 2 Wils. 101.] ¶ If the lord set up a custom to have the best live or dead chattel as a heriot, *quære* whether the tenant may not modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot. Parkin v. Radcliffe, 1 Bos. & Pull. 289.¶

If one prescribes to have a way over the land of B, to his freehold, B cannot prescribe to stop it.

9 Co. 59.

\*A custom ought not to be laid in the negative.

2 Ld. Raym. 869.

In an action brought upon a custom, it *should be shown what the custom is*, otherwise it is not maintainable.

2 Ld. Raym. 1134.\*

§ A general custom may be proved without being pleaded, but a particular custom must be pleaded.

Templeman v. Biddle, 1 Harring. 522; and as a general rule a single witness is not sufficient to prove a custom. Wood v. Hickok, 2 Wend. 501; Thomas v. Graves, 1 Rep. Const. Ct. 309; Parrott v. Thacher, 9 Pick. 426. §

## CUSTOMS OF LONDON.

THE ancient city of London being the metropolis and chief town for trade and commerce within the kingdom, it was necessary that it should have certain customs and privileges for its better government; which, though derogatory from the general law of the realm, yet being for the benefit of the citizens, and for the advantage of those who trade to, and therefrom, have not only been allowed good by the judgments and resolutions in the superior courts, but (b) have also been confirmed by several acts of parliament.\*

8 Co. 127. (b) *Magna Charta*, c. 2, 7 Rich. 2, &c.—On a *certiorari* to the mayor and aldermen to certify a custom, the recorder certifies *ore tenus*, and then, on motion, delivers in the *certiorari*, with a written copy of the return annexed; the writ is filed, and the return recorded. Plummer v. Bentham, 1 Bur. 248.—If it is not surmised in the pleadings, that a custom ought to be tried thus, it shall be tried by the county. Ibid. [When a custom has been once certified by the recorder, the courts must take notice of it. They cannot have it certified over again. Per Lord Mansfield, Doug. 380. However, if they are dissatisfied with a certificate, they may send it to be reconsidered. 2 Ves. 592.] ¶ The city cannot return, that it does not appear to them whether there is such a custom or not; nor may they send their books for the inspection of the court, leaving it to the court to determine the custom from precedents and cases. Mosel. 7.¶



## (A) Of the Customs of London in general.

[As the recorder certifies the return *ore tenus*, he is, of course, not bound to sign the copy of it. 3 P. Wms. 17. If the certificate be false, an action lies against the mayor and aldermen, and not against the recorder; for it is their certificate by the recorder. Hob. 87.]

As these customs are of various and different kinds, I shall consider them under the following division:

- (A) Of the Customs of London in general.
- (B) Of the Custom of London in respect to Orphans.
- (C) Of the Custom of London in respect to a Freeman's estate: And herein,
  1. *What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.*
  2. *Of the Children's Part, and herein of Survivorship, Advancement, and bringing into Hotchpot.*
  3. *Of the Wife's Part, and what shall bar her thereof.*
  4. *Of the Legatory, or dead Man's Share.*
- (D) Of the Custom of London, as it relates to Feme Coverts.
- (E) As it relates to Masters and Apprentices.
- (F) As it relates to Landlords and Tenants.
- (G) Of the Customs of London which are in furtherance of Justice, and for the more speedy Recovery of Debts.
- (H) Of the Custom of Foreign attachment: And herein,
  1. *Of the Nature of the Debt or Duty which may be attached.*
  2. *In whose Hands, and at what Time the Attachment may be made.*
  3. *Of the Form of the Proceedings in a Foreign Attachment.*

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## (A) Of the Customs of London in general.

If a freeman forestalls fish coming to a market within the city, and upon complaint to the court of aldermen he appears there and confesses the fact, and they order that he shall desist, and he will not promise to obey, &c., they may (a) commit him until he signifies to the court that he will conform; and this is a good custom.

Vent. 115, The City of London and Coates, adjudged. (a) Custom to commit for refusing to serve on the livery good. 2 Lev. 200; Raym. 447; Mod. 10; 2 Keb. 555; 5 Mod. 156, 319.—[So, a custom to exhibit an information by the common serjeant for opprobrious words spoken of an alderman, and on conviction to fine and imprison, is good. 1 Ventr. 327; 2 Lev. 200; 2 Salk. 425; 2 Ld. Raym. 777; 7 Mod. 28. But a custom to commit in such case in the first instance, is void. Cro. El. 689.] So, a custom to disfranchise for contemptuous words spoken of an alderman, is void. 2 Lev. 200; 2 Salk. 426.—To imprison for disturbing the election of a warden of a company, and for not promising not to disturb again. Style, 78, *dubitatur*.—To imprison until he takes the oath of an alderman of London, a good custom. March, 179.

By the custom of London, a freeman or citizen might, even before the statute of wills, devise his lands and tenements, of which he was seised in fee-simple, to whom he pleased, and may at this time devise the same in mortmain, notwithstanding the statute of mortmain, &c.

Roll. Abr. 556. Several cases to this purpose, Moor, 136; 8 Co. 127, S. P.

By the custom of London, no attaint lies for a false verdict given in London.

7 H. 6, 32 b; Roll. Abr. 557, S. C.

A citizen of London, upon an appeal brought by him, shall not be obliged to wage battle.

S. P. C. 180; Fitz. Coron. 411.

## (A) Of the Customs of London in general.

It is a good custom in London, that the mayor of London may take recognisances of any persons, being of full age, or women unmarried, (a) (for he is a judge of record,) although the debt was contracted out of London.

Roll. Abr. 557; and vide Moor, 871, Chamberlain and Thorp; but vide Cro. Eliz. 186, and Leon. 130, S. C. [where Gawdy, J., held the custom not good, because it extended as well to strangers as to citizens.] (a) And the courts above will take notice hereof. Leon. 284.

It is a good custom in London, that they, time out of mind, have had the (b) measuring of coals *infra portum* London, which (c) extends from Staines Bridge to London Bridge, and from thence to Gravesend, and from thence to Yenland and Yendale.

Roll. Abr. 557. (b) A custom that all foreigners shall weigh at the city beam, good. Lev. 14, 15.—And a by-law founded on the custom of London, which directs that no freeman shall, under a certain penalty, sell his goods unless weighed at the city beam, is good. Salk. 352; 5 Mod. 156; 6 Mod. 123, 177; 1 Ld. Raym. 498. (c) For this vide 4 Inst. 250; Sid. 148.

By the custom of London, whores are to be carted; and, therefore, if a person calls a woman (d) whore (e) in London, an action on the case lies in respect to the punishment they are subject to by the custom. But the party (g) cannot be proceeded against in the spiritual court for defamation, for that would be punishing him twice for the same offence.

Roll. Abr. 550. (d) Note, that it hath been often adjudged of late, that calling one bastard, or son of a whore, or calling the husband cuckold, was, by implication, calling the mother or wife a whore. (e) If laid in London, when spoken elsewhere, the defendant may plead the words were spoken at, &c., and traverse the speaking in London; and if the plea is refused, may have a prohibition. Lev. 116.—That the action must be brought in the courts in London. Carth. 75. (g) Whether in such a case a prohibition may be granted after sentence? Carth. 213. [It cannot, unless the want of jurisdiction appear on the face of the proceedings. *Blacquiere v. Hawkins*, Dougl. 378. In the case of *Argyle v. Hunt*, the court could not judicially take notice of the custom in London, for an action to lie for the word "whore;" probably, because it never had been certified by the recorder. And in *Stainton and wife v. Jones*, which came on to be tried before Lord Mansfield, at the sittings after M. 23 G. 3, at Guildhall, in an action on this custom for calling Stainton's wife a whore, the plaintiffs were nonsuited; not being able to prove the custom to cart whores in London. A book from the town clerk's office was produced, but it contained no account of such custom. Lord Mansfield said, that he could not take notice of the custom unless proved. It was stated on that occasion, that the custom had never been proved in such a manner as to maintain an action in Westminster Hall; that in the city court, the action is maintained, because they take notice of their own customs without proof. Dougl. 380, notes (95, 96.)]

There (h) is a custom in London, that when a chaplain keeps any woman in his chamber suspiciously, a man may come to his chamber with the beadle of the ward, and enter the chamber and search.

2 H. 4, 12 b; Roll. Abr. 557, S. C. (h) The custom of London, that if a villain abides in London for a year and a day, that he shall not be taken nor put out by writ *de nativo habendo*, nor by any process thereupon issuing, is good. 7 H. 6, 32; 8 H. 6, 3; Roll. Abr. 557, S. C.; Moor, 2 pl. 4, S. P. adjudged.

By the custom of London, if a man put a horse to livery to an hostler, and the horse remain so long there that he eats as much as he is worth, in that case the hostler may call in four of his neighbours, who shall appraise the horse, and value also the meat; and if they think that the meat amounts to the worth of the horse, or more, the hostler may detain him as his own; (i) which is a custom arising from the abundance of traffic with strangers, who could not be known so as to charge them with actions.

Moor, 876; 3 Bulst. 271; Yelv. 67; Roll. Rep. 449. (i) But if a man leaves several horses with an innkeeper in London, and takes them all away except one, the innkeeper cannot retain the horse so left till he is satisfied for the keeping of the other

(A) Of the Customs of London in general.

horses, unless there was an agreement to that purpose. *Bulst.* 207.—So, if A put the horse of B to livery to an hostler in London, and he eat out his head, yet cannot the hostler sell him; for all customs being derogatory to the common law, are to be taken strictly; and there is no custom of London that hath gone so far as this case, to authorize one man to sell and convey the property of another. *2 Roll. Abr.* 85.

It was (a) anciently insisted upon, that by custom all indictments and proceedings for any cause, except felony, should be tried and determined in London, and not elsewhere. But (b) it seems to be now admitted, that a *certiorari* lies to remove any indictment from London; but (c) it is said that, by the (d) city charters, the tenor of the indictment only shall be removed, and not the indictment itself.

(a) *Cro. Car.* 128. (b) *Raym.* 74; *3 Mod.* 230; *Hard.* 409; *6 Mod.* 246; and *vide* 5 & 6 *W. & M. c.* 11. (c) *Keb.* 252; *Sid.* 155. (d) That by the city charters the mayor shall be a principal in every commission. *3 Inst.* 72; *2 Rich.* 3, 11 a.

Besides these and several other customs, there is a general custom which is usually set forth by the city, when any of their proceedings is called in question, viz., That (e) if any of their customs heretofore used prove hard or defective, or if any thing newly arising within the city, where remedy was not before provided, should need amendment, in either of these cases, the mayor and aldermen for the time being, with the assent of the commonalty, may ordain a fit remedy thereunto, so as such ordinance be profitable to the king, for the profit of the citizens, and agreeable to reason.

(c) What ordinances, by-laws, &c., made by virtue of this custom, are good, &c., *vide* 8 *Co.* 126; *Waggoner's case*, *Skin.* 371, &c.—That none but a freeman shall exercise a trade; and that a freeman bred up to one trade, may exercise another of the same nature, *vide* *Cro. Car.* 516; *Roll. Rep.* 10; *Saund.* 311; *Sid.* 427; *4 Mod.* 145. *Vide tit. By-Laws.* \*—\* By various charters the citizens of London are free from toll, &c., throughout the kingdom, are excused from juries, &c., out of the city. [But this exemption from toll can be claimed by *resident freemen* only. *Rex v. Hanger*, *3 Bulst. Harg. Law Tracts*, 128; *Corporation of London v. Corporation of Lynn*. *4 T. Rep.* 130.] And a jury of citizens may waive their privilege, and consent to be sworn on a trial at bar in Middlesex. *Lockyer v. East India Company*, *2 Wils.* 136.—As to the erection of edifices, a man may heighten his old messuage, or house, or rebuild on the old foundation to what height he pleases, but of no other erection or building, so as to stop his neighbour's lights. *Plummer v. Bentham*, *1 Burr.* 248.—[And he cannot stop ancient lights by an erection upon a new soil, or beyond the old foundation. *Priv. Lond.* 56. For the repair of his house, a man may, by custom in London, set his poles and ladders upon the soil, or house of another adjoining. But he cannot break the house or soil. *Id.* 59.]—As to the buildings, see further *11 G. 1, c. 28*, and *14 G. 3, c. 78*.—[The former statute is confined to party-walls between houses, and does not extend to party-walls between stables. *Rex v. Pratt*, *4 Burr.* 2298.]—With respect to trade, it is a good custom that the portorage of corn, roots, &c., belongs to the city, from *Staines Bridge* to *Yendal* in Kent, and the by-law is good, that none but the company of free porters shall carry it, on penalty of 20s. *Fazakerly v. Wiltshire*, *T. 7 G.*; *Ludlam v. Bradley*, *P. 13 G. in C. B.*; *Robinson v. Webb*, *T. 2 G. 2, B. R.*; *1 Stra.* 462.—It is a good custom that persons to be admitted to the freedom be obliged to swear on the New Testament. *Rex v. Bosworth*, *2 Stra.* 1112.

The custom of London, allowing parties to build to any height upon an old foundation, does not authorize them to do so unless the whole of the foundation be their own.

*Semble*, that if the foundation built on is less ancient than the window obstructed, the custom does not authorize the building.

*Quere*,—Whether the custom of London may now be proved by the production of the *privilegia Londini*.

*Shadwell v. Hutchinson*, *1 Moo. & Malk.* 350; see *Vin. Abr. Customs of London*, pl. 2, 4, 5.

## (B) Of the Custom of London in respect to Orphans.

If any freeman or freewoman die, leaving orphans under age unmarried, the custody of their bodies and (a) goods, by the custom of London, belongs to the city, and their executors or administrators must exhibit true inventories of all their goods and chattels, and must (b) bind themselves to the (c) chamberlain to the use of the orphans, to account for the same upon oath; which, if they refuse to do, they may be committed: also, (d) if the ecclesiastical court will compel them to account there, against this custom, a prohibition lies.

Hob. 247; Roll. Abr. 550, S. C. (a) Though given them as a legacy by other freemen. Hutt. 30.—Or in a foreign county. Vent. 180. (b) Although they have already acknowledged a judgment at common law for the securing, &c. Roll. Abr. 550; Hutt. 30, S. P.—So, although they have given security in the prerogative court, yet they may be compelled to give new security to the chamber of London. Roll. Abr. 550. (c) For which purpose he is a corporation, and such securities shall go to his successor, who may sue the same. Cro. Eliz. 464. (d) 4 Inst. 249, S. P. But an infant may waive the benefit of suing in the court of orphans, and file a bill against one for the discovery of the personal estate. March, 107.

If a freeman of London leaves London, and resides in the country, yet his children, though born out of London, shall be orphans, and subject to this custom.

Roll. Rep. 316; Sid. 250; Vent. 180; Mod. 80; 2 Vern. 110, S. P.

If such orphan is taken out of the custody of such person, to whom he is committed by the court of orphans, they may imprison the offender till he produces the infant, or is delivered by course of law.

Sid. 250; Raym. 116; Lev. 162.

Also, by this custom, if (e) any one, without the consent of the court of aldermen, marry such orphan (g) under the age of twenty-one, though out of the city, they may fine and imprison him for non-payment thereof; for if the custom should not extend to marriages out of the city, their power would be but in vain.

2 Lev. 32. The King and Harwood, 1 Vent. 178, S. C.; 1 Mod. 77, 79, S. C. (e) Though not a freeman. Vent. 178; Mod. 79, and the above authorities. (g) Whether the marriage was before or after twenty-one, the husband is fineable, and may be committed if he had not the license of the court of orphans. Preced. Chan. 537.

The orphans' money in the chamber of London is not a mere *depositum*, but in nature of a debt, or chose in action, which does not vest in the husband by the marriage of such orphan, nor can he bequeath it by will.

2 Vent. 340. [The chamberlain pays interest for the money. 1 Ch. Ca. 182, S. C.]

|| By 5 & 6 W. & M. c. 10, a perpetual fund is established for the payment of interest at 4*l. per cent.* to the orphans and other creditors of the city of London; which fund, from the year 1694 to 1712, had been deficient for that purpose, but since that time there had been a surplus: it was holden, that the surplus should not go to the city, but should be applied to make good the deficiencies of the former years.

Lad v. Mayor, &c., of London, Mosel. 99. ||

(C) Of the Custom of London in respect to a Freeman's Estate: And herein, *What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.*

HERE it is necessary, in the first place, to take notice, that by the custom of London, if a freeman of London dies, leaving a widow and children, his personal estate, after his debts paid, and the customary allowance for his

(C) Custom of London in respect to a Freeman's Estate.

funeral, and the widow's chamber being first deducted thereout, is, by the custom of the said city, to be divided into three equal parts, and disposed of as follows, viz., One-third part to the widow, another third part to the children unadvanced by him in his lifetime, and the other third part such freeman may dispose of by his will as he pleases; but if a freeman of London has no wife, but has children, the half of his personal estate belongs to his children, and the other half the freeman may dispose of; so if the freeman has a wife and no children, half of his personal estate belongs to his wife, and the other half he may dispose of.

F. N. B. 122; 2 Inst. 33; Lit. Rep. 324; 2 Lev. 130; Chan. Ca. 285; Hetl. 158; Godb. 49; Latch. 134; 2 Leon. 29; Cro. Eliz. 185; Abr. Eq. 150; 2 Salk. 426. [In the case of *Biddle v. Biddle*, 18th March, 1718, before Lord Parker, it was said that the widow is entitled to the furniture of her chamber; or in case the estate exceeds 2000*l.*, then to 50*l.* instead thereof. Vin. Abr. tit. *Customs of London*, (B. 2, p. 2.)]

This custom extends only to the personal estate of the freeman, for when it first began, the citizens of London had no regard at all to a real estate, for they did not suppose any freeman of London would purchase such estate, but would employ his whole fortune and stock in trade for the benefit of commerce.

Abr. Eq. 150.

But, if a freeman of London has a mortgage in fee, this shall be counted part of his personal estate, and will be subject to the custom.

Chan. Ca. 285. [A mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part; because the custom of London cannot take place till after the debts are paid. 2 P. Wms. 335.]

But a lease for years waiting on the inheritance shall not be reckoned part of a freeman's personal estate, but shall, together with the inheritance, descend to the heir at law.

3 Chan. Ca. 160; Vern. 2, 104, S. P. decreed.

[Neither shall receipts in chemistry, physic, &c., be reckoned part of his estate.

1 Vern. 61.]

Also, if a freeman of London agrees to lay out money in the purchase of lands, and to settle the same on his eldest son, &c., this shall not be reckoned part of the freeman's personal estate.

*Ammand v. Honeywood*, Vern. 345; 2 Chan. Ca. 118, S. C., for by the agreement the money is to be looked upon as lands in equity, and therefore not subject to the custom.

On the marriage of B's daughter with A, a freeman of London, B, the father, settles a term for years in trust, that A, the husband, shall receive the rents and profits till such time as D and E, or the survivor of them, should otherwise appoint, and then such persons as they should appoint; and for want of such appointment, for such persons as the said A by will should appoint; and for want of such appointment, then in trust for the executors and administrators of A. The trustees having made no appointment, the question was, Whether this term should go according to that appointment, or be looked on as part of A's personal estate, who was a freeman of London, and so go according to the custom? and the court was of opinion, that it was not to be looked upon as part of A's personal estate, because it was never in him, but was settled by his wife's father, and therefore not subject to the custom.

Abr. Eq. 151, between Grice and Gooding, decreed.

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## (C) Custom of London in respect to a Freeman's Estate.

If a freeman of London is made both executor and residuary legatee, and he dies before he has made his election, whether he will take as executor or legatee, yet the legacy must be considered as such, and will be subject to the custom of London.

Chan. Ca. 310, *per* Lord Chancellor.

By this custom a freeman could (a) not by will dispose of such part of his personal estate as belonged to his wife or children; and (b) even dispositions by him in his lifetime have been holden void, especially when they appeared to have been made in fraud of the custom, and with a view to defeat it.

Lev. 227; 2 Vern. 277; Chan. Ca. 199. (a) It is said that this custom of the city of London, that a man could not give away any part of his estate without the consent of his children, is the remains of the old common law, and is so taken notice of in Bracton; but it being found extremely inconvenient and hard, it was by the tacit consent of the whole nation abrogated and grown into disuse; for what law has ever been made to repeal it? but in the city of London, where the mayor and aldermen had the care of orphans, they, by that sole authority and power, had preserved this part of the common law in London, which is disused everywhere else. Pr. Ch. 596. (b) But for this vide 2 Lev. 130; 2 Vern. 98, 202, 612, 685; Lev. 227; Pr. Ch. 17, 50; Abr. Eq. 152.

But now by the 11 G. 1, c. 18, § 17, it is enacted, "That it shall and may be lawful to and for all and every person and persons, who shall, at any time from and after the first day of June, 1725, be made or become free of London, and also to and for all and every person and persons who are already free of the said city, and on the said first day of June, 1725, shall be unmarried, and not have issue by any former marriage, (c) to give, devise, will, and dispose of his and their personal estate and estates, to such person and persons, and to such use and uses as he or they shall think fit."

(c) [If there were issue of the first marriage living at the time of the second, the death of such issue afterwards will not prevent the custom from attaching, and bar the widow from claiming under it. *Dansen v. Hawes*, Ambl. 276.]

*Provided nevertheless*, "That in case any person, who shall, at any time or times from and after the said first day of June, 1725, become free of the said city, and any person or persons who are already free of the said city, and on the said first day of June, 1725, shall be unmarried, and not have issue by any former marriage, hath agreed or shall agree by any writing under his hand, upon or in consideration of his marriage, or otherwise, that his personal estate shall be subject to, or be distributed, or distributable, according to the custom of the city of London; or in case any person so free, or becoming free as aforesaid, shall die intestate; in every such case the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and be distributed and distributable, according to the custom of the said city; any thing herein contained to the contrary in any wise notwithstanding."

[A, being about to marry an orphan of the city of London, agreed with the court of aldermen, in consideration of the marriage, and of their giving their consent thereto, to take up his freedom within a certain time, which time he survived, but died without performing his agreement. It was decreed, that he was in equity to be taken as a freeman, and therefore his personal estate was to be distributed according to the custom, notwithstanding he had by will made a different disposition of it. It was said by the chancellor, that the agreement being entered among the orders and proceedings of the court of aldermen, and that court being a court of record, it became matter of record.

*Frederick v. Frederick*, 1 P. Wms. 710; 4 Br. P. C. 7, S. C.

(C) Custom of London in respect to a Freeman's Estate.

If a freeman disposes of his property in such manner as not to take place till after his death, it is a fraud upon the custom, and the property shall be subject to it.

Smith v. Fellows, 2 Atk. 62, 377.

So, if, several years before his death, he purchases a leasehold estate for forty years, in the joint names of himself and wife, it is a fraud upon the custom, and the estate shall be applied as the rest of his property.

Coomes v. Elling, 3 Atk. 676.

A freeman of very advanced age, ill of the gout, two days before his death, by deed of the same date with his will, assigned part of his personal estate in trust for the separate use of his daughter, and directed that she should not have power to give it to her husband. She had married without consent, but the father had been reconciled to her and her husband. The deed was not delivered to the daughter. Lord Hardwicke held it to be a testamentary disposition in fraud of the custom, and that it was competent to the husband to dispute it; but he would not allow him to take the wife's customary part, without making a settlement upon her.

Tomkins v. Ladbroke, 2 Ves. 591.]

|| A freeman, while he was languishing on his death-bed, assigned by deed executed his personal estate in trust for himself for life, and then for the benefit of his grandchildren. The deed was set aside as to a moiety, because he had not entirely dismissed himself of the estate in his lifetime; and because being made so recently before his death, it was merely a *donatio mortis causa*, and in its nature a testamentary act, though in form a deed.

Turner v. Jennings, 2 Vern. 612.

A voluntary judgment given by a freeman, payable three months after his decease, shall not prevail as to the widow's customary part; but after payment of debts, it will bind the legatory part.

Fairebeard v. Bowers, 2 Vern. 202; Pr. Ch. 17, S. C. ||

2. Of the Children's Part; and herein of Survivorship, Advancement, and bringing into Hotchpot.

It has been already observed, that the children of a freeman of London are entitled to the third part of his personal estate, in case he dies leaving a wife, and to a moiety in case he dies leaving no wife: but (a) this custom does not extend to grandchildren; and, therefore, if a freeman of London has two sons, and the eldest dies, leaving a son; the grandchild, though in law a representative of the son, shall have no part by the custom.

(a) 2 Salk. 426; Vern. 397, S. P.

But a posthumous child shall come in with the rest of the children for a customary share of a freeman of London's personal estate.

Abr. Eq. 154.

If a city orphan dies before twenty-one, his orphanage part survives to the other orphans, and he can make (b) no disposition (c) by will to contradict it; but, if he dies after twenty-one, at which time he might by will have disposed of it, there, though he die intestate, it shall go according to the statute of distributions, between his mother and surviving brothers and sisters.

(b) 2 Salk. 426; Pr. Ch. 207. So certified by the recorder. Pr. Ch. 537, S. P.—2 Vern. 559, S. P. See 3 Will. Rep. 318, in a note S. C. cited. Although he devises it away at the age of seventeen. (c) But, if a man marries an orphan, who dies under

## (C) Custom of London in respect to a Freeman's Estate.

twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband. Vern. 88. But vide Pr. Ch. 537, *cont.*—[If a man marries an orphan, and dies; his representatives are not entitled to any part of what was his wife's customary share, but the whole belongs to the wife. Vin. Abr. tit. *Customs of London*, (B. 10) 18.]

But, if a freeman of London dies, leaving two daughters and a wife, and one of the daughters dies before twenty-one, though after a division and partition of the personal estate, yet the surviving sister shall have the whole of the orphanage part.

Abr. Eq. 156, pl. 8; Loeffles and Lewen, Gilb. Eq. Rep. 32; Pr. Ch. 370, 372.

But this custom of survivorship holds only with respect to the orphanage part belonging to such child; and therefore if he by survivorship hath the part of any other brother or sister, such part shall go according to the statute of distributions.

Pr. Ch. 537.

If the daughter of a citizen of London marries in his lifetime, against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate; and it would be unreasonable to take the custom to be otherwise.

Foden v. Howlett, Vern. 354. Said by Lord Chancellor. Yet in *Hill v. Blacket*, Cases temp. Finch. 248, it is said, the recorder certified that there was no such custom. || But in *Harvey v. Aston*, 1 Atk. 361, and Com. Rep. 749, the custom is referred to by Lord Hardwicke and Mr. Justice Comyns. ||

By the laws and customs of the city of London, if any freeman's child, male or female, be married in the lifetime of his or her father, by his consent, and not fully advanced to his or her full part or portion of his or her father's personal or customary estate, as he shall be worth at the time of his decease, then every such freeman's child, so married as aforesaid, shall be excluded and debarred from having any further part or portion of his or their said father's personal or customary estate, to be had at the time of his decease, except such father, by his last will and testament, or some (a) other writing by him written, and signed with his name or mark, shall declare and express the value of such advancement; (b) and then every such child, after the decease of his or her said father, producing such will or other writing, and bringing such portion so had of his or her father, or the value thereof, into hotchpot, shall have as much as will make up the same as a full child's part or portion of the customary estate his or her said father had at the time of his decease, notwithstanding such father shall, by any writing under his hand and seal, declare that such child was by him fully advanced. (c)

Abr. Eq. 154, 155. Certified accordingly in the case of Chace and Box, 1 Ld. Raym. 484, S. C.; Vern. 61, 89, 216; 2 Salk. 426, S. P.; Pr. Ch. 269. (a) [It is said to be sufficient, if the father declare the same by any writing under his hand, although it be in an almanac, or elsewhere. Green's Privil. of Lond. 53. In *Dean v. Delevar*, cited in 1 P. Wms. 642, it is said to be sufficient; though written by the father's book-keeper or servant. But the reporter adds a *quære*.] (b) The ground of requiring the value of the advancement to appear in this manner, is, partly by reason of the difficulty of taking an account after such a length of time, but principally because it cannot be known what is to be brought into hotchpot; and if it does not appear what the sum was, the other children may be wronged. Per Lord Hardwicke, 1 Ves. 16.] (c) Where the husband and his wife, who was a city orphan, in consideration of 100*l.*, executed a release of their customary share to the father, it was holden that they were barred from demanding any further share, and that this release was no writing, under the father's hand, signifying the advancement. Pr. Ch. 594.—[So, where the daughter only, being of full age, had, upon her marriage, for a valuable consideration, released her customary share. *Lockyer v. Savage*, 2 Str. 947.—So, if the wife be under age, and the hus-



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band and she, in consideration of a marriage portion, covenant to release her orphanage share, the husband's covenant is considered in equity, on a bill against the husband and wife for a specific performance of the articles, as an absolute release, and will extinguish the wife's right. By an old law in the city, called Judd's law, a husband is authorized to agree with the wife's father, though she be under age. *Medcalfe v. Medcalfe*, 2 Atk. 63. But the release extorted by a father from his son, merely for the sake of maintenance, and not for his advancement in marriage or trade, is absolutely void, as a fraud upon the custom. *Heron v. Heron*, 2 Atk. 160. So, if a father who has children, some of age, some under age, take a release from those who are of age, the release is void; for if the infants do not consent when they come of age, they may engross the whole orphanage part in exclusion of the rest. *Morris v. Burroughs*, 1 Atk. 399. Where a daughter accepts a legacy of 10,000*l.* left by her father, who recommended it to her to release her right to her orphanage part, which she does accordingly; if the orphanage part be much more than her legacy, though she was told she might elect which she pleased, yet if she did not know she had a right, first to inquire into the value of the personal estate, and the *quantum* of the orphanage part before she made her election, this is so material that it may avoid her release. *Pusey v. Desbouvrie*, 3 P. Wms. 316.]

A freeman of London having advanced his daughter with a portion, and intending to exclude her from any farther share, (on some displeasure taken against her,) made his will, and thereby reciting that he had advanced her with 300*l.* and (a) upwards, gave her 5*s.* and no more, and died: yet after his death, the daughter, on a bill brought to have the said 300*l.* made up a moiety of his estate, (he having no other child, and the custom not extending to grandchildren,) had a decree accordingly; for the words, *and upwards*, are *certum in incerto*, and not to be regarded, though it was objected it might be 1000*l.* or 2000*l.*, or any other sum above 300*l.*

*Abbr. Ep.* 155, Bright and Smith, decreed. [Where a child, though an only child, is advanced, and the *quantum* of the advancement does not appear, he shall be deemed *fully* advanced. *Cleaver v. Spurling*, 2 P. Wms. 527; *Fawkner v. Watts*, 1 Atk. 406; *Elliot v. Collier*, 3 Atk. 526; 1 Ves. 15, S. C.; 1 Wils. 168, S. C. And advancement in marriage with a first husband who died in the father's lifetime, is a bar to a second husband. 1 Atk. 406.] (a) Where the father by his will declared that he had given 1000*l.* to one of his children, 1000*l.* to another, &c., in full of their orphanage part by the custom, such declaration is sufficient to let them into their full customary shares, on bringing these sums into hotchpot; but it seems that the parties concerned are not so far concluded by this declaration, but may give in evidence that more was received by the children than thus expressed. *Pr. Ch.* 470, 471.—[Parol evidence of the father's declarations with respect to the advancement, can in no case be received: but declarations of the husband, or of the wife during the coverture of the first husband, are admissible. 1 Atk. 407.]

A (b) settlement of a (c) real estate on a child, is no advancement, nor to be brought into hotchpot.

*Chan. Ca.* 160. (b) A devise of the real estate to a child, does not bar such child of the customary share. 2 Vern. 753. [But, where a freeman by will charged 1500*l.* on his real estate for his daughter; and gave her a share of his personal estate; the court would not allow her to take the sum charged on the real estate, and also claim an orphanage, but put her to abide entirely by the will, or by the custom. *Cowper v. Scot*, 3 P. Wms. 119.]—(c) Or money agreed to be laid out in the purchase of lands. *Vern.* 345; 2 *Chan. Ca.* 118; *Abbr. Eq.* 153.

If upon a marriage treaty A, a freeman of London, covenants to leave his wife 2000*l.* at his death, 2000*l.* to his eldest son, and 1000*l.* apiece to his younger children, and dies, leaving several younger children; the 1000*l.* apiece to the younger children being due only by covenant, is a debt on the personal estate, and not being to be paid till after the father's death, is no provision or advancement within the custom of London, to bar them of their customary or distributory shares.

*Abbr. Eq.* 250, *Feast and Feast*.

## (C) Custom of London in respect to a Freeman's Estate.

[If a freeman by will gives 200*l.* to his son, and in his life pays him 200*l.*, and takes a receipt in full for what was intended him by the will; this shall be considered as an advancement, and brought into hotchpot.

*Car v. Car*, 2 Atk. 277.

Where a father, upon the marriage of his son, settled 5000*l.* S. S. annuities upon himself for life, remainder to his wife for life, remainder to his son for life, remainder to his son's wife for life, remainder to the issue of the marriage; it was holden, that the son, to entitle himself to a share of the father's personal estate, must bring the whole 5000*l.* and not the value of his estate in it for life only, into hotchpot

*Weyland v. Weyland*, 2 Atk. 632.

If a man makes an executor in trust, and devises his personal estate among his seven children, and four of them are advanced by him in his lifetime, and one of them dies before the testator; the children advanced shall have their share of this seventh part, without bringing what they have received into hotchpot.

*Cowper v. Scot*, 3 P. Wms. 119.]

If a freeman of London advances a child in part, by a portion which is to be brought into hotchpot, such portion or advancement must be brought into the orphanage part only.

*Vern.* 345; 2 *Vern.* 381; 2 *Salk.* 426, S. P.

And therefore if there be but one child, who has been in part advanced by the father in his lifetime, such child shall not bring his part into hotchpot, there being none in equal degree with him.

2 *Vern.* 234, 630, and 2 *Vern.* 754, S. P. For if it were to be brought in, it must fall again into the child's part. [2 P. Wms. 526; *Ambl.* 189, S. P. See *City v. City*, 2 *Lev.* 130, *semb. contr.* But see also Lord Hardwicke's remark on that case in 2 *Ves.* 595.]

[Sums of money, however small, if given as advancement, must be brought into hotchpot; but trivial sums given as presents shall not.

*Morris v. Borrowghs*, 1 Atk. 399.

So, small sums given occasionally, or maintenance money or allowance, at the university or for travelling, shall not be deemed part of a child's advancement, nor shall money given with him as apprentice.

*Hender v. Rose*, 3 P. Wms. 317.

A gold watch, or wedding-clothes, are no advancement, nor a gift of 50*l.* in money, where the orphanage share is considerable. Neither is consent to a daughter's marriage any bar to her, where the *quantum* does not appear under the father's hand.

*Elliott v. Collier*, 3 Atk. 526; 1 *Ves.* 15.

Where a freeman had two daughters, A and B, and on A's marriage gave 2000*l.* and a bond for 2000*l.* more at his death, and afterwards gave her 428*l.* to buy a house, which was done; and B married without his consent, but he was afterwards reconciled to her, often stayed weeks with her, and gave her presents from time to time to about 500*l.* but no advancement; it was decreed, that A's 2000*l.* and 2000*l.* should be brought into hotchpot, but not her 428*l.* nor B's 500*l.*

*Hume v. Edwards*, 3 Atk. 450.

If a father buy an office, though but at will, or a commission, it is an advancement.

*Norton v. Norton*, 3 P. Wms. 317, note O.

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So, if, some years after the marriage of a freeman's son, the parents on both sides meet, and agree to advance 200*l.* apiece to lie by till they can purchase a commission in the army for him, this is an advancement, and bars him of his orphanage share.

*Hearne v. Barber*, 3 Atk. 213. In this case it was said, that Judd's law, which was an act of common council in the time of Henry the 6th, does not make it a bar unless it was an advancement upon marriage.]

3. *Of the Wife's Part, and what shall bar her thereof.*

The widow of a freeman of London, by the custom, is entitled to her widow's chamber, and to a moiety of his personal estate if he leaves no child, and to a third part in case he leaves any child or children.

Hedl. 158; Vern. 132; Abr. Eq. 156.

But, if a woman, upon her marriage, accepts a settlement out of the (a) freeman's personal estate, (b) such compounding, as it is called, shall (c) bar her customary share.

Pr. Ch. 325, 326, &c.; Abr. Eq. 157. (a) Although the composition or sum to be paid her was part of her own fortune. Pr. Ch. 327. (b) Though no notice was taken of the custom. Abr. Eq. 159. (c) Where she shall take by the custom, and likewise by her husband's will. 2 Vern. 110. But vide Pr. Ch. 353.

But though such composition shall bar the wife of her customary share, yet she is not thereby precluded from demanding the benefit of any gift or devise the husband may think fit to make her.

Abr. Eq. 159.

Also, if a freeman, whose wife has been thus compounded with, dies intestate, his widow shall have such part of the legatory, or dead man's share, as she is entitled to under the statute of distributions, especially if there were no express words in the agreement to exclude her.

Pr. Ch. 327. ¶ Vide *infra*, *Lewin v. Lewin*, and vide *Pickering v. Lord Stamford*, 3 Ves. 336, *contr.*]

If a freeman of London makes a jointure on his intended wife, and the same is expressed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this shall not bar her of her customary share of his personal estate.

Abr. Eq. 158, decreed in Chancery between Atkins and Waterson.

[But, if a freeman, before marriage, settles some part of his personal estate upon his intended wife, to take effect after his death, this will bar her of her customary part, though no mention be made of the custom.

*Lewin v. Lewin*, 3 P. Wms. 15.

If a wife be divorced *a mensâ et thoro* for adultery, she forfeits her right to her moiety and widow's chamber under the custom.

*Pettifer v. James*, Bunb. 16.]

4. *Of the Legatory, or dead Man's Share.*

The legatory or dead man's share is the third part of a freeman's personal estate, in case he has a wife and (d) children, which the freeman might always have disposed of by will, and which for want of such disposition is under the direction of the statute of distributions, and not at all under the control of the custom of London.

2 Salk. 426; Vern. 6; 2 Vern. 559; Skin. 41, pl. 11; Pr. Ch. 499. (d) But, where there are no children, the custom of London gives no directions, therefore the personal estate must be wholly governed by the statute of distributions. But the custom of the

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province of York extends to give such moiety to the next of kin to the intestate. Pr. Ch. 327, 338. But note, that the custom of the city of London in the distribution of an intestate's estate, shall prevail against the custom of York. 2 Vern. 48.—As if a freeman of London dies in York, his heir shall come in for a share of the personal estate, though by the custom of York he is debarred thereof, for the custom of London, which follows the person, shall be preferred to that of York, which is only local. 2 Vern. 82.

If a freeman of London makes his will, and devises legacies to his children more than their orphanage part would amount unto, without taking any notice whatsoever of the custom; these legacies shall be a satisfaction of their orphanage shares, to which they were entitled by the custom in the nature of a debt, and the legacies shall not come (a) out of the testamentary or dead man's part, for it would be unreasonable that they should take both by the will and the custom.

Abr. Eq. 160, and vide 2 Vern. 111, 754, S. P. (a) Where it was holden that 100*l.* devised for mourning should come out of the testamentary, and not out of the whole personal estate. 2 Vern. 420.

But if such legacies are less than their orphanage shares, they shall not *pro tanto* be a satisfaction, but in such case the legatees shall take both, especially, if none of the devises in the will are thereby disappointed.

Abr. Eq. 160, *per* Lord Chancellour; but in this case he sent it to the recorder to certify the custom.

[So, if he devise no more than his testamentary part, the children shall have both their legacies and their customary shares; but, if he devise his whole estate, they must make their election.

Wilson v. Phillips, Bunb. 195.

If a freeman devise all his estate, orphanage and testamentary, and some of the children abide by the custom, others by the will, the shares of the latter shall not go among the others, but shall accrue to the testator's estate, and go according to the will.

Morris v. Burrows, 2 Atk. 627.

Although neither the father, nor the orphan, can devise either the orphanage part or contingency of the benefit of survivorship, or the part which accrued by survivorship; yet, if the father make a disposition by his will inconsistent with the custom, the children must make their election to abide by the will or the custom; for they cannot abide by the will in part, and have the benefit of the custom also.

Harvey v. Desbouverie, Ca. temp. Talb. 130; see also Hanbury v. Lord Bateman, 2 Atk. 63.]

If a loss happens to a freeman of London's estate by the insolvency of his executors, such loss shall be borne out of the testamentary part of his estate only, and not out of the whole personal estate, for the wife and children of a freeman are in the nature of creditors, and shall have two parts in three of the personal estate he died possessed of, although his legatees are thereby defeated of their legacies.

Pr. Ch. 409, decreed between Reed and Duck, although it was certified that there was no custom in London which directed how such loss should be borne. [2 Ld. Raym. 1328, S. C., by the name of Redshaw v. Brasier.] Vin. Abr. tit. *Customs of London*, (B. 9.) pl. 4, S. C. [But the funeral expenses of a child dying after his father, shall be paid out of the orphanage share. 3 Atk. 676. And if a father maintains his daughter after her husband's death, his executor shall be considered as a creditor for so much as the maintenance amounted to, which shall be deducted out of the daughter's customary share. 3 Atk. 526; 1 Ves. 15.]

[Where the wife's right to the orphanage part is extinguished by the

(E) Of the Custom of London with respect to Masters and Apprentices.

release of the husband, the estate is left as if it had never been charged with it, and it is considered as part of the testator's general personal estate, and does not go wholly to the executor of the father, as part of the dead man's share.

1 Atk. 64.¶

¶ The effect of advancement is not to increase the legatory part, but only to remove one child out of the way, and increase the shares of the others.

Folkes v. Western, 9 Ves. 460.¶

(D) Of the Custom of London as it relates to Feme Coverts.

By the custom of London, if a feme covert, the wife of a freeman, (a) trades by herself in a trade, with which her husband does not (b) intermeddle, she may (c) sue and be sued as a feme sole, and the husband shall be named only for conformity; and if judgment be given against them, she only shall be taken in execution.

Cro. Car. 69; Hetl. 9; Lit. Rep. 31, S. C.; Leon. 131; 2 Brownl. 218, S. P. (a) Need not be in a shop. Show. Rep. 184. (b) But if the wife uses the same trade that her husband does, she is not within the custom. Mod. 26. (c) But it must be in the courts of the city. Moor, 135, 136; Cro. Eliz. 409; [Cawdell v. Shaw, 4 T. Rep. 361; Beard v. Webb, 2 Bos. & Pull. 93.]

If the wife of a freeman, who is a sole trader, contracts a debt and dies, and afterwards the husband promises to pay it, yet such promise is not sufficient to maintain an *assumpsit* against the husband, for as he was originally liable, the subsequent promise was without any consideration.

Show. Rep. 183, Fabian v. Plant.

A recovery suffered by baron and feme of the lands of the feme shall as effectually bind the right of the feme by the custom of London, as a fine at common law.

Roll. Abr. 556.

(E) Of the Custom of London with respect to Masters and Apprentices.

An infant unmarried, and above the age of fourteen, may (d) bind himself apprentice to a freeman of London by indenture with proper covenants, which covenants, by the custom of London, shall be as (e) binding as if he were of full age.

Moor, 135, pl. 28; 2 Bulst. 192; 2 Roll. Rep. 305; Palm. 361; Mod. Rep. 271, pl. 22; 2 Keb. Rep. 687, pl. 14; 2 Vern. 492, pl. 445. (d) Custom of London to put over an apprentice to another, is good. March, 3. (e) And for a breach an action may be brought in any other court as well as in the courts in the city. Moor, 136.

If the indentures be not enrolled before the chamberlain within the year, upon a petition to the mayor and aldermen, &c., a *scire facias* shall issue to the master to show cause why not enrolled; and if it was through the master's default, the apprentice may sue out his indentures; otherwise, if through the fault of the apprentice—as, if he would not come to present himself before the chamberlain, &c., for it cannot be enrolled unless the infant is in court and acknowledges it.

2 Roll. Rep. 305; Palm. 361, and vide Mod. 271; Boh. Priv. Lond. 175, 338.

This custom does not extend to one bound apprentice to a waterman under twenty-one, for the company of watermen are but a voluntary society, and being free of that does not make one free of London.

6 Mod. 69; 12 Mod. 415.

(F) As it relates to Landlords and Tenants.

By the custom of London, a tenant at will under the yearly rent of 40s. shall not be turned out without a quarter's warning; and such tenant paying above 40s. yearly rent, shall not be turned out without half a year's warning.  
2 Sid. 20.

But a custom that tenant for years shall hold for half a year after his term ended, is not good.

Palm. 212.

A custom which binds the tenants and resiants in a manor to grind at the lord's mill all *their* corn and grain which they use ground in their dwellings, does not prevent them from buying and using in their dwellings flour produced from corn ground at other mills.

Richardson v. Walker, 2 Barn. & C. 827.

Where the lord of a manor had two mills, and the tenants and resiants were by custom bound to grind all their malt used in their dwellings at the said mills, but might take it to either at their own option; held, that the lord having pulled down one of the mills, had thereby suspended the custom.

Richardson v. Capes, 2 Barn. & C. 841.

(G) Of the customs of London, which are in furtherance of Justice, and for the more speedy Recovery of Debts.

By the custom of London a creditor may, before the day of payment, arrest his debtor, and oblige him to find sureties to pay the money on the day it shall become due.

Hob. 86; Vent. 29; 5 Mod. 93, and vide Roll. Abr. 555.

If a contract be entered into by two citizens, and one of them, who is thereby obliged to pay a sum of money, die intestate, his administrator shall be obliged to pay it in the same manner as if it were a debt by obligation.

Cro. Eliz. 409; Noy, 53; Roll. Abr. 557.

If A and B are bound as sureties for and with C to D, and D recovers against A in London, and has execution against him, A may there sue B for contribution *ut uterque eorum oneretur pro rata* according to the custom of London; and therefore where such action was removed in B. R. by writ of privilege, the same was remanded, because otherwise the plaintiff would be without remedy, for by the course of the common law no action lies.

Leon. 166; Moor, 136, S. P.

|| There is in London a customary action of debt upon simple contract on a *concessit solvere*; the form of declaring in which is, that the defendant, in consideration of divers sums of money, &c., before that time due and owing from the defendant to the plaintiff, and then in arrear and unpaid, *granted and agreed to pay (concessit solvere)* to the plaintiff, the said l. when and where the same should afterwards be demanded; yet, &c. And this general form of declaring has been holden good upon a writ of error. (a)

Williams's Note (2), Turbill's case, 1 Saund. 68; Pascall v. Sparing, Sty. 198. In Bro. London, 15, it is said, that it was agreed for law, that in debt in London upon a *concessit solvere* by the custom, the declaration shall be, that *for merchandises to him before sold* he granted to pay 10l., so that the merchandise must be mentioned. (a) 1 Ro. Abr. tit. Customs, (1), pl. 21; Story v. Atkins, 2 Ld. Raym. 1432.

By the custom, the defendant cannot wage his law in this action; and

## (H) Of the Custom of Foreign Attachment.

therefore it lies in these courts against an executor or administrator upon a contract made with the deceased.(a)

Gunn v. Mackhenry, 1 Wils. 277. (a) The City of London's case, 8 Co. 126 a; Snelling's case, 5 Co. 82 b; Cro. Eliz. 409, S. C.]]

## (H) Of the Custom of Foreign Attachment: And herein,

### 1. Of the Nature of the Debt or Duty which may be attached.

By the (b) custom of London, if A is indebted to B, and C is indebted to A, B upon entering a plaint against A, may attach the debt due from C (who is called the garnishee) to A, and this (c) custom of foreign attachment is to no other purpose but to compel an appearance of the defendant in the action; for if he appear within (d) a year and a day, and put in bail to the action, the garnishee is discharged.(e)

(b) Roll. Abr. 551. (c) Carth. 25. (d) For the year and day *disrationare debitum*, vide Cro. Eliz. 713; Roll. Abr. 551. (e) If he appear and put in bail, (for the appearance alone will not be accepted without bail,) the attachment is at an end, though it be after judgment and execution against the garnishee, if satisfaction be not entered upon the record. Anderson v. Clerke, Carth. 26. So it is, if the defendant surrender himself at any time before satisfaction acknowledged. Com. Dig. tit. *Attachment*, (E).]]

The garnishee may plead this custom of foreign attachment to an action brought against him by his creditor, but then the plaintiff may traverse the cause thereof (g) and that he was not indebted to him who attached it.

Pain's case, Roll. Abr. 551; Cro. Eliz. 598, S. C., by the name of Paramour v. Pain. Moor, 703, S. C., but S. P. does not appear. 1 Ro. Rep. 106, S. C., cited by Coke, C. J.; for S. P. Coke v. Brainforth, Cro. Eliz. 830. (g) Qu. of this point; for in both these cases of Paramour v. Pain, and Coke v. Brainforth, the attachment was by the defendant of his own debt in his own hands; and the existence of the debt was alleged in the plea. There is no issue on the plaintiff's debt in the mayor's court, when the defendant does not come in and defend; and the only way in which that can come in issue between them is, by the garnishee appearing and putting in bail for the defendant; which he is not bound to do, as he must thereby make himself responsible to the bail to pay the debt at all events in case it should be found for the plaintiff; for the bail are answerable for the debt, and not merely for the defendant's appearance. Where therefore a regular return of *non est inventus et nihil* appeared on the face of the proceedings in the mayor's court, which showed that the party was not there forthcoming, and had nothing whereby he could be attached to answer; it was adjudged, that the garnishee might protect himself under those proceedings upon *non assumpsit* in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below, who attached the money in his hands; though bail not having been put in, the plaintiff had not been obliged to prove that debt to entitle himself to recover against the garnishee. M'Daniel v. Hughes, 3 East, 367.]]

Such goods cannot be attached, of which the party had no property at the time of the attachment.

17 E. 4, 7 b; Roll. Abr. 551, S. C. β Only those goods and chattels which are liable to an execution can be attached. Pierce v. Jackson, 6 Mass. 244; Badlam v. Tucker, 1 Pick. 399. See Haven v. Low, 2 N. H. Rep. 13; Holbrook v. Baker, 5 Greenl. 309. Goods which cannot be rendered in the same plight are not liable to attachment. Bond v. Ward, 7 Mass. 129; Leavitt v. Holbrook, 5 Vern. 407. Private papers are not liable to attachment. Oystead v. Shed, 12 Mass. 510; nor money collected on an execution while in the hands of the officer. Conant v. Bicknell, 1 Chap. 50; Dubois v. Dubois, 6 Cowen, 494; nor a negotiable promissory note. Maine F. & M. Ins. Co. v. Weeks, 7 Mass. 439. But bank bills belonging to the defendant are liable to attachment. Spenser v. Blaisdell, 4 N. H. Rep. 198; Knowlton v. Bartlett, 1 Pick. 271. The rights of a consignee or factor, who has a lien on goods, is not subject to an attachment. Kittredge v. Sumner, 11 Pick. 50. Nor can goods held by a collector to enforce payment or security for duties be attached by the importer's private creditors. Dennie v. Harris, 9 Pick. 364; S. C. 3 Pet. 292. See 5 Pick. 120. See also, as to what goods can or cannot be attached, the following cases. Todd v. Buck-

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nam, 2 Fairf. 41; Portland Bank v. Hall, 13 Mass. 207; Blanchard v. Coburn, 16 Mass. 345; Eaton v. Whiting, 3 Pick. 484; Glidden v. Smith, 15 Mass. 170; Cushing v. Hurd, 4 Pick. 253; Atkins v. Sawyer, 1 Pick. 356; Ludd v. Hill, 4 Verm. 164; Phillips v. Bridge, 11 Mass. 249; Melville v. Brown, 15 Mass. 82; Fry v. Canfield, 4 Verm. 9; Spooner v. Fletcher, 3 Verm. 133.g

So, if A be indebted to B, and J S, a stranger, take by tort certain goods of A as a trespasser, B cannot by the custom attach these goods in the hands of J S for the debt of A, because the property is out of A at the time, and he had only a right in him.

A legacy cannot be attached in the hands of an executor by foreign attachment; because it is uncertain whether, after debts paid, the executor may have assets to discharge it.

Roll. Abr. 551; Noy, 115, S. P.

If A be indebted to B by obligation, and B be indebted by contract to H, and B die, and his administrators demand the debt upon the obligation of A, who promises him that, if he will forbear him for a month, he will pay him then, but he does not pay him accordingly, and after H bring debt in London against the administrator upon the contract, (as he may there by the custom,) the debt of A due by the obligation may be attached in the hands of the administrator; for, notwithstanding the promise broken, the debt continued due by the obligation, and a recovery upon the obligation will be a bar of the action upon the promise, in which all should be recovered in damages.

Roll. Abr. 551; Spink and Tenant, Roll. Rep. 106, S. C. Vide Fisher v. Lane, 3 Wils. 297; 2 Bl. Rep. 834, S. C.

If A lends B 100*l.* to be repaid him upon the death of his father, and after the death of the father of B this 100*l.* is attached by force of a foreign attachment, and after A brings an action upon the case against B for this money, this foreign attachment will be a good bar thereof, though the custom be to attach debts, and this is an action upon the case, in which damages only are to be given, because this is a debt, and he might have an action of debt thereupon; and therefore, inasmuch as this is well attached, he shall not defeat it by bringing an action upon the case.

Roll. Abr. 552; Hals and Walker, adjudged upon a foreign attachment in Exeter, where the custom is the same as in London.

If A sells certain stockings to B upon a contract, for which B is to give 10*l.* to A, and if he sells the stockings again before August, after that he shall give twopence more for every pair of the stockings, the 10*l.* is attachable by foreign attachment, because an action of debt lies for it, but the twopence for every pair of stockings is not attachable, because this rests only in damages, to be recovered by an action upon the case, and not by action of debt, because it is made payable upon a possibility.

Roll. Abr. 552, Read and Hawkins. *β* See Chandler v. Thurston, 10 Pick. 205.g

If there are several accounts, &c., between A and B, and A dies, and his executor and B submit to the award of J S, and he awards that the executor shall deliver certain goods, of which A died possessed, to B, and that B shall pay the executor 300*l.*, this money cannot be attached in the hands of B for the debt of A; for upon the matter the executor being liable to a *devastavit*, ought to have remedy in his own right for the sum awarded.

Vent. 112, Horsam and Targe; Lev. 306, S. C.

If A is indebted to B, who is indebted to C, and B assigns the debt of A to C, in satisfaction of his debt; now, the debt due from A is become the



## (H) Of the Custom of Foreign Attachment.

right and property of C, and B hath nothing but in trust for C, and therefore it ought not to be attached for any debt of B, and upon the special matter shown the lord mayor ought to give relief.

*Lewis v. Wallis*, Sir T. Jones, 222.  $\beta$  Property assigned for the payment of debts may be attached by a dissenting creditor, if it be not wanted for the creditors who have become parties to the assignment. *Todd v. Bucknam*, 2 Fairf. 41. In general the plaintiff in a foreign attachment stands on no better footing than his debtor, as respects the property attached. *United States v. Vaughan*, 3 Binn. 394; and, therefore, when a chose in action has been equitably assigned, it is not subject to the operation of such an attachment, as the property of the assignor. 3 Binn. 394, 400; *Corser v. Craig*, 1 Wash. C. C. R. 424. See *Sharpless v. Welsh*, 4 Dall. 279; *Moore v. Spackman*, 12 S. & R. 291. The property of an English bankrupt found in Pennsylvania may be attached, although an assignment may have been made by the commissioners of bankruptcy in England. *Milne v. Moreton*, 6 Binn. 353. $\gamma$

In an action of debt for tobacco, in the detinet, a debt cannot be attached within the custom, in satisfaction thereof, because it does not (a) appear of what value this tobacco was, so that it might appear that the debt is but a satisfaction to the value, which cannot be supplied by a plea in bar made in another action against him, in whose hands the debt was attached.

Roll. Abr. 553. (a) But, if the value of the tobacco had been averred in the record of the attachment, the debt might have been well attached in this action. Roll. Abr. 554, and vide *Jon.* 406.

A debt due by specialty may be attached by the custom of London, because the attachment may be pleaded if an action be brought for it in the courts at Westminster, but a debt (b) recovered in any court in Westminster by (c) a judgment cannot be attached by the custom of London, because the party has then no time to plead it.

Roll. Abr. 552; 4 Leon. 240; *Cro. Eliz.* 63; *Leon.* 29, 264. (b) After issue joined in an action of debt in B. R., the debt for which the action was brought cannot be attached in London, for the inferior court cannot attach a debt in a superior court. Roll. Abr. 552.—So, after imparlance to an action of debt in B. R. Roll. Abr. 552; *Cro. Eliz.* 157; 3 Leon. 232.—So, if a writ returnable in B. R. be purchased before the attachment. *Cro. Eliz.* 101, 593, 691; 3 Leon. 210; Roll. Abr. 552. [So, a sum of money directed to be paid by A to B, by the master's *allocatur*, cannot be attached in A.'s hands. *Coppell v. Smith*, 4 T. Rep. 312. So, a sum of money awarded under a rule of court cannot be attached. *Grant v. Hawding*, E. 7 G. 3, B. R. *ibid.*] (c) So, if levied upon a *feri facias*, and in the sheriff's hands. 1 Leon. 30, 264.  $\beta$  Money collected by an officer cannot be attached in his hands as the property of the judgment creditor. *Conant v. Bicknell*, 1 Chipm. 50; *Dubois v. Dubois*, 6 Cowen, 494. $\gamma$ —So, if a suit be begun in equity, the effect thereof shall not be prevented by a foreign attachment. 2 Chan. Ca. 233.

If A is indebted to B, and C is indebted to A, and B brings debt in B. R. against A, pending this action, B may affirm a plaint in London against A for the same debt, &c., and attach the debt in the hands of C; for though a debt in London, for which there is a suit depending in B. R. cannot be attached, yet he that hath brought an action in B. R. may, notwithstanding, according to custom, attach the debt of the party, for the debt in question in B. R. is not attached by this attachment.

*Cro. Eliz.* 593. *Lewknor and Huntly*, 712, 713, S. C., resolved also upon a writ of error, though the judgment was reversed for another reason.

A is indebted to B, and C is indebted to A, by simple contract; A dies intestate, and B enters a caveat against his widow's taking out administration; pending which he enters a plaint in the sheriff's court of London against the archbishop of Canterbury, and thereupon attaches the debt due from C, after which the widow has administration granted to her, who brings an action against C, who insisted on the matter *supra*. It was

## (H) Of the Custom of Foreign Attachment.

holden, that this pretended custom, in this case, was unreasonable and void, because the archbishop had no right to the debt, nor any means to recover it. Besides, hereby every creditor would be his own carver, and the goods of the intestate wasted without any remedy.

Carth. 344, Masters and Lewis; 1 Ld. Raym. 56, S. C.; Skin. 516, S. C.; 5 Mod. 75, 92, S. C.; Comb. 347, S. C.

2. *In whose Hands, and at what Time, the Attachment may be made.*

If A recovers a debt against B, in London, B may attach this debt in his (a) own hands for so much due to him.

Roll. Abr. 554; Cro. Eliz. 186. (a) Whether a debt owing to a company is attachable for the debt of the company. Mod. 212, *dubitatur*.

By this custom a debt contracted without the jurisdiction of the city may be attached, if the debtor is found within the jurisdiction, for every debt follows the person of the debtor.

Carth. 25; Vent. 236, and vide Roll. Abr. 554.

An obligee, before the debt is due by obligation, cannot by the custom attach a debt for it, because he cannot affirm a plaint for the first debt before it is due.

Roll. Abr. 553; 3 Leon. 236, S. C.

But, if B is indebted to A, and C is bound to B, but the day of payment is not yet come, A may attach this debt in the hands of C (b) before it is due to B.

Roll. Abr. 553; 3 Leon. 236; and vide Cro. Eliz. 184; Roll. Rep. 105; Cro. Eliz. 713; Noy, 68. (b) But the custom so to do must be specially alleged; Roll. Abr. 553; Noy, 68.—And the judgment shall be, that he shall be paid when it becomes due. Roll. Abr. 553; Sid. 327. || That *debita in presenti solvenda in futuro* are within the custom seems to be now settled; but whether it extends to debts as between the garnishee and the defendant below, (not being of that particular description,) which have not become actually due at the time of the attachment laid, *qu.* and vide 3 East, 367, where the point was made in the argument of counsel, though left untouched by the judgment of the court.]]

So, if A lends money to B, to be repaid upon the death of the father of B, and after an action is brought by C against A, and after the father of B dies, the money due by B to A, may after be attached in the hands of B, though it was not due at the time the plaint commenced against A, inasmuch as it became due before the time that by custom the process is to be granted against him in whose hands it is attached.

Ro. Abr. 553.

If in debt upon an obligation of 100*l.*, conditioned for the payment of 50*l.* at a day, the defendant pleads, that before the day of payment of the 50*l.* it was attached in his hands by a creditor of the plaintiff, &c., and that after the day, upon a *scire facias* against him, according to custom, he paid it; this is a good bar of the (c) whole, because the attachment being made before the day of payment, it became a debt to the creditor, and the obligee could take no advantage of a breach of the condition afterwards.

Sid. 327, Robbins and Standard. (c) If the attachment had been of 20*l.* only, it might have been pleaded in bar of so much. Sid. 327, & vide Godb. 196; Owen 2. Moor, 598.

|| If the garnishee has a lien on money or goods in his hands, the plaintiff in a foreign attachment cannot take them from him without discharging the lien.

Nathans v. Giles, 5 Taunt. 558.]]

(H) Of the Custom of Foreign Attachment.

3. Of the Form of the Proceedings in a Foreign Attachment.

By this custom the plaintiff must swear that the debt is *bonâ fide* due to him; but it is not sufficient to allege that he swore that the debt was a true one, by himself or his attorney; for the attorney's swearing is not according to the custom.

Roll. Abr. 554; Cro. Eliz. 713; Jon. 406; 2 Lutw. 985.

If A affirms a plaint against B, and upon *nihil* returned it is surmised that C hath money in his hands due to B, &c., and the money is attached in the hands of C, who appears upon the attachment, and pleads that he owes nothing to B, though this be found against C, and thereupon there is judgment against him, yet he shall not pay any costs, for there are no costs recoverable in a foreign attachment.

Cro. Eliz. 179; Leon. 321.

By this custom, if A sues B in London, &c., and C is indebted to B in the same sum, and C is condemned there to A, according to the custom, and judgment given against him accordingly; yet, if no execution be sued against C, A may resort to have judgment and execution against B, his principal debtor, and B may sue C for his debt, notwithstanding the unexecuted judgment.

Roll. Abr. 555.

In bar of an action brought in B. R., if the defendant pleads a judgment in a foreign attachment in bar, and alleges the custom to be, that if the plaintiff in the court hath process against the defendant, and upon a *nihil* (a) returned makes a surmise that B is indebted in so much to the defendant, and upon his prayer to attach it in his hands by process, and he does it accordingly; and if (b) the defendant makes default at four courts after, that, by the custom, at the last of the said four courts the plaintiff may pray process against B, to come in and show cause wherefore the judgment should not be against him at the next court after, and when he comes to apply this custom to his case, he shows that there were four defaults, and that at the fourth default the plea was continued for several courts, and then process went against B, and then after judgment against him; (c) this is not warrantable by the custom, inasmuch as he shows by the custom, it ought to be at the next court after the four defaults.

Roll. Abr. 555; 22 H. 6, 47. (a) Godb. 401; Latch. 228. (b) A custom for a foreign attachment before some default in the defendant, is naught. Vent. 236. (c) Moor, 570, S. P.

If in debt the defendant pleads that J S entered a plaint, &c. against the plaintiff in London, and upon process against him *non est inventus* was returned, and thereupon a suggestion was made that he had so much money in the hands of the defendant, and that the defendant was attached by the said money; this is an ill plea, for it ought to have been that the plaintiff was attached by so much money in the defendant's hands; for so is the custom.

Carth. 282, Lawrence and Atherton, adjudged.

¶ If it do not appear upon the proceedings, that the defendant below was summoned, or that a *nihil* was returned, or that information was given to the court of the money being in the hands of the garnishee, the judgment is void, as not warranted by the custom, which it has not pursued in its necessary and material parts.

Fisher v. Lane, 2 Rl. Rep. 834; 3 Wils. 297, S. C., but the ground of the decision not so correctly stated.

## (H) Of the Custom of Foreign Attachment.

In *assumpsit* the recovery and execution in the foreign attachment may be given in evidence under the general issue; and though it may be pleaded, (a) yet this would seem to be the better and safer course. But in debt bond (b) it must be pleaded.

Wells v. Needham, 2 Lutw. 995; 1 Ld. Raym. 180, S. C.; Brook v. Smith, 1 Salk. 280; Fisher v. Lane 3 Wils. 297; 2 Bl. Rep. 834, S. C.; Savage's case, 1 Salk. 291; Palmer v. Hooke, 1 Ld. Raym. 727; Briat v. Gyll, Skinn. 639; Nathans v. Giles, 5 Taunt. 558. (a) Morris v. Ludlam, 2 H. Bl. 362. (b) Co. Entr. 139 b, 142 a; Lib. Plac. 160, pl. 113; 2 Lib. Instrat. 164.

In pleading it is not necessary to aver the custom that the plaintiff below shall swear to the debt, or the fact that he did swear to it; nor that a writ of *scire facias* issued against the garnishee; it is enough that "he was warned to show cause." Neither is it necessary to aver, that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court; for it is not necessary that the debt should arise, or the defendant reside within it, or that he should be actually summoned.

Banks v. Self, 5 Taunt. 234; Harrington v. Macmorris, *Id.* 228.

But, if the plea do not pursue the custom, as it lays it, it will be bad. And great care should be taken to plead properly; for if the defendant fail for want of a proper plea (c) it is said, that he must pay the money over again, and has no remedy in law or equity.

Smith v. Ridges, Sir T. Jones, 165; Hatton v. Isemonger, 1 Str. 641; Morris v. Ludlam, 2 H. Bl. 362. (c) Anon. 2 Show. 373.

A foreign attachment pending is no bar to an action until judgment be recovered in the attachment.

Nathans v. Giles, 5 Taunt. 558.

If money be attached in an attorney's hands by foreign attachment, he shall not have his privilege, because in this case the plaintiff would be remediless; for the foreign attachment is by the particular custom of London, and does not lie at common law; so that if the attorney should have his privilege, the plaintiff should be without his redress.

Gilb. Hist. C. P. 209; Turbill's case, 1 Saund. 67; Ridge v. Hardcastle, 8 T. Rep. 417.]

After a *dileitur* entered by the garnishee in the sheriff's court, which is in nature of an imparlance, he cannot plead to the jurisdiction of the sheriff's court.

Carth. 25.

It was ruled, That if A brings debt in London against B, and *attaches goods of B in the hands of C*, from whose possession the goods are not removed; and B by certiorari brings the cause into K. B. and puts in bail, the attachment is at an end, and C ought to deliver the goods to B, which if he do not, B may have *trover* or *replevin*.

12 Mod. 213.

## DAMAGES.

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**DAMAGES** are a compensation given by the jury, [or assessed by the court,] for an injury or a wrong done the party(a) before the action brought.

Co. Lit. 257; 10 Co. 116. (a) The expenses the party has been at in obtaining his right, such as the moderate fees of counsel, attorneys, &c., are termed costs; and these are given by the court, and taxed by their officer. ¶ Costs are a consequence by the statute of Gloucester of detaining the debt, and are part of the damages. In contemplation of law the word *damages* emphatically includes costs. It is so considered by Lord Coke. Costs, therefore, properly fall under the *nomen generale* of *damages*, and where, for instance, 20*l.* is given for damages, and 10*l.* for costs, the whole may be stated as for damages, *quæ quidem damna in toto attingunt ad triginta libras.* Co. Lit. 257 a; 2 Inst. 288; 10 Co. 115 b; 1 Lutw. 640; Cro. Ja. 420; 7 Vin. Abr. 296, pl. 12; 2 Wils. 91; 9 East, 304; 1 Lill. Pr. Reg. 527. ¶ *β* By damages, in another sense, is understood the loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence or carelessness, or by inevitable accident. Bouv. L. D. h. t.g

- (A) In what Actions the Party shall recover Damages.
  - (B) What Persons are entitled to, or shall recover Damages.
  - (C) Against whom Damages shall be recovered.
  - (D) Of assessing the Damages: And herein,
    1. *Of the Quantum of the Damages the Jury may give.*
    2. *Whether they may give more than the Plaintiff has declared for.*
    3. *Must be assessed pursuant to the Plaintiff's Right, or the Injury he has received, And herein of assessing entire Damages.*
    4. *Where to be assessed jointly or severally, where there are several Defendants.*
  - (E) Where the Court may increase or mitigate the Damages.
  - (F) Of the Manner of assessing and recovering Damages.
  - β*(G) Of double and treble Damages.
  - (H) Damages in Maritime Cases.
  - (I) Damages in Patent Cases.g
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- (A) In what Actions the Party shall recover Damages.

At common law no damages were recovered in any real action; for the detention of the possession, &c., being the cause of damages, till the right to the land was determined, the party could not be said to suffer any wrong: also, the burden of the feudal duties lay upon the tenant in possession, and, consequently, he was to receive the mesne profits until some other made out a better right, who after recovery might have maintained an action of trespass.

10 Co. 116 a; 2 Inst. 284; Co. Lit. 257; 19 H. 6, 27; 2 Roll. Abr. 550; 11 Co. 52.

But in an *assize*, which is(b) a mixed and compendious action, the disseisee not only recovered his possession, but also the mesne profits in damages.

8 Co. 50 a; 10 Co. 116 a. (b) But in a writ of entry there were no damages; for  
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## (B) What Persons are entitled to, or shall recover Damages.

such writ only demanded the freehold, and was not mixed with the personality. 2 Inst. 289; Booth, 175. Nor in a writ of admeasurement of pasture. 2 Inst. 368.

By the statute of Gloucester made 6 E. 1, whereas before damages were not awarded in Mortdancester, unless upon a recovery against the chief lord, they shall be awarded in all cases where a man recovers in Mortdancester; so in cosinage, aiel, and besaiel; and further, every one shall render damages where the land is recovered against him, upon his own intrusion or his own act.

For the exposition of this statute, vide 2 Inst. 287.

By the statute of Merton, c. 1, damages are given on the possessory action of dower, *unde nihil habet*.

Vide tit. Dower, letter (I).

In a *quare impedit* or *darrein presentment*, he, for whom the judgment is given, shall recover as well his damages as his presentment and advowson. Comp. Incumb. 292, &c.

In all actions *ex delicto*, which are either trespasses founded on force, or upon fraud, in the not performing of contracts, damages shall be recovered; and these are (a) such actions as are said to sound only in damages.

(a) In detinue the thing is to be recovered in specie, or damages for it. Roll. Abr. 574. In debt the same is to be restored *in numero*, but there are damages for the detainer, vide Vaugh. 101. Damages shall be recovered in an *audita querela*, 26 E. 3, 73. In a writ of ward of the body and land damages shall be recovered. Roll. Abr. 575. But in writs of execution no damages shall be recovered. Roll. Abr. 575; 50 E. 3, 23, nor in a *scire facias*. 2 H. 6, 15.

If, after a prohibition to the spiritual court, the party proceeds in such court, the plaintiff upon his declaration upon the prohibition, or upon an attachment, shall recover damages.

Vide tit. Prohibition, and vide Roll. Abr. 575; Jon. 477; Cro. Car. 559; 2 Jon. 128; Raym. 387; Vent. 348, 350; 3 Lev. 360.

¶ Damages may be recovered for criminal conversation with the plaintiff's wife, (b) for slander or a libel, (c) and for a nuisance. (d)

(b) Norton v. Warner, 9 Conn. 172. (c) Stow v. Converse, 4 Con. 17; Treat v. Browning, 4 Conn. 408. (d) Gleason v. Gary, 4 Conn. 418.

Damages may be recovered for the least wrongful injury.

Kemper v. Armstrong, 12 Mart. (Lo.) R. 296; Webb v. Portland Manufacturing Co. 3 Sumn. 189.

The value of the property converted with interest from that time is in general the measure of damages in actions of trover; when the property is restored it goes in mitigation of damages.

Greenfield Bank v. Leavitt, 17 Pick. 1. §

## (B) What persons are entitled to, or shall recover Damages.

If lessee for years be ousted, and he in the reversion disseised, and he in the reversion recover in an assize, yet he shall not recover damages.

15 H. 7, 4 b; 2 Inst. 285.

So, if, after the ouster, he in the reversion enter upon the disseisor, (as he may by law, to save a descent,) and after the disseisor re-enter upon him, and he recover in an assize, yet he shall not have any damages; for the re-entry of him in reversion reduces the estate to the lessee, and then the damages for the profits belong to him.

Roll. Abr. 569.

If tenant for life, and he in reversion join in a lease for life, they may

## (C) Against whom Damages shall be recovered.

join in an action of waste; and tenant for life shall recover the place wasted, and he in reversion damages.

Co. Lit. 42 a.

In debt by baron and feme, upon a bond made to the feme *dum sola*, they shall recover damages (a) jointly.

Cro. Eliz. 259. (a) In an assize by baron and feme, if it be found they were disseised, they shall recover damages of the issues in common. 11 H. 4, 16 b; Roll. Abr. 570.—In trespass by baron and feme, for imprisoning the feme till a fine paid, for all the trespass, but the fine, they shall recover damages in common. Bro. Damages, 51; Roll. Abr. 571.

So, in trover by baron and feme, executrix of A for goods of A, they shall recover damages jointly; for the possession of the wife, as executrix, was also the possession of her husband, and the damages recovered shall be to the estate of the testator, and so may concern them both.

Styl. 48.

If two jointenants bring an assize, and the one is severed, if it be found that the other had goods taken upon the land, he shall recover sole damages for them.†

11 H. 4, 17; Roll. Abr. 571. †The owner of the goods may maintain an action alone for them.

The defendant wrongfully seized goods as for a distress, and placed a man in possession of them for some days; it was held the owner was entitled to recover damages for the seizure, although he had the use of the goods, by permission of the man in possession, the whole time.

Bayliss v. Fisher, 7 Bing. 153.

## (C) Against whom Damages shall be recovered.

By the statute of Gloucester, made 6 E. 1, c. 1, "Whereas heretofore damages were not awarded in assizes of *novel disseisin*, (b) but only against the disseisors; it is provided, that if the disseisors (c) alien the lands, (d) and have not whereof damages may be levied, (e) they, to (g) whose hands such tenements shall come, shall be charged with (h) the damages, (i) so that (k) every (l) one shall (m) answer (n) for his time."

(b) Owen, 112; Hob. 98. (c) So, if disseised; for, by equity, it extends to all that come under the disseisor by right or wrong. 2 Inst. 284.—So, if the lord distrains for rent, and a stranger rescues, though the stranger is only a disseisor in an assize against him and the tenant; if the stranger is found insufficient, the tenant shall answer in damages, though he claims not from the disseisor. 2 Inst. 284. (d) The tenant shall be charged only where the disseisor is insufficient; but, if able to pay part, but not the whole, both shall be charged; therefore the judgment is always given generally against both. 2 Inst. 284. (e) Lands held *in capite* were aliened to J S, who died, his heir within age; and the king committed the custody to B, who took the profits: the heir was no tenant within the statute. 2 Inst. 284. *Secus*, if aliened to an infant, who took the profits, or if, coming in as heir, he had been out of ward. 2 Inst. 284. (g) Yet these general words shall not charge those with damages who have an estate cast upon them by law, unless they consent thereto, as the heir of the alienee, by refusing to take the profits, may discharge himself of the damages. 2 Inst. 284. So, if disseisor enfeoffs A and B, and makes livery to A only, and A dies, if B never assented, he may waive the possession, &c. Co. Lit. 360; 2 Inst. 286. (h) And where by subsequent statutes double or treble damages are given in an assize, they shall be answered by every mesne tenant accordingly, and for their insufficiency by the tenant. 2 Inst. 285. (i) In an assize, but not in a writ of entry, for that is to be brought against the tenant only, and this clause refers only to the assize. 2 Inst. 286, 287. (k) If named in the assize; otherwise, if the disseisor is found insufficient, the tenant shall be charged with the whole. 2 Inst. 285. But, if found that the disseisor is insufficient, and that he enfeoffed A, who enfeoffed B, who enfeoffed the tenant, and that A had it one year, and B another, and the tenant another, the tenant shall be charged for

## (D) Of assessing the Damages.

his own time only, and the plaintiff shall lose his damage against A and B, because not named in the writ. 2 Inst. 285. (l) Tenant for years, or by statute, &c., is no mesne occupier within the act, unless the assize is brought by tenant by statute, &c. 2 Inst. 284. (m) If they have sufficient, otherwise the tenant must answer for the whole. 2 Inst. 285. (n) Yet several judgments shall not be given, but one judgment entirely against all, according to the usage; but the sheriff upon the execution may use such indifferency as justice requires. 2 Inst. 285. If the sheriff returns that the disseisor is insufficient, process shall issue to levy it of the tenant. 2 Inst. 285.

"It is provided also, that the (a) disseisee shall recover damages in a writ of entry upon *novel disseisin*, (b) against (c) him that is found (d) tenant after the disseisor."

(a) This extends not to his heirs. 2 Inst. 186. But by a subsequent clause in this act, where he recovers the land against the disseisor, he shall have damage. (b) Extends not to him that has an estate by law cast upon him, if he waives the possession. Co. Lit. 360; 2 Inst. 286, 287. (c) If brought against two jointenants, and one disclaims, and the other takes upon him the whole tenancy, and pleads, &c., he shall answer the whole damages. 2 Inst. 287. (d) The disseisor enfeoffs A, who enfeoffs B, and in a writ of entry in the *per* and *cui* vouches A, who pleads and loses, judgment shall be given against the vouchee, because he is found tenant in law. 2 Inst. 287.

In a writ of partition by one coparcener against the other, no damages shall be recovered, though the defendant hath not been at all times (e) ready to make partition.

2 Inst. 289; Noy, 68, vide tit. *Coparceners*. (e) If a man will avoid the damages, because he hath been at all times ready to render the thing in demand, he ought to come at the first day. 17 E. 3, 71. In detinue against an executor, supposing it to come to his hands after the death of the testator, the defendant may come at the grand distress, and say, that he hath at all times been ready to deliver the writing after the time that it came to his hands, and thereby save damages against him. 22 Ed. 3, 9; Roll. Abr. 574.

§ Damages cannot be recovered, although sustained, in a variety of cases: in these cases there is said to be *damnum absque injuriâ*. For example, no action lies against a judge or judicial magistrate for an erroneous judicial opinion or act, in a case in which he had jurisdiction. (g) Nor can a woman recover damages against her seducer. (h) Nor against a plaintiff for a loss or injury arising from an attachment of property, or arrest of the body, in a civil suit, where the defendant has prevailed upon trial, unless the action was brought without probable cause and maliciously. (i) Damages cannot be recovered for an injury, even from the gross negligence of another, unless the plaintiff be himself free from culpable negligence. (k)

(g) *Yates v. Lansing*, 5 Johns. 282; *S. C.* 9 Johns. 365; *Vanderheiden v. Young*, 11 Johns. 150; *Brodie v. Rutledge*, 2 Bay, 69; *Eli v. Thompson*, 3 Marsh. 76; *Phelps v. Sill*, 1 Day, 315; *Moor v. Ames*, 3 Caines, 170; *Ambler v. Church*, 1 Root, 211; *Young v. Herbert*, 2 N. & M. 168; *Cunningham v. Bucklin*, 8 Cowen, 168; *Wheeler v. Patterson*, 1 N. H. Rep. 88; *Weckerly v. Geyer*, 11 S. & R. 36. (h) *Paul v. Frazier*, 3 Mass. 71. (i) *White v. Dingley*, 4 Mass. 433; *Lindsey v. Larned*, 17 Mass. 190; *Vanduzor v. Linderman*, 10 Johns. 106. (k) *Smith v. Smith*, 2 Pick. 621; *Lane v. Crombie*, 12 Pick. 177; *Washburn v. Tracey*, 2 Chip. 128; *Bush v. Brainard*, 1 Cowen, 78; *Buck v. Dry Dock Co.* 2 Hall, 151; *Noyes v. Morris*, 1 Verm. 353.

The owner of a dam built in a navigable stream in conformity with the provisions of the law, the shoot of which afterwards became innavigable by flood or accident, is not liable for damages resulting from such accident, before he has had time to repair it.

*Roush v. Walter*, 10 Watts, 86.g

## (D) Of assessing the Damages: And herein,

## 1. Of the Quantum of the Damages the Jury may give.

In all actions which sound in damages, the jury seem to have a discre-



## (D) Of assessing the Damages.

tionary power of giving what damages they think proper: for though in contracts the very sum specified and agreed on is usually given, yet, if there are any circumstances of hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider of them, and proportion and mitigate the damages accordingly; as, in case upon a policy of assurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel, and about 1500*l.* insured upon it; and then the ship was voluntarily sunk.(a) So, on an action brought on a promise of 1000*l.* if the plaintiff should find the defendant's owl; the court declared, though the promise was proved, that the jury might mitigate the damages. Also on demurrer, by which the promise is confessed, the jury may consider of the circumstances, and mitigate damages accordingly.

Vide Moor, 419; 3 Leon. 150; Owen, 34; Vent. 267. *β* Carlin v. Stewart, 2 L. R. 76; Loney v. High, 13 L. R. 374; Merrill v. The Tariff Man. Co., 10 Conn. 384. *γ* 4 Dall. 207, 208; 2 Cain. Er. 215; 1 Johns. Rep. 134; 3 Johns. Rep. 62; 2 East, 211. But though an action is in form an action for damages, yet if the parties have stipulated for certain damages, the jury should find damages to the amount of the whole sum so agreed for. On this subject, and what shall be considered liquidated damages and what only a penalty, see 4 Burr. 2228, Lowe v. Peers; 2 Bro. P. C. (2d ed.,) 431, Pensonby v. Adams; Ib. 436, Rolfe v. Peterson; 2 Term 32, Fletcher v. Dyche; 2 Bos. & Pul. 346, Astley v. Weldon; 8 Ves. J. 818; 3 Bos. & Pul. 630, Smith v. Dickenson; 10 Ves. J. 499, Cock v. Richards.—In an action for breach of a contract to replace stock on a given day, the plaintiff should recover not the value of the stock on that day only, if it has afterwards risen, but the highest value as it stood at the time of the trial, if the defendant made no offer to replace it in the intermediate time; for the plaintiff should be completely indemnified for the breach of the contract; and if the stock is not replaced at the day appointed, and should afterwards rise in value, he can only be indemnified by giving him the price of it at the time of trial. 2 East, 211, Shepherd v. Johnson; Ib. 213, n., Payne v. Burke. But *quære* whether the correct measure of damages is not the value of the stock on the day when the contract was to be performed, with interest, though that value should afterwards either rise or fall. See 2 Burr. 1010, Dutch v. Warren; 1 Str. 406, S. C.; 8 Term, 162, Sanders v. Kentish; 3 Ves. J. 629, 632, Morley v. Bird; 4 Ves. J. 492, Forrest v. Elwes; 3 Cran. 298, Douglass v. McAlister; 3 Mass. T. Rep. 364, 382, Gray v. Portland Bank; 2 Cain. Er. 216, 217, Cortelyou v. Lansing; 1 Wash. 1, Groves v. Graves; Ib. 164, Reynolds v. Waller; 1 Bay, 105, Davis v. Exrs. of Richardson; Ib. 309, Atkinson v. Exrs. of Scott; Ib. 357, Wigg v. Exrs. of Garden.} Where money laid out in repairs shall be recovered in damages. Godb. 53. Where in trespass for breaking his close, &c., the court refused to grant a new writ of inquiry, because the damages were too small, the suing forth the writ being the plaintiff's own act. 2 Leon. 214. But for this vide tit. Trial, and for what cause a new trial will be granted, vide Mod. 2. In trespass the jury gave the plaintiff half a farthing damages, and held good. 2 Roll. Rep. 19; Sir T. Jon. 138. *β* The damages to be given for injuries to personal representation must be regulated by the circumstances of each case. Gilbert v. Berkinshaw, Loft, 771; Wilford v. Berkeley, 1 Burr. 609; Norton v. Warner, 9 Conn. 172; Stow v. Converse, 4 Conn. 17; Gleason v. Gary, 4 Conn. 418. *γ* (b) [But fraud vacates the policy, and therefore no such action would lie.]

The plaintiff declared upon an *assumpsit* to pay for a horse a barley-corn a nail, doubling every nail, and averred that there were thirty-two nails in every shoe, which, doubling every nail, came to five hundred quarters of barley; which being tried before Hyde, he directed the jury to give the value of the horse in damage, and accordingly they gave 8*l.*, and held good.

Lev. 111; James and Morgan, Keb. 569, S. C.; Thornborough v. Whitacre, 6 Mod. 305, S. P.; 2 Ld. Raym. 1164, S. C.; 3 Salk. 97, S. C.; 1 Wils. 295.

If A sells a horse to B, and warrants it sound, and B a few days afterwards sells it to C, and it proves unsound, and C brings an action against B, and recovers the price, and A has notice of the action, B may recover

## (D) Of assessing the Damages.

against A not only the price of the horse, but also the costs of the action brought against him by C.

Lewis v. Peat, 2 Marsh. R. 431; 7 Taunt. 153.

In an action of *assumpsit* for not delivering goods on a given day, the true measure of damages to be recovered is the difference between the contract price and that which goods of similar quality bore on or about the day when the goods should have been delivered; but on contracts for replacing stock, plaintiff may recover the price at the day of trial or executing the inquiry, for in the former case the vendee having the money in his hands, may, on the vendor's failure to deliver, purchase goods himself; but on a loan of stock the borrower has deprived the plaintiff of his money, so that he is prevented purchasing.

Gainsford v. Carroll, 2 Barn. & C. 624; Sheppard v. Johnson, 2 East, 211; Macarthur v. Seaforth, 2 Taunt. 257; and see 1 M'Clel. 377.

In an action for *mesne* profits the plaintiff cannot, on executing a writ of inquiry, give in evidence the extra costs incurred in the previous action of ejectment, but only the *taxed* costs.

Brooke v. Bridges, 7 Moo. 471.

Though a court of error cannot give costs to a party reversing a judgment, yet a plaintiff in an action of *mesne* profits may recover in damages the costs of reversing in error a judgment obtained by the defendant.

Nowell v. Roake, 7 Barn. & C. 404.

In an action against the sheriff for taking insufficient pledges in replevin, the assignee of the bond cannot give in evidence the costs incurred in an unsuccessful action against the pledges, unless he has given notice to the sheriff of such action.

Baker v. Garratt, 3 Bing. R. 56.

If a lessee for years underlets with a covenant by the under-lessee to repair, and he does not repair, by reason whereof an action is brought to the superior landlord against his lessee, such lessee may recover, in an action against the under-lessee or his assignee, not only the amount of damages recovered by the superior landlord, but also the costs of defending the action.

Neale v. Wyllie, 3 Barn. & C. 533.

In an action for slander, where defendant suffers judgment by default, the plaintiff is not bound to give any evidence; and where the jury found 40s. damages without evidence, the court would not disturb the verdict.

Tripp v. Thomas, 3 Barn. & C. 427; *β* Allen v. Listeau, 9 M. R. 439, *acc. β*

With respect to the recovery of interest by way of damages, it is now settled that, in order to recover interest, there must be an express contract to pay it, or an implied contract resulting from the usage of trade or business, or from special circumstances, or express proof that the money has been profitably used by the defendant. Interest is not recoverable on *all* sums of money payable at a specific day, but only on bills of exchange, promissory notes, and mercantile securities, and on agreements to pay in bills, notes, &c., and therefore not on life assurances payable at a fixed time after proof of the party's death.

Mountford v. Willes, 2 Bos. & Pull. 337; Slack v. Lovell, 3 Taunt. 157; Gordon v. Swan, 12 East, 419; Marshal v. Poole, 13 East, 98; Harrison v. Allen, 2 Bing. R. 4; Calton v. Bragg, 15 East, 223; Lee v. Lingard, 1 East, 401; Higgins v. Sargeant, 2 Barn. & C. 348; Murray v. East India Company, 5 Barn. & A. 204; Hare v. Rickards, 7 Bing. 254. *β* See Jennings et al. v. The Brig Perseverance et al. 3 Dall. 336; Benner et al. v. Marshall, 1 Wheat. 215. *β*

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But it has been lately held, that however a debt is contracted, if it has been wrongfully withheld by the defendant, after the plaintiff has endeavoured to obtain payment of it, the jury may give interest, in the shape of damages, for the unjust detention of the money.

*Arnott v. Redfern*, 3 Bing. 353.  $\beta$  See *United States v. Gurney et al.*, 4 Cranch, 333.  $\gamma$

It seems that the plaintiff is entitled to interest in the shape of damages in *assumpsit* on a Scotch judgment, because the judgment carries interest in Scotland.

*Arnott v. Redfern*, 3 Bing. 353.

On contracts for purchase of estates, the plaintiff may recover interest on the purchase-money from the time the purchase should be completed, if he aver and prove that he has lost the use of his money.

*De Bernales v. Wood*, 3 Camp. 257; *Farquhar v. Farley*, 1 Moo. R. 322.

But in an action for money had and received, the plaintiff can only recover the net sum received, without interest.

*Walker v. Constable*, 1 Bos. & Pull. 306; *Tappenden v. Randall*, 2 Bos. & Pull. 467.

In debt on bond, where the penalty and debt were of the same amount, and the bond expressly bore interest, *Littledale, J.*, held that the plaintiff might recover interest to the extent of the damages laid in the declaration beyond the penalty.

*Francis v. Wilson*, 1 Ry. & Moo. Ca. 105.  $\beta$  When a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, the recovery must be limited to the penalty. *Bank of the United States v. Magill*, 1 Paine, 661.  $\gamma$

In case for a malicious arrest, the plaintiff cannot recover damages for the extra costs incurred.

*Sinclair v. Eldred*, 4 Taunt. 7; *Webber v. Nicholas*, Ry. & Moo. Ca. 419. *Sed vide* 1 Stark. Ca. 306.

When the jury said, in an action on a policy, that the ship had sustained a partial loss, but to what amount there was no evidence, it was held that the plaintiff was entitled to a verdict, with nominal damages only.

*Tanner v. Bennett*, Ry. & Moo. Ca. 182.  $\beta$  See *Whittemore v. Cutter*, 1 Gallis. 478.  $\gamma$

$\beta$  In actions on contracts, it is usual to give damages to the amount specified in the agreement, yet, under circumstances of fraud or hardship, the jury may mitigate such damages. (a) But when the sum specified is in the nature of a penalty, the jury may give only the actual damages. (b)

(a) *Slosson v. Beadle*, 7 Johns. 72; *Hasbrouck v. Tappen*, 15 Johns. 200; *Bourke v. Bulow*, 1 Bay, 50; and see 8 Mass. 266; 12 Mass. 365; 1 Day, 1; 1 Bay, 89. (b) *Merrill v. Merrill*, 15 Mass. 488; *Dennis v. Cummings*, 3 Johns. Cas. 297.

On a special agreement to deliver a promissory note, less damages than the amount of the note may be given, when that will be consonant to justice.

*Pledger v. Wade*, 1 Bay, 33.

In trover for a promissory note, more damages may be given than the amount of the note and interest, where the circumstances will justify such a course. (c) The value of goods is the ordinary measure of damages, but the jury may give more. (d)

(c) *Taylor v. Morgan*, 3 Watts, 333; see *Romig v. Romig*, 2 Rawle, 241. (d) *Harger v. McMaine*, 4 Watts, 118.

Whether a sum agreed upon by the parties as the measure of damages for the violation of covenants shall be considered as a penalty or as liquidated damages, depends upon the terms used to express the contract.

*Dakin v. Williams*, 17 Wend. 447; *Smith v. Smith*, 4 Wend. 468; *Hasbrouck v.*

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Tappen, 15 Johns. 200; Sloeson v. Beadle, 7 Johns. 72; Dennis v. Cummins, 3 Johns 297; Ayre v. Pease, 12 Wend. 393; Knapp v. Maltby, 13 Wend. 587; Spencer v. Tilden, 5 Cowen, 144; Taylor v. Sandiford, 7 Wheat. R. 13; Martin v. Taylor, 1 Wash. C. C. R. 1.

When damages have been sustained for a breach of contract, the plaintiff is not entitled to recover all he could have made had the contract been fulfilled.

Gilpin v. Consequa, Pet. C. C. R. 85; Shepherd v. Hampton, 3 Wheat. 200; Douglass et al. v. McCallister, 3 Cranch, 298; Willing v. Consequa, Pet. C. C. R. 172; Youqua v. Nixon, Pet. C. C. R. 221; Hopkins v. Lee, 6 Wheat. 109; Bell et al. v. Cunningham et al. 3 Pet. 69; Watt v. Potter, 2 Mason, 77; Pope v. Barrett, 1 Mason, 177; Blanchard v. Ely, 21 Wend. 342; Boyd v. Brown, 17 Pick. 453. But see Bucknam v. Nash, 3 Fairf. 474; Board v. Head, 3 Dana, 491; Nourse v. Snow, 6 Greenl. 208.

When a right is given by law, and a remedy for its violation, such violation imports damages; and when no special damages are proved, the law will give nominal damages to the party.

Whittemore v. Cutter, 1 Gall. C. C. R. 478.

In an action on a contract in writing for a certain sum, the contract itself furnishes the rule of damages.

Tyler v. Marsh, 1 Day, 1. See 3 Conn. 58; 2 Conn. 485.

In assessing damages for injuries to personal property, the jury may take into consideration all the circumstances of the case.

Morris v. The Tariff Man. Co., 10 Conn. 384. See Bateman v. Goodyear et al. 12 Conn. 575; Edwards v. Beach, 3 Day, 447; Churchill v. Watson, 5 Day, 140; Dennison v. Hyde, 6 Conn. 508; Nicholas v. Bronson, 2 Day, 211.

The rule as to the quantum of damages for the breach of covenants of seisin, and of good right to convey, is the consideration paid with interest.

Mitchell v. Hazen, 4 Conn. 496; 4 Mass. 108.

But when the breach arises solely from a prior mortgage, the damages will be determined by the amount of such mortgage.

Lockwood v. Sturdevant, 6 Conn. 373.

The obligee of a bond cannot recover damages beyond the penalty of the bond, although satisfaction may not have been obtained for every breach of the condition.

Carter v. Carter, 4 Day's Cas. 30.

In an action by the mortgagee of a mill-site, on which no mill is actually standing, against one who, by erecting a dam below, renders the site useless for the purpose of erecting a mill, the proper measure of damages is the interest on the value of the site from the time the plaintiff takes possession.

Hatch v. Dwight, 17 Mass. 289.

Damages should be assessed according to the value of the thing when the act should have been performed.

Howard v. Person, 2 Hayes, 335.

Damages ought not to be increased, in an action for the non-delivery of whisky according to contract, because the price had raised in consequence of the passage of a law laying duties on the article.

Edgar v. Boies, 11 S. & R. 445.

The value of chattels specified in a written agreement is the rule of damages, when fraud is not proved.

Coursier v. Graham, 1 Ohio, 351.

In an action on a penal bond conditioned for the conveyance of real

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estate, held that the value of the improvements made by the obligee subsequently to the time when his cause of action accrued, cannot be taken in consideration by the jury, in determining the quantum of damages to which the plaintiff is entitled.

*Lindley v. Luken*, 1 Blackf. 266.

Assumpsit for not accepting wheat "to be delivered at B, as soon as vessels could be procured for the carriage;" held that the measure of damages was the difference between the contract price and the market price of the day when tendered and refused.

*Phillips v. Evans*, 5 Mees. & W. 475; and see *Leigh v. Patterson*, 2 Moor, 588; *Johnson v. Macdonald*, 9 Mees. & W. 602.

In trover, the value of the property at the time of the demand or conversion, is the criterion of damages.

*Lillard v. Whitaker*, 3 Bibb, 93; *Sproule v. Ford*, 3 Litt. 29; see *Morrison v. Hart*, 2 Bibb, 6; *Owings v. Ullery*, 3 Marsh. 455; *Harvin*, 31, 203; 3 Litt. 247; 3 Bibb, 251; *Mudd v. Phillips*, Litt. Sel. Cas. 50.

In estimating the damages upon a covenant to pay \$6 per cwt. in commonwealth's paper, and the rise of the price in Lexington, until the first of July thereafter; the value of the paper for which the article would sell, and not the specie price of the article, less the depreciation of the paper, is to govern.

*Monks v. Roberts*, 4 Monroe, 89; and see *Kennedy v. Vanwinkle*, 6 Monro, 398.

The common selling price of an article, not the highest nor the lowest, should be the measure of damages.

*Cole v. Sands*, 1 Tenn. 106.

Where the contract is to convey land of a certain description, the damages for the breach of it should be the lowest price of land of that description.

*Gillespie v. Hackett*, 1 Tenn. 295.

Damages cannot be recovered for the mere loss of a good bargain.

*Fagan v. Newton*, 1 Dev. 20.

For the loss of a cargo by the captain's misconduct, damages should be given according to the value of the cargo at the port where it was received.

*Howard v. Ross*, 2 Hayw. 333; 12 S. & R. 186; 8 Johns. 213; 10 Johns. 1; 14 Johns. 170; 15 Johns. 24; but see *contra*, 3 Caines, 219; 4 Hayw. 112.

In all cases of contract, the measure of damages is the value of the property at the time the contract was broken.

*Talbot v. Bedford's heirs*, Cooke's R. 447; see 2 Tenn. 49; 3 Hayw. 92; 4 Hayw. 235; 5 Yerg. 305; 4 Yerg. 41; *Pitkin v. Leavitt*, 3 Weston, 379; *Davis v. Shields*, 24 Wend. 322; *Robinson v. Heard*, 3 Shept. 296.

Vindictive damages can be given only against the wrongdoer or offender, by way of punishment; but not against persons who are only consequentially liable on account of their relation to the wrongdoer; as, the principal for the acts of his agent.

*Keene v. Lizardi*, 8 Louis. R. 33.

In an action against a rail-road company, for an injury sustained to the person of a passenger, through the negligence of the agents of the company, evidence of the loss sustained by the plaintiff in his business, in consequence of the injury received, is proper to aid the jury in estimating the damages.

*Lincoln v. The Saratoga, &c., R. R. Co.*, 23 Wend. 425. See *Cummings v. Gar-side*, 6 Whart. 299; *Bell v. McClintock*, 9 Watts, 119; 20 Wend. 210.

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The quantum of damages to be recovered in an action instituted to recover the price of property sold under a special agreement which proves inferior in quality to that contracted, is the difference between the price agreed upon and the value of the property sold.

McAlpin v. Lee, 12 Conn. 129.

The principle upon which damages are given in actions of trespass, is to indemnify the plaintiff for what he has suffered, taking into consideration all those circumstances which give character to the transaction.

Bateman v. Goodyear, 12 Conn. 575.

When a party agrees to demise certain premises to another, who breaks up his establishment and proceeds with his family and furniture to the place where the premises are situate, and the landlord refuses to give possession, the tenant is entitled to recover the damages sustained by him in consequence of such removal of his family and furniture, although special damage is not alleged in the declaration.

Driggs v. Dwight, 17 Wend. 71.

Imported wool belonging to the plaintiff, on which the duties had been paid, was injured by reason of the negligence of the defendant's servants, and in consequence it became necessary to take it out of the original packages; and in a few weeks an act of Congress was passed, under which, if the wool had remained in the original packages, the plaintiff would have been entitled to a return of the duties: it was held that the plaintiff was not entitled to additional damages on account of being thus deprived of a right to claim a return of duties.

Stone v. Codman, 15 Pick. 297.

A letter was sent by the manager of a lottery to a vender of tickets, enclosing a prize-list or statement of the drawing, which the postmaster unlawfully refused to deliver to such vender, but delivered it to another, who, availing himself of the information it contained, purchased of such vender a ticket which had drawn a prize. The injury was holden to be the immediate consequence of such unlawful withholding of the letter, and the true measure of damages the net amount of the prize.

Bishop v. Williamson, 2 Fairf. 495.

In action for false imprisonment brought in consequence of the illegal arrest of the plaintiff in another case, evidence of the value of the services of an attorney, in getting rid of such illegal arrest, is not admissible, for the purpose of increasing the damages.

Strang v. Whitehead, 12 Wend. 64.

When damages are given for an injury done to goods *in transitu*, the damage is to be estimated at the place of destination.

Oakley et al. v. Russell et al. 6 N. S. 62.

The measure of damages for which bank directors are responsible for illegal or improper measures, is the extent of the injury sustained by the plaintiff.

Percy v. Millaudon, 3 L. R. 594.g

2. *Whether they may give more than Plaintiff has declared for.*

In (a) personal actions, the plaintiff shall recover damages only for the *tort* done before the action\* brought, and therein the plaintiff counts to his damage.

10 Co. 117 a. (a) But in a real action he recovers his damages pending the writ,

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and therefore never counts to his damage, 10 Co. 117 a, and though damages be given by statute, yet the old form remains. 2 Inst. 286.—\* In Foster and Bonner, B. R. E. 1776, the court, on argument, determined, that in an action for carrying persons across the Thames, in prejudice to the Gravesend ferry, the plaintiff might give in evidence a *tori*, after suing forth the *latitat*, and before the day of exhibiting the bill, saying, in such case, the filing of the bill was the commencement of the suit.

Also, in personal actions the plaintiff shall recover no more than he hath counted for, although the jury give him more, for he best knows the measure of his wrong, and what he is entitled to.†

2 H. 6, 7; 8 H. 6, 5; 10 Co. 116; Owen, 45, S. P. *per Cur.* Kelw. 21; Yelv. 45; Cro. Eliz. 544; Bulst. 49; Fitz. *Damages*, 16, S. C.; Bro. 2, S. C.; Cro. Ja. 297, S. C.—§ Smith v. Allen, 5 Day, 337; Gratz v. Phillips, 5 Binn. 564; Cloud v. Campbell, 4 Munf. 214; Stroag v. Whitehead, 12 Wend. 64; Davenport v. Bradley, 4 Day, 309. † If the jury give more, the plaintiff must relinquish the *extra* damages, for if he enters up the judgment for the whole, which the jury gave, it is error, and cannot be amended or helped in any manner. So determined in B. R. H. 1773, Sandiford and Bean, Esq.; Cheveley v. Morris, 2 Bl. Rep. 1300, S. P. § It seems, however, that in an action on the case, when the damages assessed are greater than the sum laid in the declaration, but the sum laid in the writ is large enough to cover them, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. Palmer v. Mills, 3 Henn. & Munf. 502; Kennedy v. Woods, 3 Bibb, 322. When the amount of the verdict is more than the damages laid in the declaration, a *remittitur* may be entered for the excess. Fury v. Stone, 2 Dall. 184, S. C.; 1 Yeates, 186; Lewis v. Cooke, 1 Har. & McHen. 159; but the excess must be remitted before judgment. Bealle's Adm'r v. School's Ex'r. 1 Marsh. 475. See Smith v. Allen, 5 Day, 337. §

If the tenant vouches, the demandant shall not recover more damages against the vouchee than he hath counted of: for the vouchee comes in lieu of the tenant, and the judgment is given against the tenant.

8 H. 6, 11; Roll. Abr. 578.

But the plaintiff in *detinue* may recover more damages against the garnishee than he hath counted of; for his count is not against the garnishee, but against the defendant, and damages against him are for the delay after the count.

8 H. 6, 5, 11; Bro. *Damages*, 68, S. C.; Roll. Abr. 578, S. C.

In trespass for rescuing a distress, to his damage so much; if the defendant justifies the rescous upon special matter, upon which it is demurred for the plaintiff, he shall have damages as he hath counted of; (a) for the defendant hath acknowledged the trespass, and hath not denied the damages.

21 E. 3, 40 b; Roll. Abr. 578. (a) In debt for 200*l.* upon the 2 E. 6, for not setting forth tithes, if the defendant pleads the 31 H. 8, c. 13, § 21, and that the lands were discharged in the hands of the prior of B. at the time of the dissolution, &c., and thereupon issue taken; and at the trial the defendant cannot make good his plea; the value shall be taken as confessed, because the issue is joined upon a collateral point; and the defendant took not the value by protestation. Allen, 88. Ruled upon a trial at bar, and a verdict given for 200*l.* Vide Roll. Abr. 572.

Where the jury find greater damages than the party declares of, the court may, to prevent error, give judgment for so much as is stated in the declaration, *nullo habitu respectu* to the rest, else the party may release the (b) overplus, and take judgment for the rest.

Yelv. 45. (b) [But a *remittitur* cannot be entered in a term subsequent to that in which the judgment is entered. Wray v. Lister, 2 Str. 1110; Cheveley v. Morris, 2 Bl. Rep. 1300.] § Fury v. Stone, 2 Dall. 184; Bealle's Adm'r v. School's Ex'r. 1 Marsh. 475; Addis. 114. §

Also, though the jury cannot regularly give the plaintiff more damages than he hath counted of, yet may they award him costs distinct and separate from the damages; and though such costs (c) exceed the damages laid in the

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declaration, yet shall the plaintiff recover both; for the damages are given for the wrong, for which the action is brought, and the costs for the charge of the suit; the one before the suit, and the other in and for the suit.

For this vide 10 Co. 115 b; Cro. Eliz. 568; 2 Roll. Rep. 447; Cro. Ja. 69; Yelv. 70; Roll. Abr. 578; but vide 2 Inst. 288. (c) Where the jury may give 10*l.* costs, though they give but 10*l.* damages on the statute 21 Ja. 1, c. 16; Salk. 207; and vide tit. *Costs*. β In an action on a bond, the jury may give damages beyond the amount laid in the declaration, provided they do not exceed the amount of the penalty. *Payne v. Ellzey*, 2 Wash. 143; *Winslow v. Commonwealth*, 2 Hen. & Munf. 465; see 5 Munf. 494; 6 Munf. 282; 1 Bay, 482. g

3. *Must be assessed pursuant to the Plaintiff's Right, or the injury he has received: And herein of assessing entire Damages.*

If in a writ of entry *sur disseisin*, or in nature of an assize, a writ of inquiry of damages is awarded, the plaintiff shall recover his damages but from the time of the disseisin to the time of the award of the inquiry of damages, and not after, though the writ of inquiry be not served till seven years after; and if in such writ an issue is joined triable by verdict, he shall recover damages but from the time of the disseisin to the time of the verdict.

10 Co. 117.

But in a *præcipe quod reddat*, of a rent of the possession of the demandant himself, he shall recover arrears as well (a) pending the writ as before *usque diem judicii reddit*.

10 Co. 117. (a) But in personal actions the plaintiff shall recover damages only for the tort done before the action brought. 10 Co. 117.

The disseisee, in an action of trespass, may recover damages for the first entry without any regress.

Co. Litt. 257.

But after regress he may have trespass with a *continuando*, and therein recover for all the mesne occupation as well as for the first entry.

Co. Litt. 257; vide 1 Roll. Abr. 550.

So, in an action upon 5 R. 2, c. 7, for entering into land, *ubi ingressus non datur per legem terræ*, the plaintiff shall recover damages for the first tortious entry only.

Co. Litt. 257 a.

But in an action upon 8 H. 6, c. 9, where one enters by force; or enters peaceably and detains with force; or when one enters with force, or detains with force; the plaintiff without any regress shall recover treble damages, as well for the mesne occupation as for the first entry.

Co. Litt. 257.

If in case for not grinding at the plaintiff's mill, the plaintiff derives his title under a lease made to him 11 Ja., and then sets forth, that the defendant at several times from 2 Ja. to 12 Ja. did grind his corn elsewhere, he cannot have judgment, though after verdict, because the damages are assessed for all that time, viz., from 2 Ja. to 12, whereas the plaintiff's lease commenced 11 Ja.; so that the damages are given to the plaintiff before he had any title.

*Harbin and Green*, Hob. 189; *Moor*, 887; *S. C. Carth.* 387; 1 *Ld. Raym.* 248; 12 *Mod.* 131; *Comb.* 442; 2 *Salk.* 663, *S. P.* and *S. C.* cited.

In case the plaintiff declared, that J S, 19 Sept., 16 Car. 2, was retained as an apprentice to serve the plaintiff for nine years, and continued in his



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said service till the 31 Oct., 21 Car. 2, when the defendant procured the said J S to leave the plaintiff's service, (a) *per quod* the plaintiff *totum proficuum quod ratione servitii præd. J S per totum residuum termini recipere potuisset totaliter perdidit*; and (b) after verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended that damages were given for all the term, as well the time (c) to come as past; for the damages must be intended to be taxed according to the declaration; and if it should be intended otherwise, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given.

Hambledon and Veere, 2 Saund. 169; Lev. 299, S. C.; Carth. 261, S. C. cited. (a) The plaintiff declared for a battery of his servant, 19 Jan., &c., *per quod* he lost his service for a long time, viz. for the space of six months then next following, &c. After a verdict for the plaintiff, though the original bore *teste* before the end of the six months, yet the plaintiff had his judgment, for the viz. was more than needed, being not of the substance of the action, but for aggravation of damages only. Hunt v. Lawring, Hob. 284; Sims v. Gregory, Allen, 23, *per curiam*. ¶The declaration was of Michaelmas term of an assault on the 18th Oct., and an imprisonment from thence for twenty weeks. After verdict for the plaintiff, it was moved in arrest of judgment, that the action was brought too soon, and it appeared that damages had been given for an imprisonment long after the action was depending. But for the plaintiff it was argued, that the *continuando* in this case was laid under a *scilicet*, and therefore will not vitiate what is properly laid in time; and that this differs from all the cases where the time is affirmatively laid. Besides, it was laid, that he *did* imprison the plaintiff, and therefore respects a time past, and as to that only the evidence could be applied. And of this opinion was the court, and the plaintiff had judgment. Webb v. Turner, 2 Str. 1095. (b) In covenant against an apprentice for running away from his service before his time, whereby the plaintiff lost his service *for the said term*, which was not then expired, the plaintiff *demurred*; and by Twisden, J., though it has been adjudged to be naught after verdict, yet being on demurrer, it may be helped; for the plaintiff may take damages for the *departure* from the service only, and not for the loss of service during the term, and then it will be well enough. Horn v. Chandler, 1 Mod. 271. (c) In trespass, assault, and false imprisonment, the plaintiff declared, that the defendant on the 1st Feb., in the 8th of W. 3, with force and arms, &c. Upon not guilty pleaded, the plaintiff had a verdict, and the *postea* being stayed, the question was, whether the plaintiff should have his judgment; the declaration being of Easter term then last, and he having declared of a trespass on the 1st Feb., 8 W. 3, which time was not then come. But by the court—There must be evidence given of a fact done before the action brought; the time is but a circumstance of a thing done; for when by a traverse it is made part of the issue, such traverse is never good. So the plaintiff had judgment. Blackwell v. Eales, 5 Mod. 286; Carth. 389, S. C.¶

In trespass, the plaintiff declared, that upon the second day of July, anno 5 W. 3, &c., and from thence to the time of the action, he was possessed of two meadows adjoining to a river: and that the defendant, Aug. 2, in the same year, exalted his mill-banks to that degree, that thereby the water overflowed his (the plaintiff's) meadows, *per quod* he lost the use and profit of his meadows, from the said second of July to the time of the action; and after verdict and entire damages, judgment was arrested; for it was impossible that he should lose the use, &c., before the fact was done.

Prince v. Moulton, Carth. 386; 2 Salk. 663, S. C.; Comb. 442, S. C.; Ld. Raym. 248, S. C. [Yalden v. Hubburh, Com. Rep. 231; 2 Ld. Raym. 1382.]

But, where in trespass for erecting and continuing 300 perches of stone wall on the soil of the plaintiff, 2 April, an. 2 W. & M. *transgression. prædict. quoad continuation. mur. præd. a 20 die Feb. anno primo W. & M. usque diem exhibitionis billæ continuando*; it was objected, that the continuance being laid for one year before the commencement of the trespass, and entire damages being given, all was void; yet it was adjudged, that the continuance being for a time before the commencement of the action, was

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senseless and void; and it cannot be intended that any damages were given for a matter which was void in itself.

Bridges and Horner, Carth. 320.

In case, for stopping lights by erecting a new structure, the declaration concluded, that *occasione premassorum magna tenebritate obscurat. fuit et adhuc existit*, &c., after verdict and entire damages, it was objected, that by *adhuc existit*, the jury had given damages for a matter subsequent to the action, and that no damages can be given for a matter after the action commenced; (a) because if another action should be brought for the same thing, the former action could not be pleaded in bar to it; but it was resolved, that the *adhuc* should (b) refer to the time of the plaint levied, and not to the time of the declaration.

Carter and Cawthrop, Carth. 261; 4 Mod. 152, S. C.; 3 Lev. 345, S. C.; 1 Show. Rep. 366, S. C. (a) [In trespass, tort, &c., new actions may be brought for matter subsequent to the depending suit, and therefore damages cannot be given for it: but it is otherwise where a duty or demand has arisen, pending the writ, for which no satisfaction can be had by a new suit, for there such duty or demand shall be included in the judgment upon the action already depending; as in the old writ of annuity; *assumpsit* for principal and interest, upon a contract obliging the defendant, the principal, with interest from such a time. Robinson v. Bland, 2 Burr. 1086.] (b) But in an action *de uxore abducta*, and keeping her from him *usque* such a day, which was some time after the exhibiting of the bill, judgment was stayed, for the jury shall be intended to have given damages for the whole time mentioned in the declaration. Vent. 103. {Mr. Serjt. Williams, after a review of the cases on this subject, states the principle which appears to be established by them to be, "that where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment." 2 Saund. 171, c; 2 Johns. Rep. 287.} ¶ So, in trespass and false imprisonment, the plaintiff declared that the defendant imprisoned him the 1st Oct., 9 W. 3, and detained him in prison for four months; and after verdict for the plaintiff and entire damages, judgment was arrested, because the declaration being of Michaelmas term, 9 W. 3, and the damages being entire, and given for the imprisonment of four months from the 1st Oct., it appeared that the damages were given for imprisonment after the action commenced. Brasfield v. Lee, 1 Ld. Raym. 329; Hanbury v. Ireland, Cro. Ja. 618, S. P. And a judgment in C. P. was reversed in K. B. because the jury on the writ of inquiry had given damages for necessities provided after the action commenced, and to a time after the writ of inquiry was executed. Baker v. Backe, 2 Ld. Raym. 1382.¶

If an action upon the case be brought for speaking words all at one time; and upon not guilty pleaded, verdict be given for the plaintiff; though some of the words will not maintain the action, yet if any of the words will, the damages may be given entirely, for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation.\*

Roll. Abr. 576. But for this, and for what things the damages shall be said to be given, vide Godb. 343; Moor, 141, pl. 283, 708, pl. 987; Cro. Eliz. 329, 788; Bulst. 37; 3 Bulst. 283; Cro. Car. 237, 328; March, 48; Sid. 38; Winch. 33.—\* But, if the declaration consists of several counts, all the words in some of which are not actionable, and there is not any special damage laid, or if laid, not found, and a general verdict is taken for the plaintiff, (except as to the special damage, if any laid, and that is found for defendant,) the judgment will be erroneous, and may be avoided, by motion in arrest of judgment, or reversed, on error brought.—[It is the rule of the court of C. P. to award a *venire facias de novo* in such case, upon payment of costs, that the plaintiff may sever his damages. Anger v. Wilkins, Barnes, 478; Smith v. Haward, lb. 480.] §1 Binn. 546.¶

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But, if the action be brought for several words spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another time; and upon not guilty pleaded, a verdict be found for all the words, and entire damages given; this is not good. See *suprà*, n.

Moor, 706; Cro. Eliz. 329; Bulst. 37; 3 Bulst. 283; Cro. Car. 237, 328; Hutt. 131; Roll. Abr. 576.

If the plaintiff declares that he bought of the defendant *diversa bona et catalla, viz. unum fulcrum lecti* (*Anglice*, a field-bedstead) with a tester and curtains of say, *unum canopium*, (*vocat.* a canopy,) &c., and that the defendant assumed to deliver *bona præd.*, but had not, &c., and there is a verdict for the plaintiff, and general damages given, it shall not be presumed that any damages were given for the tester and curtains, which (a) were not alleged *positivè*, but only *expositivè*; and this exposition is too extensive, for *fulcrum* signifies the bedstead only.

10 Co. 130 a, 132 b. (a) *Trover de uno risco*, (*Anglice*, a trunk full of linen, &c.,) and damages intended to be given for the trunk only. Cro. Ja. 665.

If in an action upon a covenant divided into two (b) branches, the breach is assigned in one part only, &c., and the jury assess damages generally *pro fractione conventionis præd.*, this shall have relation to that part only in which the breach was assigned.

Steel and Spight, 2 Roll. Rep. 178. (b) A brought an action in an inferior court for slandering him in his trade, by which he lost his custom, within the jurisdiction of that court *et alibi*; and it was held maintainable, notwithstanding the *alibi*. Vent. 104, cited by Twisden to have been adjudged.

If in debt upon 2 E. 6, for not setting forth tithes growing upon seventy acres of land, &c., the jury as to sixty-six acres give damages, &c., and as to the five acres residue give damage, &c., whereas it ought to have been, as to the four acres residue; yet this being only (c) a miscounting of the jury, and no damage to any thereby, the plaintiff shall have his judgment.

Cressit and Burgis, Styl. 161. (c) An action upon the sale of several things for divers sums of money, *quæ quidem pecuniarum summæ attingunt ad 10l.*, whereas rightly computed, they came but to 9l., the jury gave damages less than 9l. and it was held good; but, if the verdict had been for 10l. it had been naught. Vent. 104, cited by Twisden to have been adjudged.

If in trespass for an assault, battery, and wounding, the defendant, *quoad* the force, pleads not guilty; and *quoad* the assault and battery, that he was removing a market-cross to a more convenient place, and the plaintiff interrupted him, *per quod mollitèr manus imposuit*, &c., and thereupon they are at issue, and the jury find the defendant guilty *de injuriâ suâ propriâ*; and (d) so recite the entire declaration of the assault, battery, and wounding, (though the wounding was not in issue,) and assess damages *occasione transgressionis illius* to 20l., it must be intended, that the damages were given for all in the declaration, viz., the wounding, though not in issue, and the jury cannot find (e) more than the plaintiff has declared for, and assess damages for it.

Calvert v. Arnold, Sid. 96. (d) But without such recital, it would not have been presumed that damages were given for what was not in issue. Hob. 187; Cro. Ja. 353. (e) Nor can they give damages for what they have not found. Bulst. 64.

If in trover, *inter alia, de una salsura*, (*Anglice*, a salting-trough,) there is a verdict for the plaintiff and entire damages: the declaration as to the trough being merely in English, the damages shall be intended given for the other

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particulars ; but, if the defendant had been acquitted of the other things, and expressly found guilty of this, it would have been otherwise.

Sid. 98 ; Lev. 99.

If in an avowry for rent due in money, and also for so many hens, it appears on the face of the avowry that the hens were not due at the time of the distress taken ; although there are entire damages and costs, yet the plaintiff may release the damages and rent for the hens, and take judgment only for the rent in money, (a) but need not release the costs.

Carth. 437 ; Morrice and Golder, adjudged, and a *remittitur* entered accordingly. (a) Byars and Newton, Trin. 28 ; Car. Rot. 728, S. P., said to be adjudged.

If an action upon the case is brought (b) upon two (c) promises, and both are found for the plaintiff, the jury may give entire damages for both, for this is at the peril of the plaintiff ; but, if the action does not lie for one of them, the plaintiff (d) shall not have judgment for the other. (e)

Roll. Abr. 570 ; Roll. Rep. 423 ; 3 Bulst. 258, S. C., the judgment being given on demurrer and entire damages assessed upon a writ of inquiry. (b) So, in other actions upon the case. Moore, 707 ; Cro. Eliz. 560 ; Hob. 189 ; 10 Co. 130 ; Moore, 281.—So, in debt. Brownl. 70.—So, in trespass. Styl. 174, 182, 399 ; 3 Leon. 213 ; Cro. Car. 21 ; Godb. 57.—So, in covenant. Cro. Eliz. 685 ; Cro. Ja. 439 ; Saund. 155.—And for this vide 5 Cro. 108 a ; 10 Co. 130 ; 3 Bulst. 231 ; Hetl. 51, 53 ; Lit. Rep. 61 ; Styl. 198 ; Cro. Eliz. 59 ; Cro. Ja. 239 ; Sid. 38 ; Moore, 281. [1 Stra. 621 ; Fort. 376 ; Andr. 21 ; 2 Ld. Raym. 1381.] (c) So, where the plaintiff alleges two breaches of an award, one of which is insufficient, and entire damages are given. Leon. 170 ; 5 Co. 108 ; 10 Co. 131, but vide Yelv. 35, and tit. *Arbitrament*. (d) Where entire damages shall hinder the plaintiff's judgment, vide 2 Roll. Abr. 99.—(e) [But, if one of the promises be insensible, or impossible to be performed, and there be a general verdict for the plaintiff with entire damages, the judgment will not be arrested ; because it is not to be intended that any part of the damages was assessed as to such a promise. 1 Roll. Abr. 577, pl. 5, 6. But a distinction is made by Lord C. J. Vaughan, in *Nichols v. Reeve*, 1 Freem. 83, between a legal impossibility of performing a promise, and a physical one ; that it is only with respect to the latter that the above rule holds : for in the other case, *non constat* to the jurors whether the promise be good or not in law, and therefore the presumption is, that they gave damages for it.]

So, where an action against an administrator was laid as follows : *ss. In consideration that the plaintiff had sold a mare to the intestate, he promised to pay the plaintiff tantam denariorum summam quantam equa predict. rationabiliter habere meruit*, and then avers in fact, *quod equa predict. rationabiliter habere meruit 8l.* ; which last promise being void, it being absurd to say that the mare deserved to have so much money, makes the whole void.

Carth. 254 ; Blackman and Cobbet, adjudged, and the judgment of the Court of C. B. in which there were entire damages, reversed accordingly.

#### 4. Where to be assessed jointly or severally, where there are several Defendants.

The jury cannot regularly assess (g) several damages for one trespass, with which the defendants are jointly charged by the plaintiff's writ or declaration ; for though in fact one was more malicious, and did greater wrong than the other, yet all coming to do an unlawful act, the act of one is the act of all the parties present.

11 Co. 6 b ; Cro. Eliz. 860 ; Cro. Ja. 118, 384 ; Roll. Rep. 31 ; Hob. 66, vide Bulst. 157. (g) For by finding them guilty *de præmissis*, they find them equally guilty, and it is a rule in law, that what the plaintiff had laid joint in his declaration, the jury cannot sever in their verdict. Carth. 20, *arguendo*. ¶ Callison et al. v. Lemons, 2 Porter, 145. ¶ On the trial of an action against two defendants, A and B, it was proved, that the assault by A was more violent than that by B. Lord Ellenborough, C. J., told the jury, that the damages could not be severed, so as to give more damages against A than against B, but that they might give their verdict against both, to the

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amount which they thought the most culpable ought to pay. *Brown v. Allen and Oliver*, 4 Esp. N. P. C. 158.]  $\beta$  See *Weakley v. Roger*, 3 Watts, 460; *Halsey v. Woodruff*, 9 Pick. 555. $\gamma$

But in trespass, if one defendant is found guilty at one time, and the other at another time, several damages may be (a) taxed.

11 Co. 6 b; *Brownl.* 233, S. C. (a) And the plaintiff hath election to take execution *de melioribus damnis*. 3 Mod. 102.

So, where they plead several pleas, as in an action of battery, if one pleads not guilty, and the other justifies, and both issues are found for the plaintiff; in such case he may enter a *nolle pros.* against one, and take judgment against the other, because their pleas are several.

*Walsh v. Bishop*, Cro. Car. 239; 3 Mod. 102, S. C. cited.

If in trespass against two, one appears against whom the plaintiff counts *simul cum*, &c., who pleads, and is found guilty and damages assessed, and after the other appears and pleads, and is found guilty, he shall be charged with the damages taxed by the first jury.

11 Co. 6 b; Roll. Rep. 31, S. C.; 10 Co. 119.

If in trespass against A, B, and C, for a battery and wounding, A appears, and the plaintiff declares against him, *simul cum*, &c., and A pleads not guilty, and a *venire* issues, &c., and after B appears, and the plaintiff declares against him *simul cum*, and B pleads not guilty, and a *venire* issues, and both these issues are tried at the same assizes, viz., that against A is first tried, and 200*l.* damages given; and after that against B is tried, and 50*l.* damages given; and after C appears and confesses the action, and a writ of inquiry is awarded upon the roll, but none issues; the (b) plaintiff at his election may have judgment for the damages given by the jury, and this shall bind all, for in judgment of law the several juries gave their verdict at the same time.

Sir John Heyden's case, 11 Co. 5 b; 1 Ro. Rep. 30, S. C.; *Johns v. Dodsworth*, Cro. Car. 192. Like point in an appeal of mayhem. (b) In trespass against A, B, and C, A and B justify; to which the plaintiff replies, and then they demur. C pleads another plea, whereupon issue is joined, and the demurrer is adjudged against A and B, and upon writ of inquiry damages are given; and after, the issue is found for the plaintiff, and damages given: the plaintiff may have his election, which damages he will take. *Headley v. Mildmay*, Roll. Rep. 395; Cro. Ja. 350, S. C., adjudged upon a writ of error; and the first judgment affirmed accordingly, because the writ is entire, and the defendants are all charged with one battery, though the declarations are several.  $\parallel$  In trespass against three, two of them pleaded, the other let judgment go by default; the jury, on trial of the issue, found for plaintiff, damages 35*s.* Afterwards, on the writ of inquiry against the other defendant, the jury assessed 2*s.* damages, and judgment was entered, that plaintiff do recover against two defendants 35*s.* and against the other 2*s.* On motion that the 2*s.* damages might be struck out, and judgment be entered against all three jointly for 35*s.*, the court said that plaintiff might take judgment *de melioribus damnis* where several damages are given, or enter a *remittitur*; but that taking damages for the whole makes the judgment bad in point of law, and that it is not amendable, not being the misprision of the clerk, but founded on the verdict. *Sabin v. Long*, 1 Wils. 30.  $\parallel$  {1 Hen. & Mun. 488, *Ammonett v. Harris*. So, if separate actions are brought against joint trespassers, the plaintiff may recover against each, but he can have but one satisfaction. He may elect *de melioribus damnis* and issue execution therefor against one of them; and the others must pay the costs of the respective suits against them. A recovery against one, without satisfaction, will not bar his recovery from the others. 1 Johns. Rep. 290, *Livingston v. Bishop*.}

[So, where two defendants in *assumpsit* severed in pleading, and the one pleaded a bankruptcy, which, on issue joined, was found for him; it was holden, that the plaintiff might enter a *nolle prosequi* as to him, and still proceed to final judgment and execution against the other.

*Noke v. Ingham*, 1 Wils. 89.]

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In trespass for an assault, battery, and wounding, the defendant *quoad* the battery and wounding pleads not guilty, and *quoad* the assault justifies, and both issues are found against the defendant, several damages shall not be found, for the assault is included in the battery and wounding.

Cro. Ja. 251. And if the damages should be found severally, it would be double.

If in trover and conversion of 2000 loads of coal, upon not guilty pleaded, the defendants are (a) found severally guilty for several loads of coals, and severally not guilty for the residue; the jury must assess several damages; (b) adjudged upon a writ of error in the Exchequer Chamber, and judgment against them severally for damages, according to the verdict, and entire costs.

Player v. Warn, Cro. Car. 54. (a) So, in trespass, if one defendant is found guilty in part only, and the other in all, the damages shall be several. Cro. Eliz. 860; Brownl. 233; Buls. 50. (b) But vide Carth. 20, where it is said that the contrary had been lately resolved in C. B., between Whorewood and Jackson. [And agreeably to that resolution the law is now settled. For where the count is of a *joint* trespass, and the jury find the defendants guilty of a *joint* trespass, or they all confess the trespass, the damages cannot be severed. Hill v. Goodchild, 5 Burr. 2790; Onslow v. Orchard, 1 Str. 422; Lowfield v. Bancroft, 2 Str. 910; Mitchell v. Milbank, 6 T. Rep. 199.]

In trespass and false imprisonment, and imposing the crime of treason on the plaintiff, against A, B and C, B confessed the action, A and C pleaded jointly not guilty, and were found guilty; the jury assessed damages, viz., 1000*l.* against A and 50*l.* against B and C each; and the plaintiff entered a *nolle prosequi* as to B and C, and took judgment against A only for the 1000*l.*: it was holden, that the defect of the verdict was (c) cured by the *nolle prosequi*; for as the plaintiff might have brought his action against them jointly or severally, so it is but reasonable that he should have the same election as to the damages; although it was objected that the plaintiff hath election *de melioribus damnis* only where the trials are at several times, and this was a fact of which they are all equally guilty, and that it was a contradiction to say that the plaintiff is injured by one to the value of 50*l.* only, and by the other to the value of 1000*l.*

Rodney v. Strode et al., adjudged in B. R. Pasch., 2 J. 2, and affirmed in the Exchequer Chamber, as also in the House of Lords, 1 W. & M., and a like judgment said to be lately given in B. R. between Trobarefoot and Greenway, Carth. 19; 3 Mod. 101, S. C.; Cro. Car. 243, like case; where it is said, though damages ought not to have been taxed severally, yet the plaintiff relinquishing his suit against the other, it is not material, no advantage being taken thereof. [Though if several damages be assessed in such case, and judgment thereupon entered up, it would be error, yet it is no ground to arrest the judgment. Carth. 19; 6 T. Rep. 199.] (c) For this vide Rast. Ent. 127, 583, 654; Roll. Abr. 784; Cro. Car. 54.

[If there be judgment by default as to part, and an issue upon other part, or in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue, as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury, who try the issue, shall assess the damages for the whole, or against all the defendants. In these cases, when the defendants who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant*, (a) *assumpsit*, (b) &c., the plea of one defendant, for the most part, enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none; and therefore, if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment of damages against

(E) Where the Court may increase or mitigate them.

the others, who let judgment go by default. But in actions of *tort*, as *trespass*, &c., where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such as shows the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default; (c) but, where the plea merely operates in discharge of the party pleading it, there, it shall not operate to the benefit of the other defendants, but, notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants. (d)

Tidd's Pr. 732, 5th edit.; 11 Co. 5; Dicker v. Adams, 2 Bos. & Pull. 163.  $\beta$  When one of two defendants pleads to issue, and the other lets judgment go by default, damages must be assessed against both at the same time, by the jury who try the issue. Van Schaick v. Trotter, 6 Cowen, 599.  $\gamma$  (a) 1 Lev. 63; 1 Sid. 76; 1 Keb. 284, S. C. (b) Ca. Pr. C. B. 107; Pr. Reg. 103, S. C.; 3 T. Rep. 662. (c) 2 Ld. Raym. 1372; 1 Str. 610. (d) 2 Str. 1108, 1122.

If there be a demurrer to part, and an issue upon other part; or, in an action against several, if some of them demur, and others plead to issue, the jury who try the issue shall assess the damages for the whole, or against all the defendants.

Tidd's Pr. 732.

But if, in trespass, one defendant lets judgment go by default, another demurs, and a third pleads to issue, and is acquitted, the plaintiff may assess several damages against the others.

2 Str. 1140, 1222.

If there be a demurrer to one count, and an issue on the other, and the plaintiff be nonsuited on the issue, contingent damages cannot be assessed on the demurrer.

Snow v. Como, 1 Str. 507.]

(E) Where the Court may increase or mitigate the Damages.

In (a) all actions at *nisi prius*, where damages are the principal, as the court can have no certain conusance of the cause, either by record or other matter apparent, they can neither mitigate nor increase the damages.

Roll. Abr. (a) In trespass for cutting his trees, upon not guilty pleaded, the court cannot increase the damages given by the jury, because it lies not in their conusance. 3 H. 4, 4; Bro. Costs, 7.—Nor can they diminish them, because the trespass is local, and it cannot appear to them what the damages were. Brownl. 204.—So, in case for words, though the court thought the damages excessive, yet they would not mitigate them. Palm. 314. And though at first they inclined to do it, yet upon great consideration they resolved to leave such matters of fact to the trial of the jury, who best know the quality and estate of the person, and the damages he hath sustained.

But in (b) battery *pro amputatione manus dextrae*, the court may increase the damages, for it is apparent to the court by the record and (c) view of the person.

22 E. 3, 11 b; 3 H. 4, 4; Roll. Abr. 572; Leon. 139, so done. (b) So, in an appeal of mayhem, upon view of the mayhem. 8 H. 4, 22; 3 Ass. 30.—In an appeal of mayhem the jury gave 20 marks damages, and upon view in court, and information of the surgeons there present, the court increased the damages to 100l. because he lost the use of his hand. Roll. Abr. 572, Freeman and Trevers. (c) It is not sufficient that the justices of *nisi prius*, upon view thereof, certify that he had sustained damages to such greater sum; for the justices of the court, out of which it issues, cannot increase

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the damages without their view. 8 H. 4, 23; Roll. Abr. 573; 3 Salk. 115; Ld. Raym. 176.—But, upon a view *in pais* by any of the justices of the court into which the *nisi prius* is returned, they may increase damages. 8 H. 4, 23; Bro. *Damages*, 74.  $\beta$  In an action for mayhem, the damages may be increased by the court on view of the party. Hoare v. Crozier, 2 Tidd's Pract. 928.g

So, in trespass, if judgment be given upon *nihil dicit*, and a writ of inquiry of damages executed, the court may increase or (a) diminish the damages found by the inquest; for that they might have awarded damages, according to their discretion, without such writ: adjudged in an action of assault, battery, and wounding; (b) the manner of doing thereof being specially laid in the declaration; though the inquest gave 200*l.* damages, yet, upon examination of surgeons, and upon view of the wound in court, and for the heinousness of the fact, being done in the high street in the daytime with a stiletto, with an intent to kill him; and the surgeon by agreement being to have 150*l.* for the cure, the plaintiff being in great danger of death, and having lost a pottle of blood, as the surgeons said, the court increased the damages to 400*l.* *in toto*; and judgment given accordingly.

19 H. 6, 10, adjudged; Roll. Abr. 573; Styl. 310, S. C. adjudged. (a) Judgment in battery by *non sum informatus*, and upon a writ of inquiry of damages found, &c. And upon a motion to mitigate the damages, the court said, that in such cases they never alter the damages. Lit. Rep. 150; Hetl. 93; Ld. Raym. 176. (b) Otherwise, if the wounding be not particularly expressed in the declaration, that the court may judge thereof by the record; for it ought to appear that the wounding was by this battery, and the party is not to be viewed in court by a bare averment at the bar. Styl. 345.—So, in an appeal of mayhem, when the particulars of the mayhem are not expressed in the declaration, the court, upon view of the mayhem, cannot increase the damages, unless the judge of *nisi prius*, before whom tried, certify the particulars of the mayhem to the court; or where tried before a judge of the same court, who affirms that these are the mayhems that were proved upon evidence; otherwise *non potest constare curiæ*, that these are the same mayhems for which the plaintiff has declared; Latch. 223; Sid. 108, 177. [In Austin v. Hilliars, Hardr. 408, it was adjudged, that the damages may be increased, if the word *maihemavit* be in the declaration, though the better way is to express the manner of the mayhem. And in another case, the court seemed to think a declaration that the defendant assaulted and maimed the plaintiff in his left hand, particular enough. Brown v. Seymour, 1 Wils. 6;  $\beta$  Hoare v. Crozier, 2 Tidd's Pract. 928.g If the wound be apparent, though it be not a maim, the damages may be increased by the court. Cook v. Beal, 1 Ld. Raym. 176.]

In trespass for an assault and battery against A and B, A appeared, &c., and a verdict was given against him, and damages taxed to 30*l.* and the court upon view of the mayhem increased the damages to 40*l.* and after a verdict was given against B and damages taxed; and then it was moved that the court, upon another view of the wound, would increase damages against B, for that A had murdered the officer that came to serve the execution upon him for the 40*l.*, so that possibly the plaintiff might recover nothing against A. But it was denied by the court, for that they could have the view but once in the same action; though if he had brought several actions, it would have been otherwise; but the court directed the plaintiff to stay still A was hanged, and then they might have the view and increase the damages.

Lit. Rep. 51.

In trespass *Quare insultum fecit et maletractavit* the wife of the plaintiff, *et equam*, upon which the wife rode, *percussit*; so that the wife was thrown, and another horse trod upon her, *per quod* she lost the use of three fingers, &c.; there was a verdict for the plaintiff, and 8*l.* damages; and the court refused to increase the damages upon view of the mayhem and hearing surgeons, because there was no mayhem or wounding directly done by the



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party, but rather by accident, viz., by the coming, &c., of another horse, which, how he came, &c., or whether the wife might have avoided him, is matter of evidence.

Burford v. Dadwell, Sid. 433; 1 Mod. 24, S. C., but not so well reported.

¶ An inferior court may increase damages *super visum vulneris*, as well as a superior court; because the law is the same in the one court as it is in the other.

Ridge v. Pitt, P. 33 Car. 2, B. R.; 1 Lill. Pr. Reg. 534.¶

The courts have a general discretionary power, except in special cases, as (a) local trespasses, &c., either to increase or abridge the damages found by an (b) inquest of office.

Roll. Abr. 573. (a) 27 H. 8, 2, pl. 8; 19 H. 6, 10, pl. 28; Brownl. 204. (b) In action for taking his goods, if the defendant avows, upon which it is demurred, and adjudged for the plaintiff, or upon default, and damages found upon the writ of inquiry of damages, the court may increase them; for the court (this being upon demurrer) might\* have awarded damages without inquiry; and therefore the inquest is but for their information. 14 H. 4, 9; 3 H. 6, 29 b; Yelv. 152; Brownl. 214.—But, where on a writ of inquiry the court refused to mitigate damages, vide 3 Leon. 150; Godb. 135; Lit. Rep. 150; Hetley, 93.—\* *Qu. de hoc?* The constant practice is, to award a writ of inquiry to the sheriff who summons a jury, to assess the damages, which done, the inquest is returned to the court. β In an action sounding in damages, when the judgment is by confession, but for no certain sum, the court cannot assess the damages, but a writ of inquiry should be executed. Dunbar v. Lindenberger, 3 Munf. 169; Owings v. Goodwin, 1 Harr. & Johns. 33. γ ¶ “A writ of inquiry is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages.” So said by Wilmot, C. J., on a motion to set aside a writ of inquiry for excessive damages, where judgment had gone by default, in an action of trespass for breaking and entering the plaintiff’s house, and opening and searching several boxes and drawers therein. Bruce v. Rawlins, 3 Wils. 61. So, where the plaintiffs obtained an interlocutory judgment in an action of *assumpsit*, and a writ of inquiry was awarded, it was said by the same judge, “that the taking of the inquisition and entering final judgment were only the conclusion and necessary consequences of the interlocutory judgment; for the court themselves, if they had so pleased, might, upon the interlocutory judgment, have assessed the damages, and given final judgment thereupon; and the inquisition is only a matter of course taken to inform the conscience of the court. Hewit v. Mantell, 2 Wils. 372. So in *Theilussan v. Fletcher*, Dougl. 316, it was observed by Buller, J., “that writs of inquiry are often sued out in cases where they are not necessary; as, for instance, in actions of covenants for payment of a sum certain; as in *Holdip v. Otway*, 2 Saund. 107, *et infra*, (F).”¶

In trespass for taking his goods to the damage of 20*l.* if the defendant pleads an arbitrament made in another county, and this is tried against the defendant, and damages assessed for the trespass; yet, inasmuch as this foreign jury could not have full consance of the trespass, and the defendant hath not denied the damage to be according to the count, the court, with the assent of the plaintiff, may increase the damages, and to so much as the plaintiff hath counted.†

13 Hen. 4, 7 b; vide Roll. Abr. 578; All. 88. † *Qu. if this is law?* The plaintiff might have produced his evidence before this as well as before another jury; and whether setting aside the verdict would not be more proper?

On the statute of Westm. 2, c. 12, which gives damages to an appellee on a false and malicious appeal; if the jury give too great damages, the court may abridge them; or, if they give too small damages, the court may increase them; for after the acquittal of the appellee, their inquiry as to damages is to be considered only as an inquest of office. Also, the (c) words of the statute are, *Damages shall be given according to the discretion of the justices, &c.*

2 Hawk. P. C. c. 23, § 147. (c) By the statute 3 E. 1, c. 20, it is enacted, that if a

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trespasser in parks and ponds is attained at the suit of the party, great and large amends shall be awarded, according to the trespass; in the explanation of which statute, it is said, that if the damages are too small, the court hath power to increase them, for that the word *award* properly belonged to the court. 2 Inst. 200.

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If trespass is brought against overseers of the poor, &c., for any act done by authority of 43 Eliz. c. 2, and there is a verdict for the defendant, the jury shall assess the damages which shall be (a) trebled by the court.

Yelv. 176. (a) So, on the statute of Westm. 2, c. 26, the court shall double the damages. 2 Inst. 416.—So, on the statute, 23 H. 6, c. 10; Cro. Car. 438.

(b) No damages can be given to the party grieved upon an indictment, or any (c) other criminal prosecution; and where, by statute, damages are given to the party grieved by the offence intended to be redressed, they cannot be recovered on an indictment grounded on such statute, unless such method of recovering them be expressly given by the statute; (d) but they ought to be sued for in an action on the statute, in the name of the party grieved; yet the court may, by (e) virtue of a privy seal, give to the party injured part of the fine set on the offender, or (g) may induce a defendant to make satisfaction to the prosecutors, by giving an intimation, that on that account the fine to the king shall be mitigated.

(b) Roll. Abr. 220; 2 Roll. Abr. 83; Cro. Car. 531. (c) Notwithstanding the king, by his commission, erecting a new court, expressly directs, that the party shall recover his damages by such a prosecution. Cro. Car. 558; 2 Hawk. P. C. c. 25, § 3. (d) Jon. 380; Cro. Car. 438, 448. (e) 1 Keb. 487.—May give the third part of the fine assessed. 2 Hawk. P. C. *ubi suprà*. (g) Said to be every day's practice. 2 Hawk. P. C. *ubi suprà*.

In all actions in which the plaintiff is to be recompensed in damages, the jury must ascertain the damages by their verdict, nor can such omission or defect be supplied by writ of inquiry; for, if this were permitted, the party would be deprived of his remedy by attain against the jury for excessive damages; for no attain lies against them on a writ of inquiry, it being an inquest of office.

10 Co. 119; Latch. 113; Roll. Abr. 272; 2 Roll. Abr. 112; Skin. 595, pl. 8; Salk. 205, pl. 3.

So, in a writ *de valore maritagii*, where issue was joined on the tenure, and the jury assessed 40s. damages, and 10s. costs, but did not inquire of the value of the marriage; it was holden, that this defect (h) could not be supplied by writ of inquiry.

10 Co. 118 b, Cheney's case. (h) So, in *detinue*, where the jury gave a verdict, but omitted to inquire of the value of the goods. 10 Co. 119 b. But in Skin. 595, and Salk. 205, this point is said by Holt, C. J., to have been otherwise determined, but, as he thought, contrary to law, being against Cheney's case.

If there be (i) a demurrer upon evidence, though the jury are thereby discharged of the issue, yet they may tax damages conditionally, viz., if judgment shall be given for the plaintiff; or when the demurrer is determined, it (k) may be done by (l) writ of inquiry, and the more usual course is where there is a demurrer to evidence, to discharge the jury without further inquiry.

Darrose v. Newbott, Cro. Car. 143. (i) Where there is a demurrer to part, and issue to part. 2 Roll. Abr. 722. (k) Where an omission of taxing damages by the jury cannot be supplied by writ of inquiry, but a *venire facias de novo* shall go. 2 Roll. Abr. 321.—Where the court will refuse a writ of inquiry, but will award a new *venire*. 22 E. 3, 5; Roll. Abr. 571. (l) Where upon a writ of inquiry the plaintiff is not bound to prove his property. Cro. Ja. 220; Yelv. 151; Brownl. 214.

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If in debt upon a bill obligatory, the plaintiff hath judgment (a) by default, the court, by the assent of the plaintiff, which is always entered upon record, may tax the damages, *occasione detentionis debit.*; (b) but, if he will not assent thereto, he may have a writ of inquiry. But this election is in the plaintiff, not in the defendant. (c) Also, it is said to be the course and practice of both courts upon a judgment in debt, (d) by default or confession, to tax damages as well as costs.

Holdip and Otway, 2 Saund. 106, 107; Sid. 442, S. P.; Fitz. Bar. 283. (a) So, if a verdict is found for the plaintiff, and the jury do not assess damages, &c., for the debt is certain, and the loss of the plaintiff apparent. Dyer, 105, in margine.—In replevin, the plaintiff is nonsuit; the court, without a writ of inquiry, may assess damages, because they accrue not in respect of any local matter, but it is the delay in the non-payment of the rent; *secus*, where judgment is given for the plaintiff, for he ought to recover for taking his cattle, and the damages may be greater or less, according to the value of the cattle and circumstances of taking. Ognell's case, 3 Leon. 213. (b) Cro. Ja. 415. (c) ¶ Where, therefore, the plaintiff had sued out a writ of inquiry, the court would not set it aside at the instance of the defendant, holding, upon the authority of the case of Holdip v. Otway, that the election to proceed in this course was with the plaintiff and not with the defendant, and that having sued out the writ of inquiry he had made his election. Blackmore v. Flemyng, 7 T. Rep. 446. But the mere award of a writ of inquiry is not conclusive on the plaintiff, but he may afterwards elect to have his damages assessed by the court. Gould v. Hammersley, 4 Taunt. 148. ¶ (d) So, upon demurrer. Latch. 113. ¶ In cases where the demand is certain, and it is perfectly clear to the court what the damages must be; they will, on the application of the plaintiff after interlocutory judgment, either themselves assess the damages, or direct them to be assessed by the proper officer. In debt on a judgment, it was moved for the plaintiff that the court should tax the damages, namely, interest, without a writ of inquiry, and, after some doubt made by the chief justice, it was at last referred to the secondary to tax the damages. Roo v. Apsley, 1 Sid. 442; 11 H. 7, 5 b; Bro. *Default*, 105; 1 R. Abr. 571, (J.), pl. 1, 2, 3. And it is now the constant practice upon interlocutory judgments in actions upon bills of exchange and promissory notes. Shepherd v. Charter, 4 T. Rep. 275; Rashleigh v. Salmon, 1 H. Bl. 252; Andrews v. Blake, *Ibid.* 529; Longman v. Fenn, *Ibid.* 541.—The like is done in actions of covenant for the payment of a sum certain; Thellusson v. Fletcher, Dougl. 316; Berthen v. Street, 8 T. Rep. 326; Byrom v. Johnson, *Ibid.* 410; or on an award, Meggison v. —, K. B. *per cur.*; Tidd's Pr. 568, 5th edit. So, in an action on a bail bond; Moody v. Pheasant, 2 Bos. & Pull. 446; or on a replevin bond, Middleton v. Bryan, 3 Maule & Selw. 155. But, where the damages are not already determined, or the *quantum* is not ascertainable merely by figures, the inquiry must go to a jury. Where the defendant had suffered judgment by default in an action of *assumpsit* on a foreign judgment, the Court of King's Bench refused to order a reference to the master, saying, that it was an attempt to carry the rule farther than had yet been done; and as there was no instance of the kind, they would not make a precedent for it. Messin v. Lord Massareene, 4 T. Rep. 493. Nor would they make such a reference in an action on a bill of exchange for foreign money, the value of which is uncertain, and can only be ascertained by a jury. Maunsell v. Lord Massareene, 5 T. Rep. 87; Bagshaw v. Playn, Cro. El. 536; Rands v. Peck, Cro. Ja. 617; Cuming v. Monro, 5 T. Rep. 87. Nor on a motion to refer a bill of exchange to the officer to compute principal, interest, exchange, re-exchange, charges, expenses, and costs, would the court of C. P. allow it as to the *charges and expenses*. Goldsmid v. Taite, 2 Bos. & Pull. 55. And in a later case the Court of K. B. would not direct the master to allow *re-exchange* in an action on a bill of exchange drawn in Scotland upon, and accepted by, the defendant in England. Napier v. Shneider, 12 East, 420. Nor can such a reference to the officer be had in *assumpsit* for a sum certain due upon an agreement; *Per Cur.*, H. 37 G. 3, B. R.; Tidd's Pr. 569, 5th edit.; nor in an action upon a bottomree bond; Palin v. Nicholson, E. 38 G. 3; B. R. *Ibid.*; nor where judgment has gone by default in an action of covenant upon a deed of indemnity; it being open to the defendant in such a case to enter into questions of collateral satisfaction before the sheriff's jury; Denison v. Mair, 14 East, 622; nor to ascertain the amount of the damages in an action of debt on a judgment recovered on a bill of exchange; for a jury may possibly give no damages at all; Nelson v. Sheridan, 8 T. Rep. 395. Nor will a reference be made to calculate interest in any case where there is no express stipulation for the payment of it, except

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perhaps in the case of bills of exchange and promissory notes, the course of dealing in the mercantile world with respect to which is so universal to allow interest upon them, that it may be considered as in the contemplation of the parties at the time. 14 East, 626. Where there was a demurrer to one count on a bill of exchange, and judgment for the plaintiff, and a plea to other counts on which issue was joined, the court referred it to the master to see what was due on the former. *Duperoy v. Johnson*, 7 T. Rep. 473. In such case, however, a *nolle prosequi* must be entered on the other counts, *Heald v. Johnson*, 2 Smith, 46, which may be done at any time before final judgment. *Per Cur.*, H. 48 G. 3, K. B.; Tidd's Pr. 369, 370, notes. Where the original bill of exchange has been lost, and no tidings of it could be gained, the court have permitted a reference of this sort to the master upon the production of a copy verified by affidavit. *Brown v. Messiter*, 3 Maule & Selw. 281.¶

If, in replevin, the defendant avows as overseer of the poor for a distress for a rate, upon the 43 Eliz. c. 2, and on the trial the plaintiff is nonsuit; if the jury omit to find damages, this omission will be supplied by writ of inquiry; for if the jury had inquired, they had inquired only as an inquest of office, on which no attaint lies. ¶ But in this case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll, that the defendant was overseer of the poor, and that the action was brought against him for something done by virtue of his office.

*Herbert v. Waters*, Salk. 205; *Skin*. 595, S. C. adjudged; *Valentine v. Fawcett*, Ca. temp. Hardw. 138; 2 Str. 1021, S. C.; *Say*. Rep. 214, S. C.; *Dewell v. Marshall*, 2 Bl. Rep. 921; 3 Wils. 442, S. C.¶

Also, the omission of the inquiry of the value of the church in a *quare impedit*, may be supplied by a writ of inquiry.

10 Co. 119; *Skin*. 596, S. P. agreed.

But in an avowry for a rent-charge, according to the 17 Car. 2, c. 7, the omission of the jury cannot be supplied by writ of inquiry; for that statute expressly requires, that the same jury shall inquire of the rent arrear, value of the cattle, &c.

¶ *Sheafe v. Culpepper*, 1 Sid. 380; *Sir T. Raym.* 170, S. C.; 1 Ventr. 40, S. C.; 1 Lev. 255, S. C.; 2 Keb. 409, 431, 536, S. C., and in *Herbert v. Waters*, 1 Salk. 205, and *Skin*. 595, S. C., cited and agreed to be law.¶

¶ So, where no damages are given on trying a traverse of the return to a writ of *mandamus*, the omission cannot be supplied by writ of inquiry.

*Kynaston v. Mayor, &c., of Shrewsbury*, 2 Str. 1051.¶

Where in an action of libel the defendant pleaded the general issue, and eight special pleas of justification, and the jury found for the plaintiff on the general issue, and on two of the pleas of justification, but assessed no damages, and for the defendant on the six remaining special pleas, and the Court of King's Bench afterwards allowed the plaintiff to enter up judgment *non obstante veredicto* on the issues found for the defendant, on the ground that the pleas were bad in law, and awarded a writ of inquiry to assess damages and final judgment for the damages assessed, the Court of Exchequer Chamber on error reversed the judgment of the King's Bench as to the award of inquiry and the judgment thereon, remitted the record to the King's Bench, and directed that court to award a *venire de novo* to try the general issue, and also the issues on the pleas found for the plaintiff, holding that the verdict found for the plaintiff on those issues was void, because the jury ought to have assessed damages thereon.

*Clement v. Lewis*, 3 Bro. & Bing. 297; 7 Moo. 200; and see S. C. 3 Barn. & A. 702.

A mere miscalculation of damages and costs will not avoid a judgment.

*Dunn v. Crump*, 3 Bro. & Bing. 309; 7 Moo. 137, and cases there cited.

## (H) Of Damages in Maritime Cases.

If the plaintiff has evidently sustained some damages, and the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit a verdict for plaintiff for nominal damages.

*Feize v. Thompson*, 1 Taunt. 121.

Liquidated damages cannot be recovered on an agreement containing various stipulations of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.

*Kemble v. Farren*, 6 Bing. 141.

## B (G) Of double and treble Damages.

By double or treble damages is understood twice or three times as much as single damages. Statutes giving such damages having been liberally construed. The construction has been different from that given to double or treble costs.

Vide ante, *Costs*, C., and *Buckle v. Bewes*, 4 B. & C. 154; 1 McClell. R. 214, 567; 1 Mass. 153; *Witherton v. Hildebrand*, 1 Miss. 280.

When double or treble damages are given by a statute, the demand of such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of the statute.

*Rees v. Emerick*, 6 S. & R. 288; *Morrison v. Gross*, 1 Browne, R. 9; *Brown v. Bristol*, 1 Cowen, 176; *Benton v. Dale*, 1 Cowen, 160; *Hubbell v. Rochester*, 8 Cowen, 115; *Livingston v. Platner*, 1 Cowen, 175; *Beekman v. Chalmers*, 1 Cowen, 584.

For the violation of a patent-right, the jury should find the actual damages, and the court will treble them.

*Gray et al. v. James*, Pet. C. C. R. 394; *Cross v. The United States*, 1 Gallis. R. 26.

## (H) Of Damages in Maritime Cases.

Supposed profits are not to form an item for damages in cases of restitution. (a) The prime cost of property lost, and in cases of injury, the lessened value of the property, with interest thereon, is the true rule in such cases for estimating damages. (b) When the seizure is illegal, the original wrongdoers may, under certain circumstances, be made responsible in vindictive damages, but not the owners of a privateer, who are only constructively liable. (c)

(a) *The Lively*, 1 Gallis. 315. (b) *La Armistad del Rues*, 5 Wheat. 385. (c) *The Amiable Nancy*, 3 Wheat. 546.

The commander of a squadron is liable to individuals, for the trespass of those under his command, in case of positive or implied orders, or when he aids by his actual presence and co-operation. (d) And so is the commander of a ship of war of the United States, who seizes a vessel on the high seas without probable cause. (e) But when there is probable cause the captors will not be liable. (g) The owners of a privateer are liable for the conduct of their agents, the officers and crew. (h)

(d) *The Eleanor*, 3 Wheat. 345. (e) *Maley v. Shattuck*, 3 Cranch, 458. (g) *The Liverpool Packet*, 513; *The Mariana Flora*, 11 Wheat. 1. (h) *Del Col v. Arnold*, 3 Dall. 333.

The holder of goods under a respondentia bond with an assignment of the bill of lading, may recover damages in an action of trespass against a wrongdoer for taking them unlawfully, to the full value of the property, though it exceeds the amount of the debt due on the bond.

*The Pacific Insurance Co. v. Conrad*, 1 Baldw. 141.

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## (I) Damages in Patent Cases.

Damages cannot be recovered for expenses incurred in soliciting from the United States compensation for the illegal capture, nor for a premium of insurance, no premium having been paid.(a) But counsel fees in prosecuting and defending successfully a case of admiralty jurisdiction may be recovered as part of the damages.(b)

(a) *Maley v. Shattuck*, 3 Cranch, 458. (b) *Canter v. The American and Ocean Insurance Co.*, 3 Pet. 554.

## (I) Damages in Patent Cases.

As to the injury sustained in order to be entitled to damages, it must be for a violation of the patent right. In a case where a patent was taken out for a new combination of existing machinery, and claims only the combination, unless that combination has been substantially violated, the patentee cannot recover damages.(c) But the least violation of the patentee's rights will entitle him to damages; as, if the defendant merely make the machine, but not use it, nominal damages will be given.(d) It is not a violation of his right to use a machine which he has himself granted, or agreed to deliver, for such an agreement necessarily implies the right to use it as the grantee pleases, or to hire it to another.(e)

(c) *Odiome v. The Amesbury Nail Factory*, 2 Mason, 28. (d) *Whittemore v. Cutter*, 1 Gallis. 478. (e) *Gray v. James*, Pet. C. C. R. 394.

In measuring the amount of damages the jury may give "actual damages" or such as the plaintiff can actually prove he has sustained, as contradistinguished from vindictive damages.(g) They may give merely nominal damages where there has been in fact no injury, as where the machine has been *made* but not *used* in violation of the patentee's right.(h) The jury may, in their discretion, give to the plaintiff, as part of his actual damages, such expenses for counsel fees, &c., as have been necessarily incurred by him in vindicating his right, and which are not taxable in the bill of costs.(i) The law gives to the plaintiff, for an infringement of his patent right, treble the actual damages sustained by him; and treble the amount of profits actually received by the defendant, in consequence of using the plaintiff's invention, will be allowed.(k)

(g) 1 Gallis. 478. (h) *Ibid.* (i) *Boston Manufacturing Company v. Fiske*, 3 Mason, 119. (k) *Lowell v. Lewis*, 1 Mason, 182.

In actions for the recovery of damages for the violation of a patent right, the plaintiff may recover against one of two defendants.(l) A sheriff who sells, by virtue of his office, the materials of a patented machine, does not thereby render himself liable to an action for the infringement of the patent right.(m)

(l) *Reutgen v. Kanowas*, 1 Wash. C. C. R. 168. (m) *Sawin v. Guild*, 1 Gallis. 485.

## DEBT.

§ DEBT is a sum of money due by certain and express agreement;(n) in a less technical sense, it is any claim for money; and in a still more enlarged sense, it is any kind of a just demand.(o) Debt is also used to signify an

## (A) In what Cases an Action of Debt will lie.

action of debt, which is a remedy for the recovery of a debt *eo nomine* and in *numero*, though damages, generally nominal, are awarded for its detention. (p)

(n) 3 Bl. Com. 154. (o) Bouv. L. D. h. t. (p) 1 H. Bl. 550; Bull. N. P. 167; Cowp. 588.g

(A) In what Cases an Action of Debt will lie.

(B) At what Time it shall be said to have accrued.

(C) Who may bring Debt: And herein, of the Privy of Contract and Estate.

(D) Against whom it may be brought.

(E) Where Debt is the proper Action, and not Covenant Case, &c.

(F) Of the Manner of bringing the Action, and where it must be brought in the *Debet & Detinet*, or *Detinet* only.

(G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

## (A) In what Cases an Action of Debt will lie.

An action of debt is said to be founded upon contract, either express or implied; in which the (a) certainty of the sum or duty appears, and therefore the plaintiff is to recover the same in *numero*, and not to be repaired in damages by the jury, as in those actions which sound only in damages; as *assumpsit*, *trover*, &c.

4 Co. 90; Slade's case, Vaugh. 101. β The United States v. Colt, 1 Pet. C. C. R. 145; Raborg v. Peyton, 2 Wheat. R. 386; Bullard v. Bell, 1 Mason, 243; United States v. Lyman, 1 Mason, 482. When the obligor binds himself, in the same contract, to pay distinct sums of money at different times, an action of debt lies on each sum as it becomes due. Faw v. Marsteller, 2 Cranch, 10. Debt is the proper form of action for the recovery of money from a stakeholder of a bet on a trotting-match. M'Keon v. Caherty, 3 Wend. 494.g (a) Hence debt due by specialty can only be recovered by action of debt.—If upon a submission to arbitration, the arbitrators award the payment of a certain sum of money, debt lies; but, if they award the doing of something advantageous to the party only, an action on the case. Vide tit. *Arbitrament and Award*. If one makes a bill to another in these words, *Memorandum, I owe to A B 20l. to be paid in watches*; an action of debt must be brought for the money, and not an action for the watches, for the number of watches is not certain. And. 117.

But, if in an (b) action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring an action of debt for those damages.

(b) As in waste, 43 E. 3, 2; and vide Roll. Abr. 600, 601, several cases to this purpose.—[Debt will lie on a foreign judgment, without stating in the declaration, or proving the giving of the judgment. Walker v. Whitter, Dougl. 1.] β Debt is the proper form of action on a judgment obtained in a sister state, before a court of competent jurisdiction of the subject and of the person of the defendant. Mills v. Duryee, 7 Cranch, 481; Andrews v. Montgomery, 19 Johns. 162; Hitchcock v. Fitch, 1 Caines, R. 461; Hubbell v. Cowdrey, 5 Johns. 132; Taylor v. Bryden, 8 Johns. 173; Borden v. Fitch, 15 Johns. 121.g

Also, if after judgment for the plaintiff in B. R. the defendant brings a writ of error in (c) *cam. scacc.*, an action of debt may be brought in B. R. upon the judgment, pending the writ of error; and the defendant cannot plead *nul tiel record*; for by the writ of error the transcript of the record only is removed.\*

Sid. 236; Lev. 153; Raym. 100. S. C. (c) So, after writ of error brought in parliament. Sid. 236. But for this vide Style, 124; Mod. 121; 3 Lev. 397; 2 Vent. 261; 3 Keb. 330, and the title *Error*.—\* But the court, on motion, will stay the suit, the defendant giving judgment, and make a rule to stay execution till the writ of error on the principal judgment is determined.

## (A) In what Cases an Action of Debt will lie.

Debt lies in the Marshalsea, or any other court, upon judgments in C. B. or B. R., and upon *nul tiel record*, the issue shall be tried by *certiorari*, and *mittimus* out of Chancery.

Salk. 209, *per Cur.*

Every contract must be legally (a) entered into, and the (b) consideration thereof must be lawful, otherwise an action of debt will not lie.

For this vide head of *Obligations*.

(a) If a man by deed acknowledges that he hath so much money of J S's due to him, in his hands, though here is no contract of borrowing between them, yet J S may have an action of debt against him. 11 H. 6, 39. (b) As marriage, work, soliciting a cause, &c., vide Roll. Abr. 593, several such instances.

If a sheriff levies a certain sum of money on a *levari facias*, at the suit of J S, and returns the writ (c) served, J S may have an action of debt against the sheriff, without any actual contract; for the levying of the money to the use of J S is a contract in law that he should pay it over.

Hob. 206; Moor, 886; Brownl. 5. And where it will lie against the executor of the sheriff, vide tit. *Sheriff*, and tit. *Executors and Administrators*. (c) Otherwise, where he returns, that he hath taken goods into his hands to such a value, which remain *pro defectu emptiorum*. Cro. Ja. 514; 2 Roll. Rep. 57; Godb. 276; and vide March, 13. But, if he returns, they were rescued from him, he shall be charged; for he might have taken the *posse comitatus*, &c. Mildmay v. Smith, 2 Saund. 343; Sly v. Finch, Cro. Ja. 514; Godb. 276, S. C.; Clark v. Withers, 2 Ld. Raym. 1075.

If (d) a statute prohibits the doing of a thing under a certain penalty, and prescribes no particular method for the recovery thereof, the party entitled to the penalty may recover the same by action of debt.

Roll. Abr. 598. (d) As 14 H. 8, c. 5, against practising physio without license.—2 & 3 Ed. 6, c. 13, which gives the treble value for not setting forth tithes. Roll. Abr. 598, and which is now the common practice.

An action of debt lies by a sheriff upon the statute of 28 Eliz. c. 4, for his fees given by the statute, for an execution served by him; though the statute does not say that he shall have his fees, or any action for them, but only says, that he shall not take, for (e) any execution served, any consideration or recompense besides that thereafter in the said act mentioned, &c.

Roll. Abr. 598; Latch. 17, 51; Noy, 75. (e) The sheriff brought debt for his fees of executing an *elegit*; and held by Holt that it lay; for it is all the execution the plaintiff in the original action can have on this judgment; and he may enter on the land extended, if he can, without force. Salk. 209, vide Cro. Car. 286.

The action of debt is a proper remedy which the law gives for the recovery of rents reserved upon leases for (g) years; but this extended not to (h) freehold rents; the reason whereof, and how it is now remedied by 8 Ann. c. 14, vide title *Rents*.

Co. Lit. 162 a. (g) Also, the grantee for years of an annuity may have an action of debt for the arrears. Cro. Eliz. 268, 896. (h) But, if there had been tenant for life of a rent, and he died, the rent being in arrear, his executor, by the common law, might have an action of debt for the arrears, because there was no other remedy. 4 C. 49 a.

If a lessee for years assigns over his whole term by indenture, reserving rent, the lessee, by the name of rent, may recover in an action of debt upon the (i) contract; although it was objected, that the lessee having no (k) reversion, it was to be considered as a sum in (l) gross, and therefore not recoverable until the term was expired.

Carth. 161, Newcomb and Harvey, adjudged. (i) *β* Norton et al. v. Vultee, 1 Hall, R. 384, *accord. g* Also, debt would lie against a second assignee. Carth. 162, *per Curiam*. (k) Husband possessed of a term in right of his wife, makes a lease for half the term, and dies; his executors shall have debt for the rent, and yet the feme shall



(A) In what Cases an Action of Debt will lie.

have the reversion. Dyer, 227. (f) If a termor surrenders to the lessor without deed, rendering rent, this is recoverable as a rent, and is not as a sum in gross. Vent. 272; 2 Lev. 80, adjudged.

If a man lend goods as a security for money, and the borrower tender the money, and recover the goods in an action of trover, yet the pawnbroker may have an action of debt for his money; (a) because, though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whom it came. The same law as to land.

Cro. Ja. 243; Yelv. 179; Bulst. 29, 31. (a) So, if a man lend perishable goods as a pledge, and they decay, yet the person to whom they are pledged may have an action of debt for his money, because the duty continues. Yelv. 179; Co. Lit. 209.

The conusee of a statute-merchant, as also the conusee on the 23 H. 8, c. 6, the statute and recognisance having the seal of the conusors, as well as the seal of the king, may bring an action of debt, and waive the execution given by the statute; *secus*, of a statute-staple; because the king's seal only, without that of the party, is affixed to it.

Bro. Statute-Merchant, 16; Moor, 405; Cro. Eliz. 461, 494, 544.

[Debt lies against an officer intrusted with the custody of a prisoner, against whom judgment has been obtained, for his escape, whether voluntary or negligent, in which the very sum for which the party is charged in execution is to be recovered. But against his executors the suit is not *originally* maintainable. (b)]

Bonafous v. Walker, 2 T. Rep. 126. [Albert v. Eyles, 2 H. Bl. 108; Hawkins v. Plomer, 2 Bl. Rep. 1048.] (b) 41 Ass. pl. 15; Dy. 322 a, b; 1 Roll. Abr. 921.—This action in Saund. 218, is referred to the common law: but in 2 Inst. 382, and 2 T. Rep. 129, to stat. Westm. 2; 13 E. 1, c. 11, and 1 R. 2, c. 12. β In such case the execution must have been issued by a court of record. Brown v. Genung, 1 Wend. 115. When the escape has been voluntary, the return of the prisoner will not, *ipso facto*, purge the escape. Brown v. Littlefield, 2 Wend. 398.γ

If an indenture of covenant contain a stipulated penalty for non-performance, the remedy is by an action of debt for such specific sum. By the same method the arrears of an annuity or rent-charge may be recovered. (c)

3 Wooddes. 96. (c) Co. Entr. 119 a, b, 120 a; Hardr. 332.

Debt may be brought by the assignees of bail (d) and replevin (e) bonds, under particular statutes.

(d) Stat. 4 Ann. c. 16, § 20. (e) Stat. 11 G. 2, c. 19, § 23.]

Debt lies by the assignees of a replevin bond against one of the sureties in the *detinet* only.

Wilson v. Hobday, 4 Maule & S. 120.

Debt lies by the drawer against acceptor of a bill of exchange payable to the drawer or his order, and expressed to be for value received.

Priddy v. Henbrey, 1 Barn. & C. 674.

Debt does not lie by the devisee of a rent for life against the owner of the land out of which it issues, during the continuance of the freehold estate; for such action did not lie at common law, and the statute of 8 Ann. c. 14, § 4, only extends to cases of tenants holding for life under lessors.

Webb v. Jiggs, 4 Maule & S. 113; Kelly v. Clubbe, 3 Bro. & Bing. 130.

After a landlord has recovered in ejectment against his tenant, he may still maintain debt against the tenant for double *value*, under the statute 4 G. 2, for holding over after a notice from the landlord. It seems otherwise as to the action for double *rent* under 11 G. 2, c. 19.

Soulby v. Neving, 9 East, R. 310.

## (A) In what Cases an Action of Debt will lie.

Debt lies for interest in a general count, without stating any special contract.

*Doran v. O'Reilly*, 5 Dow, R. 133. Therefore in declaring in debt on a mortgage deed, it may be prudent to add a second count for interest, and also to lay the damages sufficiently large to cover the amount of interest; for as there is never any covenant to pay interest *subsequent to the day of default*, such interest is only recoverable as damages and not as debt.

Debt lies on the decree of a colonial court, made for payment of the balance due on a partnership account.

*Henley v. Soper*, 8 Barn. & C. 16.

||Debt may be brought by the payee against the maker of a promissory note expressing a valuable consideration upon the face of it.

*Bishop v. Young*, 2 Bos. & Pull. 78.||

§ Debt is the proper form of action for the recovery of money from a stakeholder of a bet on a trotting-match.

*McKeon v. Caherty*, 3 Wend. 494.

Debt lies on a decree of a Court of Chancery in another state, for the payment of money only by the defendant, without any act to be done by the plaintiff.

*Post v. Neafie*, 3 Caines, R. 22.

In New York, debt can be supported upon a judgment obtained in the Marine Court.

*Bennett v. Moody*, 2 Hall, R. 471.

On a judgment fairly and regularly obtained in another state, before a court having jurisdiction of the subject, and of the person of the defendant, debt is the proper remedy.

*Mills v. Duryee*, 7 Cranch, 481; *Andrews v. Montgomery*, 19 Johns. R. 162; but see *Borden v. Fitch*, 15 Johns. 121; *Hitchcock v. Fitch*, 1 Caines, 461; *Hubbell v. Cowdrey*, 5 Johns. 132; *Taylor v. Bryden*, 8 Johns. 173; *Powlings v. Bird's ex'rs.*, 13 Johns. 192.

When, by the charter of a joint company, the stockholders are liable in their individual capacities for the payment of the debts contracted by the company, to the nominal amount of the stock held by them respectively, debt is the proper remedy.

*Simonson v. Spencer*, 15 Wend. 548.

Debt may be maintained in Pennsylvania, on a decree of a court of equity in another state, for the payment of money.

*Evans v. Tatem*, 9 S. & R. 252.

It seems that wherever *indebitatus assumpsit* lies, debt may be maintained.

*United States v. Colt*, 1 Pet. C. C. R. 149.

Debt lies to recover the annual interest of money payable on bond, when the principal is not due.

*Sparks v. Garrigues*, 1 Binn. 152.

Debt may be maintained in the United States courts by the endorsee of a bill of exchange against the acceptor.

*Raburg et al. v. Peyton*, 2 Wheat. 385; *Kirkham v. Hamilton*, 6 Peters, 24.

An action may be maintained to recover the amount of a judgment recovered in a *qui tam* action prosecuted in another state of the Union.

*Keely v. Root*, 11 Pick. 389; *Spencer v. Brockway*, 1 Ohio, 124.

(B) At what time it shall be said to have accrued.

Debt will lie on a judgment where the execution has been levied irregularly, and without producing satisfaction:

*Fish v. Sawyer*, 11 Conn. 545. See *Wood v. Pettis*, 556.

Debt will lie for an escape.

*Duncan v. Klinefelter*, 5 Watts, 114; *Middlebury v. Naight*, 1 Verm. 423; *Brown v. Genung*, 1 Wend. 115; *Whitehaven v. Varnum*, 14 Pick. 523.

Debt will not lie on a writing by which the maker obliges himself to pay a sum of money which may, however, be discharged in property; (a) nor on an agreement to pay "a horse at the value of thirty pounds." (b)

(a) *Dorsey v. Lawrence*, Hardin, 509; but see *contra*, *Bradford v. Stewart*, 1 Minor, 144. (b) *Watson v. McNairy*, 1 Bibb, 356.

Debt is the proper remedy upon an account stated and acknowledged under seal.

*Hubbard v. Beckwith*, 1 Bibb, 492.

Debt may be maintained on a judgment of a territorial court, or of a foreign court.

*Price v. Higgins*, 1 Litt. 273; *Abbot v. Knight*, 1 Root, 405.

The proper remedy on a note for \$527 "to be paid in Philadelphia funds," is covenant and not debt.

*January v. Henry*, 3 Monro, 8. See *Gamble v. Hatton*, Peck's R. 130; *Hutchins v. Tucker*, 2 Yerg. 448; *Deberry v. Darnell*, 5 Yerg. 151; *Scott v. Conover*, 1 Halst. 222.

Debt will lie upon an instrument without seal, given for the security of money.

*Harwood v. Crowell*, 2 Hayw. 396; 1 Hayw. 193; Mart. (N. C.) R. 1.

Debt as well as *scire facias* lies upon a recognisance to the commonwealth.

*Commonwealth v. Green*, 12 Mass. 1.

Debt does not lie against the sheriff for the escape of a prisoner committed to prison on mesne process, when the escape is effected through the insufficiency of the jail.

*Lovell v. Bellows*, 7 N. H. Rep. 375.

Debt may be maintained on the judgment of a justice of the peace in another state.

*Cole v. Driskill*, 1 Blackf. 16.

Debt lies at common law on, 1st. Judgments obtained in a court of record; 2d. Specialties entered or acknowledged of record, as a recognisance, &c. 3d. Specialties indented or not indented; 4th. Contracts without specialty either express or implied.

*Respublica v. Lucaze*, 2 Dall. 123; S. C. 1 Yeates, 70.

Debt cannot be maintained against executors on a simple contract of the testator.

*Carson v. Hood's Ex'rs.*, 4 Dall. 108.g

(B) At what time it shall be said to have accrued.

If a man enters into a bill obligatory for the payment of (c) several sums of money at several days, an action of debt will not lie till the last day is past.

Co. Lit. 47 b, 292, S. P.\*—\*In 292 b, it is more fully explained, viz., there it is said, "If a man be bound in a bond, or by contract to another, to pay 100*l.* at five several days, he shall not have an action of debt before the last day be past.—But, if a man be bound in a recognisance to pay 100*l.* at five several days, presently after the first day of payment, he shall have execution upon the recognisance for that sum, and shall not

## (C) Who may bring Debt.

tarry, till the last be past, for that it is in the nature of several judgments." 3 Co. 22 a, 128 b; Cro. Ja. 505; Cro. Car. 241. -{On a bond with a penalty, conditioned for the payment of money by instalments, the action may be brought on failure of paying the first instalment; and judgment will be given for the penalty, to remain as a security for future payments. 1 Wils. 80; Buller, 168; 2 W. Black. 706; 1 Cain. 440, 443; 1 Bin. 152.} (c) If to pay 20*l.* in manner following, viz., 10*l.* at one day, and 10*l.* at another day, debt lies not till after the last day, because one entire duty; but, if a man binds himself to pay J S 10*l.* at one day, and 10*l.* at another day; after the first day, debt lies for 10*l.* because it is in itself a several duty. Owen, 42. [Coates v. Hewit, 1 Wils. 81. *acc.*] So, if A makes a bill to B for the payment of 20*l.*, viz. 10*l.*, &c., and thereby covenants and grants with B that if he makes default in either of the said payments, that he will then pay what of the whole shall be unpaid, after default at the first day, debt lies for the whole. Leon. 208, adjudged.

So upon a contract, debt lies not till all the days of payment are past, for where there is but (a) one contract, there can be but one debt, and, consequently, but one action of debt for the recovery of it.

Co. Lit. 292; 3 Co. 22; 4 Co. 94; 5 Co. 51, S. P. [Rudder v. Price, 1 H. Bl. 547.] (a) But the law is otherwise of a covenant or promise to pay money, &c., at several days, for as often as the money is not paid, according to the covenant or promise, so often is there a breach of the covenant or promise, and consequently so often an action lies. Co. Lit. 292 b. [Cooke v. Whorwood, 2 Saund. 337. See too 1 H. Bl. 552.] {See also 2 Mass. T. Rep. 284, Tucker v. Randall; Ibid. 568, Greenleaf v. Kellogg; 3 Mass. T. Rep. 221, Cooley v. Rose.}

If a man leases lands for years, reserving yearly 20*l.* at four (b) quarters, debt lies for one quarter before the others are past; for it is reserved for the lessor's maintenance in lieu of the profits, and shall be considered as several contracts.

Co. Lit. 47 b, 292 b, S. P. (b) So, if reserving weekly, during the term, nine quarters of wheat. Roll. Abr. 601; but for this-*vide* Plowd. 172; Allen, 57; Raym. 222; 2 Lev. 80; Vent. 242, 272; Carth. 161, and title *Rent*.

If one enters into an obligation or contract to pay money, &c., on two several contingencies, the obligee may have an (c) action of debt on the happening of either of them; for the putting in, that he shall pay at the one or the other, must be taken to have been inserted for the benefit of the obligee; and the rather, because every contract is to be construed most strongly against the obligor.

*Vide* title *Election*. (c) As in debt on an obligation, that if a ship put to sea, and either the goods or the obligor came safe, he should pay such a sum over and above the use allowed by the statute; although the obligor dies, yet an action of debt lies against his executor on the happening of the other contingency; for the law supplies the words, *which should first happen*. Lev. 54; Sayer and Gleanes.

## (C) Who may bring Debt: And herein, of the Privy of Contract and Estate.

At common law, if the lessor, who had reserved rent-service, had died, and there had been rent-arrear, neither his heir nor (d) executor could maintain an action of debt for them; not the heir, because he had nothing to do with the personal contracts of his ancestor; not the executor, because he could not represent his testator as to any contracts relating to the freehold and inheritance.

*Vide* head of *Rent*. 11 H. 6, 15; 19 H. 6, 41 b; Co. Lit. 162 a. (d) But, if a woman had been endowed of a rent, or a rent had been granted for life, and the tenant had attained; and after rent had been arrear, and then the particular estate in the rent had determined by death, the executors of the tenant in dower, or of the grantee for life, should have had debt by the common law; because by possibility the testator might have had debt; as, if he had surrendered his estate to the reversioner, he should have had debt for the arrears incurred before; and these particular estates, with the attainment of the tenant, or when the law supplies an attornment, amount to a real contract in law; which realty, when the freehold is determined, resolves itself to the personality.

## (C) Who may bring Debt.

4 Co. 49 a, b; Keilw. 47. Executor may bring debt for the arrears of annuity due to his testator upon the deed.

But the executor might have maintained an action of debt for (a) relief fallen in the lifetime of the testator.

11 H. 6, 15; Roll. Abr. 596; 4 Co. 49, S. P.; Noy, 43, S. P. adjudged; and said, that in such action, seisin of the services need not be alleged; otherwise, where the party himself avows. Dalt. 17. Because it is now become as a flower fallen from the stock, and they have no other remedy. Co. Lit. 162 b, S. P. For it is no rent, but a casual improvement. (a) Debt will lie for an administratrix for a fine of a copyholder; and *per* Holt, Ch. Just., it is the proper action; but three judges held, that an *assumpsit* likewise will lie. Carth. 90, 91; 3 Mod. 239; Show. 35; 3 Lev. 262. [Evelyn v. Chichester, 3 Burr. 1717, *acc.*]

And now by 32 H. 8, c. 37, reciting, Forasmuch as by the common law, executors or administrators of tenants in fee-simple, tail, or for (b) life, of rents (c) service, charge and seck, and fee-farms, had no remedy to recover such arrears as were due to their testators in their life; it is enacted, That the executors and administrators of such person to whom (d) such rent or fee-farm shall be due, and not paid at his death, may have debt for such (e) arrearages against the (g) tenant or tenants that ought to have paid the said rents or fee-farms, so being behind in the life of their testator, or against the executors or administrators of the said tenants; and further, that it shall be lawful for such executor or administrator of such person, to whom (h) such rent or fee-farm shall be due, and not paid at his death, to distrain for the (i) arrears, and all such rents and fee-farms upon the lands, &c., charged with the payment of such rent or fee-farms, and chargeable to the distress of the testator, so long as the said lands, &c., continue in the seisin or possession of the tenant in demesne, who ought immediately to have paid the said rent or fee-farm so behind to the testator in his life, or in the seisin or possession of any other claiming (k) only (l) by (m) and (n) from the same tenant (o) by purchase, gift, or descent, (p) in like manner as their testator might or ought in his life, and shall make avowry upon the matter aforesaid.

(b) Intended of tenants *pur auter vie*, so long as *cestui que vie* lived. Co. Lit. 162 a. (c) Reserved upon a lease for life, or gift in tail within the act. Co. Lit. 162. (d) Extends not to a quit-rent issuing out of a copyhold. Yelv. 135. But vide Carth. 91, where, by Eyre, Just., this is doubted. (e) Whether money, corn, cattle, &c., or other profit to be delivered or yielded, whether annual, or second, third, &c., year, but work days, or other corporal service, is not within the act. Co. Lit. 162. (g) Whether the lessor, lessee, or occupier. Lit. Rep. 93. The tenant is not charged, but he is under a necessity to pay it, to save the distress. Allen, 62. (h) This extends not to the grantee of a rent-charge for years, if he lives so long. Cro. Car. 171, adjudged; for the statute hath provided only where the testator dies seised of a rent in fee, or for life, and the executors have no remedy, and vide 2 Sid. 62. (i) But it extends not to the arrears of a *nomine pœne*, relief, aid *pur fair filz chivalier* or *file marrier*. Co. Lit. 162 b. (k) Of *cestui que use* of a feoffment, though he claims not only by the feoffor, but by the statute also. 4 Co. 50 b.—So, if the tenant makes a gift in tail, and the donee dies, a distress may be taken upon the possession of the issue in tail, though he claims *per formam doni*, as well as by descent. 4 Co. 53 b; 2 Leon. 153; 3 Leon. 59, 60. (l) The tenant leases for life, the remainder in fee, and the tenant for life pays not his rent to the lord, and the lord dies, and the tenant for life dies, the executors of the lord cannot distrain upon him in remainder, for he claims not by or from the tenant for life. Co. Lit. 162 b. 5 Co. 118 a.—So, in case of a reversion. Co. Lit. 162. (m) And not paramount, as the lord by escheat. Co. Lit. 162; Leon. 303. Or one that is remitted to an ancient title. 4 Co. 50 b. (n) The feoffee, and lessee of the feoffee, &c., *in infinitum*, are within the act. 4 Co. 50 a, b; Leon. 303; 2 Leon. 153. (o) But tenant in dower, or by the curtesy, shall not be charged, for they claim not by the party only, but by law also; Leon. 303, *per Curiam*; 3 Leon. 263, *per Curiam*. (p) So, that if after rent is arrear, the lord grants away his seignory, his executors shall have no remedy, for the act gives none, where the testator had none at his death.

## (C) Who may bring Debt.

By § 3, if any man, in right of his wife, hath any estate in fee-simple, tail, or for life, in rents, or fee-farms, which shall be unpaid in the wife's life; such person after the death of his wife, his executors and administrators shall have debt for the (a) arrears against the tenant of the demesne that ought to have paid the same, his executors or administrators, and he may distrain for the arrears in like manner as he might have done if his wife had been then living, and avow upon the matter aforesaid.

(a) Extends to such as incurred before marriage; for as to those incurred during marriage, he might have had debt by the common law. 4 Co. 51 a, b; Co. Lit. 162 b; Co. Ent. 119; Bendl. 263; Kelw. 214.

By § 4, if one hath rents or fee-farms for the life of another, which shall be unpaid, and *cestui que vie* dies; after his death, such person, his executors or administrators, may have debt against the tenant in demesne that ought to have paid the same when first due, his executors or administrators; and also (b) distrain for the same arrears upon such lands, &c., (c) out of which payable, in such manner as he ought or might if *cestui que vie* had been living.

(b) But, if upon a judgment against tenant for life of a rent-charge, a moiety thereof is extended upon an *elegit*, and after rent being arrear, the tenant for life dies, the tenant by *elegit* cannot distrain for the arrears by this act; for coming in by an act of parliament, he is in the *post*. Pool and Neal, 2 Sid. 28, 62, adjudged. (c) If a rent is granted to A for the life of B, and after the land out of which, &c., is let to C for life, the remainder to D in fee; and rent being in arrear, B dies, and after C dies, A may distrain upon D in remainder for all the arrears. Co. Lit. 162 b, Edrich's case; 5 Co. 118, adjudged, et vide Moor, 625; Cro. Eliz. 805, S. C. Debt is given in lieu of the distress.

If a man leases for years, rendering rent, and after devises the rent to another, and dies, the devisee may have an action of debt for the rent, though it is become a rent-seck, because by the original creation thereof debt lay.

Roll. Abr. 598.

So, if the lessor grants over the rent, and the lessee attorns, for the attornment creates a privity; and there is no case where a thing may be transferred or assigned over, but the remedy shall go along with it; and the law (d) favours remedies for rents.

Leon. 315; 2 Leon. 1; vide Dyer, 140; Cro. Eliz. 895. (d) Husband possessed of a term in right of his wife, makes a lease for half the term, and dies, his executors shall have debt for the rent, and yet the feme shall have the reversion. Co. Lit. 46.—Rent granted for life, tenant dies, debt will lie, because there is no other remedy. Dyer, 227.

If a man grants an annuity for years, an action of debt may be brought for the arrears during the years, for being a grant for years, it is by the deed as a contract.

Cro. Eliz. 268, adjudged; Bulst. 151, said to be adjudged; Yelv. 208, and Bulst. 151. Lucas and Fulwood, S. P., seems to be admitted; but the plaintiff could not recover, because his plaint was of debt, and his count of annuity; but vide Dyer, 140; Cro. Eliz. 3; 9 H. 7, 17, cited in 7 Co., Lillington's case, 45 E. 3, 8.

If the father grants a rent-charge to the son in fee, and the rent being arrear, the father dies, and the land descends to the son, by which the rent is extinct, the son may charge the executors of the father in an action of debt for the arrearages incurred in the life of the father; for though no action lies for them, as for the arrearages of a rent, [yet for the arrears of an annuity it is maintainable; and though by the descent of the land to the grantee, being heir to the grantor, as well the annuity as the rent was determined, and the original election was annexed to an inheritance, yet inasmuch as

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the inheritance of both was determined by act of law, (which will do no wrong to any,) his election shall remain as to the arrears.

4 Co. 49 a.]

[By stat. 8 Ann. c. 14, an action of debt is given for the recovery of rents upon leases for a life or lives *during their continuance*, which the common law denied: on which statute Mr. Serjt. Hawkins queries, whether it doth not extend to leases of incorporeal hereditaments?

Hawk. Abr. Co. Lit. 73.

By stat. 5 Geo. 3, c. 17, § 3, which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for the recovery of rent on such leases.]

β An action on a bond given to A and B, as overseers of the poor of a certain town, must be sued in the names of the overseers for the time being.

Armine v. Spencer, 4 Wend. 406.

A specialty given and made payable to A or bearer, cannot be sued in the name of the bearer.

Howell v. Hallett, 1 Minor, 102.β

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If a feme, lessee for life, takes husband, and dies, debt lies against the husband for (a) rent issuing out of the land, incurred during coverture; for he took the profits out of which the rent issued.

10 H. 6, 11, 26 E. 3, 64; Roll. Abr. 592. (a) Also it lies against him or his executors, for the arrears of a rent-charge incurred during such time as he took the profits. 4 Co. 49 b.

If lessee for years assigns all his interest to another, yet the lessor may have debt against the (b) lessee for the arrears incurred after the assignment; for the privity of contract remains, and the lessee by his own act shall not prevent the remedy of the lessor against him upon his contract.

Walker's case, 3 Co. 92; Moor, 351, S. C. adjudged; Cro. Eliz. 556, S. C. cited, 715, S. C. cited, and denied by three judges to be law. Sid. 266, S. C. cited, and agreed to be law, though several of the cases there put, as there reported, were denied to be law. Latch. 260, S. C. cited, and said it was not adjudged, as appears by the book of entries. Poph. 120, seems to be the S. C. cited, et vide Dals. 16. (b) Or assignee, at his election. 4 Leon. 17; 3 Co. 24.—But, if he once accepts the rent from the assignee, he shall not after charge the lessee for rent due after the assignment. 3 Co. 24 b; Marrow and Turpin, Moor, 600; 2 And. 133, et vide Sid. 402.—For in the acceptance of the rent from the assignee, notice of the assignment is implied. March and Brace, Cro. Ja. 334, adjudged, 2 Bulst. 152, adjudged, et vide Roll. Rep. 366. {To prevent the landlord from charging the lessee in *debt* for rent accruing after the assignment, an actual acceptance of rent by him from the assignee is not necessary; any assent on his part to the assignee will have the same effect. Therefore debt will not lie against a bankrupt for rent accruing after the commissioners' assignment; for the estate is vested in assignees by virtue of acts of parliament, in which every man's assent is included, and this is equivalent to an express assent. And if the estate is devested out of the lessee purely by an act of the law, without any fault of his, he will be discharged. 8 East 314, n., Wadham v. Marlowe; 1 H. Black. 437, S. C.}—But, though he refuses to accept the assignee as his tenant, yet he may after charge him in an action for the rent, if he pleases. Devereux and Barlow, 2 Saund. 181.—Where covenant, against the lessee, after assignment of his term, brought upon an express covenant for non-payment of rent, and held good, and that the accepting the assignee as tenant did not hurt. Edwards and Morgan, 3 Lev. 233; Carth. 178. {1 H. Black. 433, 4 Term, 94, Mills v. Auriol. So of assumpsit on the agreement of a tenant from year to year to pay the rent during the tenancy. 8 East, 311, Boot v. Wilson.}

But, if after such assignment of the lessee the lessor grants over his rever-

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sion to another, the grantee shall not have debt against the lessee; for the privity of contract holds only between the lessor and lessee.

3 Co. 22 b, *per Cur.*, Poph. 55, S. P. adjudged; Brownl. S. C., Cro. Eliz. 556, cited; Moor, 351, cited; but vide Cro. Eliz. 636, and 3 Lev. 233.

If A leases three acres to B rendering rent, and B assigns all his estate in one acre, and after A grants the reversion of three acres to C, he may have debt against (a) B for the whole rent, for the entire estate remaining in part, the entire privity and action for the whole remains against the first lessee.

Cro. Eliz. 633; 3 Co. 24 a, S. C. cited, and vide Lit. Rep. 53. (a) Cro. Ja. 411, said the lessor in such case may have a joint action against the lessee and assignee.—For arrears of a rent-charge for life, after determination thereof, debt lies not against him alone that received the profits of part of the land charged, but against all that received the profits of any part thereof. *Duppa v. Mayo*, 1 Saund. 284.

If lessee for years assign his whole term in the moiety of the land, the lessor may have an action against the assignee for the moiety of the rent; for the assignee having the entire estate in the moiety of the land, he hath a sufficient privity of estate to be charged by the lessor, if he pleases, with the moiety of the rent.

2 Lev. 231; Gamon and Vernon adjudged, Sir T. Jones, 104, S. C.

If a prebendary leases for years rendering rent, and this is confirmed by dean and chapter, and the lessee dies, and his (b) executor (c) assigns over the term, and after the prebendary resigns, and a new prebendary is made, he shall not have debt against the executor of the first lessee for the rent due after the assignment; for the successor was no party to the contract, but privy in law only, (d) and by the assignment of the term, the cause of the charge is removed. Adjudged between (e) Overton and Syddal, Cro. Eliz. 555.

(b) So, where the administrator of the lessee assigns. Marrow and Turpin, Cro. Eliz. 715, adjudged; Moor, 600, adjudged, *per totam Curiam*; 2 And. 133, adjudged; Latch, 260, cited, and said no judgment was ever given, as appears by the roll; but *qu. Vent.* 210, cited, and said that the acceptance of rent from the assignee was pleaded, &c. 3 Mod. 326, cited, and said the late resolutions had been contrary. 4 Mod. 76, cited, and denied to be law; for the executor shall be still liable to the contracts of his testator, so long as he hath any assets to satisfy them. (c) By the report of the case in Popham the lessee assigned. (d) That the executor is liable notwithstanding, Ironmonger and Nusam, Noy, 97; Latch. 261; 2 Vent. 209, cited to have been so resolved. Helyar and Cashord, Sid. 240, 260, adjudged; Lev. 127, adjudged. But by this report the action was brought against an administrator. (e) Poph. 120, S. C. and the court divided. Gouls. 120, adjudged by three judges *cont.* Popham, who held the contrary, and that the successor was privy to the contract of the predecessor. 3 Co. 24 a, S. C. cited to have been adjudged by Popham, C. J., and all the court, whether the assignment were by the lessee himself or his executor; yet vide the report of the case in the books before. Sid. 266, S. C. cited from 3 Co. 24, and denied to be law, as there cited. Lev. 127, S. C. cited to have been adjudged, because the privity of contract did not go to the successor more than to the heir, and the heir of the lessor shall not have debt against the lessee after assignment, because the privity of estate only descended to him. Latch. 262, S. C. cited, and said that the lessor being a sole corporation, the privity of contract was determined.

If the assignee of a term assigns to another, yet he may be charged in debt for rent growing due after, before notice given to the reversioner; but *qu.*

Lev. 215, Keighly and Bulkley, adjudged by Keeling and Windham, *cont.* Twisden. Sid. 338, S. C.; Raym. 162; 2 Keb. 260, S. C.

For where covenant was brought for rent against the assignee of the executrix of the lessee, who pleaded that before any rent arrear he assigned over to J S, on demurrer it was holden, that the privity was destroyed, and



## (E) Where Debt is the proper Action, &amp;c.

the assignment complete without notice, and the defendant discharged of all the rent accrued after the assignment.

Carth. 177; Tovey and Pitcher, held by Pollexfen and Rokeby in C. B., *cont.* Powell and Ventris, that the defendant ought in his plea to have set forth notice given to the plaintiff of the assignment; and Ventris dying, the judgment was accordingly; but upon a writ of error in B. R. the judgment was reversed by three judges. 3 Lev. 295, S. C.; Show. 340, S. C.; 4 Mod. 71, S. C.; 2 Vent. 228, 234, S. C.; Salk. 81, pl. 2; 12 Mod. 23, S. C. [1 Ld. Raym. 368, S. C. cited.] {In Taylor v. Shum, 1 Bos. & Pull. 21, which was debt for rent against the assignees of a term, who pleaded that before the rent became due they had assigned over to another, there was no averment in the plea of notice of the assignment to the plaintiff. The court decided in that case, that it was no fraud in the assignees to assign over their interest to whom they pleased, even to a beggar, or to a person about to leave the kingdom, with a view to destroy their own responsibility; for they had a right to divest themselves of their interest by the mere form of an assignment, and were discharged, though their assignee did not take possession or receive the lease; they having previously offered to surrender the premises to the plaintiff, and not having since enjoyed them.}

|| Debt does not lie against an executor or administrator upon a simple contract of the testator or intestate. But, if the defendant does not demur, advantage cannot be taken of it, either in arrest of judgment or in error.

Barry v. Robinson, N. R. 293; Prince v. Nicholson, 5 Taunt. 665. ||

## (E) Where Debt is the proper Action, and not Covenant, Case, &amp;c.

ACTIONS of debt are founded on contract, in which the plaintiff sets forth his demand in certainty, and insists on being restored to it *in numero*.

4 Co. 92 b, Slade's case. β See Bibbins v. Noxon, 4 Wend. 207. g

The inconvenience of the defendant's being allowed to wage his law in this action occasioned the substituting of other actions in the room of it, such as all actions on the case, which are properly founded on injuries and fraud; for in these the defendant could not wage his law, because he could not make oath of paying that which by reason of its uncertainty he could not know, and which could never be known before it was ascertained by the jury.

Vaugh. 101.

Hence if A declares that he sold corn, &c., to B, and that B at or before such a day promised to pay so much money, A may at his (a) election bring debt or *assumpsit* for the injury done by the violation of the contract.

4 Co. 92 b, Slade's case; Moor, 433, S. C.; Yelv. 90, S. C. Vide the Register, 95, 139. (a) If I deliver 20*l.* to A, to deliver to B and he does not deliver it, I may have an action of account, debt, or perhaps case, against him. Keilw. 69 a, 77 b; Cro. Ja. 687; Dyer, 21; Hut. 12.—A delivers oxen to B to sell for as much as he can get, and he sells them for so much, A may have debt against B for the money. Roll. Rep. adjudged.—A delivers money to B to redeliver, debt lies for it. Palmer, 364.—The defendant, by bill sealed, acknowledged that he had received 7*l.* of the plaintiff *ad emendum* a pair of bellows. Cro. Eliz. 644, adjudged, that account or debt lay. Vide 3 Leon. 38; Roll. Abr. 597; 2 Ld. Raym. 814; 2 Salk. 658; 7 Mod. 87.

A pays money to B as a fine, upon B's promise to make a lease of land, and before the lease is made B is evicted; debt lies not for the money, for it was not paid to be received back; but case lies for non-performance of the bargain, in which he shall recover in damages not only the money given for the fine, but the damage by breach of the contract.

Palm. 364.

If A covenants with B to pay him (b) so much money as he shall expend

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in the repairing and victualling of a ship for him, and B expends 300*l*. accordingly, an action of debt or covenant lies for the money expended.

Styl. 31, 133, S. P. (b) 2 Jon. 184. Like point adjudged, though the certainty of the debt did not appear by the deed.

If it be recited by deed that there is a suit depending between the vicar of S and A concerning a *modus decimandi*, which concerns all the parishioners of S, and B, a parishioner, by the said deed, agree and promise A to pay his proportionable part of the charges of the suit, an action of debt or covenant lies upon this deed; for by an averment of what was expended in the suit, that which was at first uncertain may be reduced to a certainty. (a)

3 Lev. 429, Sanders and Mark, adjudged after a long debate. (a) [That debt will lie for an indeterminate sum, capable of being readily reduced to a certainty, hath been established by other cases. Bloomer v. Wilson, Sir T. Jones, 184; Birch v. Weaver, 2 Keb. 225; Rands v. Peck, Cro. Ja. 618. Nor is it now understood to be necessary that the plaintiff should recover the full sum demanded. Aylett v. Lowe, 2 Bl. Rep. 1231. Walker v. Witter, Dougl. 6.; Rudder v. Price, 1 H. Bl. 550. And a declaration in debt upon a simple contract hath been holden good, though it specified by the several counts a less sum than appeared to be demanded in the recital of the writ, and yet assigned as a breach the non-payment of the sum demanded in the writ. M'Quillin v. Cox, 1 H. Bl. 249.] ¶ So of a declaration in debt by bill, where the sums demanded in the several counts amounted altogether to more than the sum at first demanded in the *queritur*, for that is superfluous and may be rejected. Lord v. Houston, 11 East, 62. Adjudged on a special demurrer. ¶ Gardner v. Bowman, 4 Tyr. 412.g {But the declaration must state the demand with certainty. Therefore if a statute authorize an action of debt on a protested bill of exchange for principal, interest, damages, and costs of protest, the declaration must aver the amount of those costs, or there will be error. 1 Cran. 194; Wilson v. Lenox and Maitland.}

If A retains B to embroider a satin gown of a maid servant of the daughter of A, taking for the same 40*s*., B may have debt against A for the money; for the embroidering of the gown of another at the request of A is a sufficient consideration to charge A, and it is at the election of B to bring debt, or an *assumpsit*.

Cro. Eliz. 880.

¶ An action of *covenant* will not lie upon the statute of 3 & 4 W. & M. c. 14, against the devisee of land to recover damages for a breach of covenant by the deviser; but the remedy given by that act is expressly confined to cases where *debt* lies.

Wilson v. Knobley, 7 East, 128.¶

β The words "undertook and agreed to pay," in a quantum meruit count, do not necessarily import the form of action to be *assumpsit*, but are good in debt.

Gardner v. Bowman, 4 Tyr. 412.g

The action of debt lies on a bill by endorsee against his immediate endorser.

Watkins v. Wake, 9 Dowl. 242.g

(F) Of the Manner of bringing the Action, and where it must be brought in the *Debet* and *Detinet*.

If the action be brought for (a) money, it must be in the *debet* and *detinet*; but if (b) for goods or chattels, it must be in the *detinet* only.

(a) 50 E. 3, 16 b; Roll. Abr. 604, S. P. β Debt in the *debet* and *detinet* lies upon an instrument to pay a certain sum of money, lent, which might be discharged on or before the day of payment, in cotton or tobacco. Young v. Hawkins, 4 Yerg. 171; Stewart v. Donnelly, 4 Yerg. 177; Bloomfield v. Hancock, 1 Yerg. 101; Dougherty v. Guinn, 5 Yerg. 435.g (b) 3 Leon. 260; 4 Leon. 46, S. P.; Winch, 75. It was

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brought for money in the *debet* and *detinet*, and for two shirts in the *detinet* only.\*—  
 \*Sed qu. If the declaration was good, as it seems to be two distinct species of action, and to require two different pleas.

So, if brought for foreign money (*a*) not made current, for then it is as bullion.

Palm. 407; Latch. 77, 84; Jon. 69, S. C. adjudged, where by Dod. the action might be brought in the *debet* and *detinet*, or in the *detinet* only; but this must be intended where so much English money, being the value of the foreign, is demanded. Rastal and Draper, Cro. Ja. 88; Yelv. 80; Brownl. 90; Noy, 13, and vide Leon. 41; Yelv. 135; Brownl. 101. (a) But, if made current by proclamation, the action for it may be brought in the *debet* and *detinet*. Noy, 13; Latch, 77, 84; Palm. 407.—Debt in the *debet* and *detinet* for 107l. 10s. where the declaration was upon a special wager for 100 guineas, which the plaintiff averred were worth 107l. 10s., and it was objected that it should have been in the *detinet* only, for 100 guineas in specie, but held well enough as to this point, though reversed for another fault. St. Leger and Pope, Carth. 322; 5 Mod. 4; 4 Mod. 406; Lutw. 484; Salk. 344, S. C.; 10 Mod. 366; 12 Mod. 81, S. C.

If a man sells certain cloths for 66l. Flemish money current at Middleburgh, to be paid upon request, he may bring an action of debt for 39l. 12s., setting forth the special matter, and averring that the 66l. *Flemish tempore venditionis*, &c., amounted to 39l. 12s. *moneta Angliæ*, and that the defendant has not paid, &c., and if he values the foreign money otherwise than in truth it is, the defendant may plead in abatement, and so help himself. Adjudged, after a verdict, for the plaintiff, and said, that it being found that he owed what is demanded, there ought to be no (*b*) farther inquiry of the value.

Cro. Ja. 88, Rastal and Draper adjudged. Yelv. 80; Brownl. 90; Moor, 775, S. C.; Leon. 41; Cro. Eliz. 536, S. P. adjudged, et vide Yelv. 135; Brownl. 102. (*b*) But in debt against an executor for 47l. 8s. 8d. *moneta Flandriæ attinent, ad valentiam 40l. English*, the defendant pleaded *plene administravit*, and it was found against him, and judgment given *quod recuperet debitum*; but upon a writ of error between Bagshaw and Plain, Cro. Eliz. 536, it was reversed, because it should have been *quod recuperet* the 47l. 8s. 8d. Flemish, and a writ ought to have been awarded to inquire the value; Moor, 704, reversed, because the jury had not inquired of the value of the Flemish money, and the affirmation of the plaintiff that it amounted to 40l. was not a sufficient warrant for the court to give judgment upon.

If an executor brings debt for any thing in right of his testator, it must be in the *detinet* only.

Moor, 566; Roll. Abr. 602, 603; 20 H. 6, 5; 5 Co. 32 b, S. P., laid down as a rule.

As, if A be in execution upon a judgment for B, and after B die, and after A bring an *audita querela* against C the executor of B, and have a *scire facias*, and thereupon put in bail by recognisance in Chancery, according to the statute of 11 H. 6, c. 10, and after upon this *audita querela* judgment be given against A, and afterwards a *scire facias* issue against the bail, and after judgment the bail be taken in execution upon the recognisance, and the sheriff suffer him to escape; upon which escape the executor brings an action of debt; (*c*) this action ought to be brought in the *detinet* only, and not in the *debet* and *detinet*, for this recognisance is in the nature of the first debt, this being in a legal course.

Roll. Abr. 602; Lane, 79, S. C. adjudged. (*c*) So if one, as executor, obtains judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape, &c., for the first action being in the *detinet*, and that for the escape being founded upon the same record, it ought to pursue it. Cro. Eliz. 326; Cro. Ja. 545, 685; Hob. 264; 2 Roll. Rep. 132; Styl. 232; Hut. 79, S. P. adjudged, in which last book it was endeavoured to distinguish it from the other cases, because the plaintiff declared generally, and not as executor.

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So, if an executor recovers in an action of debt upon a contract, and afterwards brings debt upon the judgment, it must be in the *detinet*.

Roll. Abr. 603; Lane, 80, S. P.

If an executor brings debt upon an obligation made to the testator, where the day of payment incurred after the death of the testator, yet the writ shall be in the *detinet* only, for he brings the action as executor.

20 H. 6, 5 b; Roll. Abr. 602, S. C.

So, if a man binds himself to the testator to pay him 100*l.* when such a thing shall happen; if it happens after the death of the testator, yet the writ of debt by the executor shall be in the *detinet* only.

20 H. 6, 6 b; Roll. Abr. 602.

If a rent be granted to another for years, the executor of the grantee shall have debt for the arrearages of this rent incurred after the death of the testator in the *detinet* only, for he had it as executor.

11 H. 6, 36; Roll. Abr. 602, S. C.

So, if lessee for twenty years leases for ten years rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator (b) in the *detinet* only.

Roll. Abr. 603; Spark and Spark, Cro. Eliz., and Noy, 32, S. C. adjudged; Cro. Car. 225; Lev. 250; 2 Keb. 407; Sid. 379, S. P. adjudged. (a) But in the case of Tragle and King, 2 Jon. 169, it is adjudged, it lay in the *debet* and *detinet*, and a diversity taken between things in action and chattels in possession; for as to things in action the writ must always be in the *detinet*; as for the arrears of an account, &c., and it shall not be assets till recovered; but in this case, the reversion of the term being in the executor immediately by the death of the testator, it is assets; for the whole value, and the showing he is executor, is only to entitle him to the term to which the rent is incident.—And where being brought in the *debet* and *detinet*, it is aided after verdict, by 16 & 17 Car. 2, c. 8; vide Lev. 250.

If in an account an executor recovers a debt due to his testator, in debt for the arrearages thereupon, the writ shall be in the *detinet* only; for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator.

Cro. Eliz. 326; Cro. Ja. 545; 5 Co. 31 a. But for this vide Hob. 88, 184, 272; Noy, 19; 2 Lev. 111; 2 Jon. 47.

But, if an executor takes an obligation for a debt due to his testator by contract, in debt upon this obligation, the writ shall be in the *debet* and *detinet*.

20 H. 6, 4 b, 5 b; Roll. Abr. 602, S. C.

So, if an executor recovers in trespass for goods taken out of his possession, in debt for the damages recovered, the writ shall be in the *debet* and *detinet*, for he need not name himself executor.

20 H. 6, 5 b; Roll. Abr. 602, S. C.; Lane, 80, S. C. cited.

So, if the executor sells the goods of the testator for a certain sum, he shall have debt for this in the *debet* and *detinet*.

Roll. Abr. 602; Lane, 80; Cro. Ja. 685.

If an executor, having lands by an extent upon a statute made to the testator, and, naming himself executor, by deed leases them for three years, rendering rent, &c., if an action of debt is after brought by him for this rent, it must be in the *debet* and *detinet*, because it is founded upon his own contract.

Winch. 80, S. C.; Brownl. 205; Mod. 185, S. P.

So, an executor, being lessee for years of a rectory in the right of the tes-

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tator, may have debt upon 2 & 3 E. 6, c. 13, for not setting out tithes in the *debet* and *detinet*, because founded upon a wrong in his own time, and by the statute it is given to the party grieved.

Cro. Ja. 545, cited to have been adjudged.

Also, debt against an executor shall be in the *detinet* only, for he is chargeable no farther than he has assets.

11 H. 4, 16; Roll. Abr. 603.

But after (a) judgment against an executor, one may in a new action of debt in the *debet* and *detinet* suggest a *devastavit* by the executor, and (b) thereby charge him *de bonis propriis*.

Sid. 397, vide tit. *Executors*. (a) But not without a judgment. Cart. 2.—And therefore it lies not upon a bond suggesting such a *devastavit*, for it is hard upon such a surmise to charge an executor in his own right. Vent. 321, adjudged, and the court said they would not extend these actions farther than they had been. 2 Lev. 209, adjudged; Lev. 147; and for this vide Roll. Abr. 603; 5 Co. 32; Saund. 216. (b) Where the defendant has been held to special bail in such action. Vent. 355; Sid. 63.

So, if the executor obliges himself to pay a debt due by contract by the testator, in debt upon this obligation the writ may be in the *debet* and *detinet*, because the obligation made it his own debt.

11 H. 6, 8, 17 b; Roll. Abr. 603, S. C.

In an action of debt against an executor for rent, incurred in the life of the testator, the writ shall be in the (c) *detinet* only.

11 H. 6, 36; Roll. Abr. 603.  $\beta$  Debt will lie upon an implied promise against an executor having assets. Knapp v. Hanford, 6 Conn. 170. (c) If debt be brought against an administrator in the *debet* and *detinet* for rent due before his time, where it should only be in the *detinet*, this is aided after verdict by 16 & 17 Car. 2, c. 8. Vide Sid. 379; Potter's case, and tit. *Error*.

But, if an action of debt be brought against an executor for the arrearages of a rent, reserved upon a lease for years, and (d) incurred after the death of the testator, the writ (e) shall be in the *debet* and *detinet*, (g) because the executor is charged of his own possession.

Roll. Abr. 603; Cro. Eliz. 711; Moor, 566; Brownl. 56; Cro. Ja. 411, 546; Bulst. 23; 2 Brownl. 206; Cro. Car. 225; All. 34; Mod. 185; 2 Brownl. 202; Palm. 116, S. P. (d) Where part incurred in the time of the testator, and part after his death, his executor may be charged in the *detinet* for the whole. All. 76; Styl. 118. (e) He may be charged in the *detinet* only, but then he shall answer only out of the testator's estate. Royston and Cordary, All. 42, adjudged, and said that it was never doubted. Styl. 79, adjudged, and vide Styl. 52; Lev. 127.\* (g) For though he hath the land as executor, yet nothing shall be employed to the execution of the will but such profits only as are above that which is to make the rent; and therefore so much of the profits as is to make or answer the rent he shall take to his own use, and he shall be charged for it in the *debet* and *detinet*. Poph. 120, per Popham; 5 Co. 31; Cro. Eliz. 712; [but see Cro. Car. 225.]—And if the land be not worth more than the rent, it is a good plea to such action in the *debet* and *detinet*; for in such case he is to be charged in the *detinet* only. Vent. 171, per Cur.; and for this vide Palm. 118; Sid. 266; Mod. 185.—But where he is to be charged upon a lease made to the testator, and hath not the profits of the lease to answer it, he ought to be charged in the *detinet* only; as where debt is brought against an executor of a lessee for rent incurred after assignment of the term. Poph. 120; Sid. 266; Lev. 127; 2 Vent. 209; 3 Mod. 327. So, if brought against him after waiver of the term. Helier v. Casebert, Lev. 127, and vide Allen, 43. ¶ But it was said by Wyndham, J., in this case, that an executor cannot waive a term so as not to be charged with the rent, if he has assets; for he is bound to perform all contracts of the

\* But where part incurs in the life of the testator, and part after, the plaintiff may bring two actions, for the first part in the *detinet* only, the other in the *debet* and *detinet*, and need not charge him as executor, in the last case, by which means he may obtain a judgment *de bonis propriis*.

## (F) Of the Manner of bringing the Action, &amp;c.

testator, if he has assets, be the rent above the value of the land or not, which was not denied. And Kelynge, J., said, that he could not so waive, but that he shall be charged in the *detinet*, upon which the assets will come into question; and if he continues the possession, he shall be charged in the *debet* and *detinet* in respect of the perception of the profits, whether he has assets or not, to which Twisden, J., agreed. So in *Billinghurst v. Speerman*, 1 Salk. 297.||

If an action of debt is brought against baron and feme, upon an obligation entered into by the feme before marriage, it shall be in the *debet* and *detinet*; for by the marriage all the personal goods and power of disposing of the real are by law given the husband, which he has to his own use, and not as executors, who have them only to the use of another.

Lloyd and Walcot, 5 Co. 36 a; 3 Leon. 206, S. C. adjudged; Allen, 73, S. P.

So, if an action is brought upon a bond against the heir of the obligor, it shall be in the *debet* and *detinet*, (a) because he hath the assets in his own right.

5 Co. 36 a. (a) And for another reason, because he is bound by special words in the obligation. Cro. Eliz. 712, and vide Cro. Eliz. 350; 2 Leon. 11; 2 Brownl. 204, 205.—But if in the *detinet* only, it is good after verdict by 16 & 17 Car. 2, c. 8. Comber and Watton, Lev. 224, adjudged; Sid. 342, 375, 379; 3 East, 2.

|| Debt will lie for use and occupation generally, without stating where the premises lie, or setting forth any of the particulars of the demise.

Wilkins v. Wingate, 6 T. Rep. 62; Stroud v. Rogers, cited *ibid.* King v. Fraser, 6 East, 348.||

A count stating that defendant was indebted to plaintiff for work and labour, and being indebted, that he undertook and promised to pay, whereby an action hath accrued, &c., is not a good count in debt, and cannot be joined in a declaration with counts in debt.

Brill v. Neele, 3 Barn. & A. 208.

In a declaration in debt in the Common Pleas, it is unnecessary to refer to the *clausum fregit* in the writ.

Luckett v. Plumer, 2 Bro. & Bing. 659.

## §2. The Pleadings.

The pleadings will be considered in relation to; 1st, the declaration; 2dly, the plea; 3dly, the replication.

## § 1. The Declaration.

The contract may be set forth in pleading, according to its legal effect.

Tompkins v. Corwin, 9 Cowen, 255.

In declaring against the assignee of a lease, he may be described as assignee in general terms.

Norton v. Vultee, 1 Hall, R. 384.

Debt on bond for the payment of a sum of money, payable in instalments, it is not requisite to assign breaches in the declaration according to the requirements of the statute.

Spaulding v. Millard, 17 Wend. 331.

In an action on a bond given by a deputy sheriff for the faithful performance of the duties of his office, the plaintiff must assign breaches, and he cannot, without such assignment, recover even nominal damages.

Barnard v. Darling, 11 Wend. 30.

When two several sums are demanded in two separate counts, the declaration, in the commencement, should demand the aggregate amount, the first

## (G) Of the Extinguishment of the Debt, &amp;c.

count should describe the sum demanded in it as parcel, &c., and the second count should demand the residue, &c.

*The People v. Van Eps*, 4 Wend. 387.

When the merits of a case are affected by time, the delivery of the deed should be stated and shown; but it is not requisite when time is immaterial.

*Tomkins v. Corwin*, 9 Cowen, 255.

When a condition precedent must have been performed to entitle the plaintiff to recover, its performance must be shown in the declaration.

*Whitney v. Spencer*, 4 Cowen, 39.

But it is not requisite in declaring in debt on a recognisance of bail, to allege that a *fi. fa.* had been issued against the principal, before the return of the *ca. sa.*

*Gillespie v. White*, 16 Johns. 117.

Debt or bond conditioned to pay taxable costs of a suit, the averment *licet sepius requisitus* is good on general demurrer.

*Bacon v. Wilber*, 1 Cowen, 117.

A breach of a condition "to free the land from all legal encumbrances, either by deed or mortgage, now in existence, and binding on the premises, by the 20th of February," is not well assigned in negative words; it should show some encumbrance at the time of suit brought.

*Julliant v. Burgott*, 11 Johns. 6.

The assignment by the plaintiff of two several breaches for the non-payment of two several sums of money, when the condition of the bond was to pay two several sums at several days, is bad on special demurrer for duplicity.

*Taft v. Brewster*, 9 Johns. 334.

An averment that the defendant is *justly indebted*, does *ex vi termini* involve notice, whenever notice is necessary to prove the indebtedness.

*Kellogg v. The Union Company*, 12 Conn. 7.

In debt on an indemnity bond, *nil debet* is not a good plea. (a) Nor can that plea be pleaded to an action of debt or a decree of a court of equity, made in a sister state. (b)

(a) *Bauer v. Roth*, 4 Rawle, 83. (b) *Evans v. Tatem*, 9 S. & R. 252. See *Reed v. Ross*, 1 Bald. 36.

## (G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

If a man accepts an (c) obligation for a debt due by simple contract, this extinguishes the contract, but the acceptance of an obligation for a debt due by another obligation is (d) no bar of the first obligation.

13 H. 4, 1; Roll. Abr. 460. (a) This must be intended from the debtor; for if a stranger gives bond for such debt, it is otherwise. 2 Leon. 110, adjudged.—So, if upon the making the contract, a stranger gives bond for it, or being present promises to give bond for it, and after does so, the debt by contract is extinguished, the obligation being made upon or pursuant to the contract. 2 Leon. 110, *per Cur.*—So, if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court, for by the deed the legacy is extinct, and it is become a mere debt at common law. Yelv. 38. (b) For one deed cannot determine the duty upon another. Cro. Eliz. 304, 727, for this vide 2 Dan. 116.—So, if a statute is accepted for it. Roll. Abr. 470.—Otherwise, if a judgment is given or obtained upon the obligation. 6 Co. 44, 45. β When one is indebted to another by simple contract, and he gives his creditors a promissory note drawn by himself, for the same sum without any new consideration, the new note shall

## (G) Of the Extinguishment of the Debt, &amp;c.

not in general be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor. 15 S. & R. 162; 1 Hill, N. Y. Rep. 516; 1 Wash. C. C. R. 266; 2 Wash. C. C. R. 24, 512; 3 Wash. C. C. R. 396; Addis. 39; 5 Day, 511; 9 Watts, 273; 10 Pet. 532; Bouv. L. D. verbo *Novation*.g

|| A stated account is no plea to debt upon simple contract; for both being equal, the latter is not merged in the former.

Roades v. Barnes, 1 Burr. 9; 1 Bl. Rep. 65, S. C.

But a plea that the defendant endorsed a promissory note, of which he was the payee, to the plaintiff, "for and on account of the debt," has been admitted. So has a plea that the plaintiff and defendant accounted together, and that the defendant drew a bill of exchange upon himself payable to the plaintiff or his order, for the sum he was found in arrear, and delivered it to the plaintiff, and afterwards duly accepted it.

Kearslake v. Morgan, 5 T. Rep. 513; Richardson v. Rickman, Ibid. 517.]]

In debt upon an obligation the defendant cannot plead *nil debet*, but must deny the deed by pleading *non est factum*, for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*.

Vide Hard. 332, of Pleas in Bar, head of *Pleas and Pleadings*.

But, if the debt be due by simple contract, then he may plead *nil debet*, for it does not appear that there is any debt continuing.

Hob. 218; 2 Inst. 651.

In debt for rent, if it be by deed, the proper plea is *non est factum*; but, if it be without deed, the defendant may plead *non dimisit*, nothing in arrear, or that he never (a) entered. Also, by the better opinion of the books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment. [The indenture is only inducement to the action; matter of fact is the foundation of it.]

Hard. 332. (a) But, if the lease be by indenture, debt lies, though he never entered; 2 H. 8, 14; Roll. Abr. 605; 2 Ld. Raym. 1477; 2 Str. 763; and therefore, in a declaration in debt for rent against such lessee, it need not be shown that he entered, for the contract is the ground of the action. 4 Leon. 18; Hetl. 54; Vent. 41.—And the occupation not material; otherwise, of a lease at will. Dyer, 14 a; Hetl. 54; Vent. 41, 108; Salk. 209, S. P.; Ld. Raym. 170.—Where upon a lease from year to year *quamdiu partibus placuerit*, no entry or continuance of the possession was shown as to the second year, and yet after verdict it was intended the lessee was in possession for all the time for which the rent was found due. 3 Salk. 136; Mod. 3; Sid. 423, and vide Plow. 423; Palm. 117; 2 Roll. Rep. 131; Keilw. 65.

[So, in debt for an escape, (b) or on a *devastavit* (c) against an executor, *nil debet* is a good plea; for the judgment is but inducement, and the escape and *devastavit* are the foundation of the action.

(b) Waites v. Briggs, 2 Salk. 565. (c) Wheatley v. Lane, 1 Saund. 219.]

In debt for the arrears of an (d) annuity granted for life, *nil debet* is no good plea, for the action is merely founded upon the deed, for without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed.

Keilw. 147. (d) But in debt upon the grant of a rent, *nil detinet* is a good plea, because the plaintiff hath other remedy to levy it, viz., by distress; otherwise, upon the grant of a bare annuity, for there being no remedy by distress, the grant must be avoided by matter of as high a nature, viz., by acquittance. Hard. 333.

[So, in debt for a penalty upon articles of agreement, or on a bail-bond,



## (G) Of the Extinguishment of the Debt, &amp;c.

*nil debet* is no plea, for in these cases the deed is the foundation, and the fact but inducement.

Warren v. Consett, 2 Ld. Raym. 1500; 2 Str. 778, S. C.; 1 Barnard, 15, S. C.; 8 Mod. 106, 323, 382, S. C.; Fortesc. 363, 367.]

But in debt for the arrears of a rent-charge, devised to the plaintiff's wife for life, against the (a) administrator of the occupier of the land, *nil debet* is a good plea, for a will is no deed, nor wants any delivery: adjudged, and said the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing out thereof.

Hard. 322, Wilson's case. (a) That where the testator could not plead *nil debet* his executor shall not plead *non debet*. 2 Mod. 266.

In debt upon 2 & 3 E. 6, c. 13, for not setting forth tithes, (b) not guilty or (c) *nil debet* are good issues.

2 Inst. 651; Cro. Eliz. 621, S. P., adjudged. (b) Where the action is founded upon a penal statute, not guilty is a good plea. Cro. Eliz. 257; Gouls. 39; Noy, 56; 2 Inst. 651; Moor, 914, pl. 1293. [See 1 T. Rep. 462.] (c) Hob. 218, S. P., adjudged.

In debt upon a contract, the defendant cannot plead the contract was for a less sum, or otherways, than the plaintiff has declared, and traverse the contract in the declaration laid, but may (d) wage his law.

Moor, 49. (d) Or plead *nil debet*. Keilw. 39; Cro. Eliz. 880; Palm. 223. The contract being but the conveyance to the action, is not traversable. Co. Lit. 295.

[Under the plea of *nil debet*, the defendant may give in evidence a release, or other matter, in discharge of the action.

1 Ld. Raym. 566; 12 Mod. 376, S. C.; 1 Ld. Raym. 394, S. P.; Gilb. Debt, 434, 443. *Semb. contr.*

And it has been holden, that as this plea is in the present tense, the statute of limitations may be given in evidence under it.

Draper v. Glassop, 1 Ld. Raym. 153; Anon. 1 Salk. 278, S. P. {Contra, 2 Mass. T. Rep. 87. And see 1 Cran. 343, 465.}

But in debt *qui tam*, the defendant was not allowed to give in evidence on *nil debet*, a former recovery against him by another person for the same cause.

Bredon v. Harman, 1 Str. 701.]

A plea of *nul tiel record* to an action of debt on an Irish judgment must conclude to the country, for the record of the judgment is only proveable by an examined copy on oath, the veracity of which must be tried by a jury.

Collins v. Lord Matthew, 5 East, R. 473; and that such judgment is not a record, but *assumpsit* lies on it. See Harris v. Saunders, 4 Barn. & C. 411.

In debt on a recognisance, if the enrolment is not averred, the opposite party may plead *nil debet*.

Glynne v. Thorpe, 1 Barn. & A. 153.

## DEODAND.

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A DEODAND is that instrument which occasions the death of a man, and is forfeited to the king in order to be disposed of in pious uses by the king's almoner.(a) This forfeiture of whatever procures the death of a man without the default of another was introduced to increase the terror and abhorrence of murder, so that nothing that occasioned it should seem to go unpunished. Also, that weapon or instrument, whereby one man kills another, is called a deodand.

3 Inst. 57, 58; 5 Co. 110; H. P. C. 34; Pult. 125; Crom. 31 a. (a) The law of deodands has been inveighed against as founded in superstition and ignorance, and inconsistent with reason and sound policy. Similar confiscations, however, obtained among the wisest nations of antiquity, the Jews, the Athenians, and the Romans, Exod. xxi. 28. Æschin. contr. Ctesiph. Pott. Archæol. Gr. iii. 178, and the Lex Aquilia. They originated in the necessity of watching over the safety of individuals; and a law which tends to check rashness or negligence where the consequences may be so fatal, cannot be considered as altogether irrational or impolitic. It may indeed be fairly doubted, whether the law, as it prevails with us, was founded in superstition, that is, in the Romish doctrine of purgatory. It should seem as if the subsequent application of the thing forfeited had been mistaken for the origin of the law itself. The deodand, it is probable, was at first merely civil: it was taken upon the same principle with the *weregild*; it was the *pretium sanguinis*, the mulct or compensation required by the state for the loss of one of its subjects. Fost. Cr. Law, 287; Stiernh. de Jure Goth. L. 3, c. 4. Instead of being given, as by the Aquilian law at Rome, to the family of the deceased, it fell to the crown, and formed a part of its casual revenues. The *Lex Aquilia* provides, not that the instrument which caused the death of a human being should be forfeited to the family of the deceased, but that he who should have killed a slave, or a beast, of the kind which usually feed in flocks, as sheep, goats, horses, and the like, should pay to the owner the highest price which it might have been worth within the last thirty days before its death. Inst. 4, 3, 9; Dig. 9, 2, 21; Code, 335; Extravag. 5, 36. By the crown it was often granted to particular subjects, and under those grants it is holden at this day, and descends and is transferable with the soil upon which the right attaches. At what particular time it was devoted to pious uses, nowhere distinctly appears; the statute *De officio Coronatoris*, 4 E. 1, in speaking of deodands, uses the word "*banni*," that is, mulcts or confiscations, Du Cang. Gloss. tit. *Bannus*, &c.; though Bracton, who wrote in the preceding reign, gives them the name of "*deodanda*." ]

To understand what things are forfeited as deodands, we must observe that it is laid down as a rule, that *omnia quæ movent ad mortem sunt deodanda*, and, therefore, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also.

Hawk. P. C. c. 27.

As where a cart meeting a wagon loaded upon the road, and the cart endeavouring to pass by the wagon, was driven upon a high bank and overturned, and threw the person that was in the cart just before the wheels of the wagon, and the wagon run over him and killed him; it was holden, that the cart, wagon, loading, and all the horses, were deodands, because they all moved *ad mortem*.

Salk. 220. The Lord of the Manor of Hampstead's case, by Pollexfen and Gregory on the Home Circuit.

But, if a man, riding on the shafts of a wagon, fall to the ground and

## Deodand.

break his neck, the horses and wagon only are forfeited, but not the loading, because it no way contributed to his death.

3 Inst. 58; S. P. C. 20; Hawk. P. C. c. 27.

So, where a thing not in motion causes a man's death, that part thereof only which is the immediate cause is forfeited; as, where one climbing upon the wheel of a cart while it stands still, falls from it and dies of the fall, the wheel only is forfeited; but if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater.

Also, if a man riding on a horse over a river is drowned (a) through the violence of the stream, the horse is not forfeited, because not that, but the waters caused his death.

Cro. Ja. 483; 2 Ro. Rep. 23; Poph. 136. (a) *Secus*, if the horse had thrown him. Salk. 220.

By the opinion of our (b) ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a steeple, &c., may be deodands; but, by the (c) latter resolutions, they cannot, unless they were severed before the accident happened.

(b) S. P. C. 20 b; Pult. 124 b. (c) As Sid. 204; Lev. 136; Raym. 97; Keb. 723, 744, S. C., where a man was ringing a bell, and the rope caught him up and dashed him against the roof of the belfry, whereby he died. 6 Mod. 187, S. C. cited by Holt, and that it was no deodand.—So, of the wheel of a forge. 6 Mod. 187. See Salk. 220; Hawk. P. C. c. 26, § 5, 6, 8, &c.

It was (d) formerly holden, that a horse or cart, by a fall from which an infant was slain, was not forfeited, perhaps, because the misfortune in this case might seem rather owing to the indiscretion of the infant than any default in the thing. But this distinction has not been allowed of (e) late; for the law does not ground the forfeiture on any default in the things forfeited, since it extends it to things without life, to which it is plain that no manner of fault can be imputed.

(d) 1 Hawk. P. C. c. 27, § 4. (e) [It has not been allowed as to things which *move* to the death of an infant: but it obtains as to things at rest; for no deodand is due where an infant is killed by a fall from any thing that is not in motion. And according to Sir William Blackstone's reasoning, it should seem that the distinction ought to hold in both cases: for if, as he supposes, the original design of deodands was to purchase propitiatory masses for the souls of such as were snatched away by untimely death; and the presumed innocency of childhood rendered such an atonement unnecessary, that presumption must equally arise, and the effect of it should be the same, whether the thing that was the immediate cause of the death were at rest or in motion. And of this the learned commentator seems sensible himself, for he hath recourse to a further reason to support the law in the latter case, namely, that "such misfortunes are in part owing to the negligence of the owner of the animal causing the death, and therefore he is properly punished by such forfeiture." 1 Bl. Comm. 300, 301. It is said, that it was holden in the time of Littleton, that the deodand did not arise, unless the party died without receiving extreme unction, Lill. Pr. Reg. tit. *Deodands*: *Encyclopedie Methodique*, tit. *Deodand*; so that the judges of those days seem to have been influenced by the same reasons upon which the distinction was founded in the case of infants. It appears, however, by Fleta, that the masses which the deodand was to purchase were not merely for the soul of the deceased, but for those of the king's ancestors, and all the faithful departed this life: *Ex his autem provium est, quod pro animabus antecessorum regis omniumque fidelium tantum precium sanguinis distribuantur, et ideo deodanda vocantur.* Lib. 1, c. 25, § 9.]

This forfeiture takes place at land only, and doth not extend to the seas, that are continually liable to storms and tempests; and therefore a ship in salt water, whether in the open sea, or within the body of a county, from which a man falls and is drowned, is not forfeited.

3 Inst. 58; H. P. C. 33; S. P. C. 20 b; Hawk. P. C. c. 27.

## Descent.

But a ship, by a fall from which a man is drowned in the fresh water, shall be forfeited, but not the merchandise therein, because they no way contribute to his death.

H. P. C. 33; 3 Inst. 59; Hawk. P. C. c. 27.

In all these cases, if the party wounded die not of his wound within a year and a day after he received it, there shall be nothing forfeited; for the law does not look on such a wound as the cause of a man's death after which he lives so long. But, if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time.

S. P. C. 21 b; H. P. C. 55; Hawk. P. C. c. 27; Dalt. c. 97; Plow. 260; Kelw. 68.

However, nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; (a) but after such inquisition, the sheriff is answerable for the value of it, and may levy the same on the town where it fell; and therefore the inquest ought to find the value.

3 Co. 110 b; Co. Litt. 115; Dalt. c. 97; S. P. C. 21 a; Palt. 125; Hawk. P. C. c. 27. (a) [Hence Lord Coke infers, and he is followed in it by Lord Hale and Sir William Blackstone, that deodands cannot be claimed by prescription. Co. Litt. 114 a; 5 Co. 110 b; 1 H. H. P. C. 419; 2 Bl. Comm. 265. But *qu.* this doctrine.]

As this forfeiture seemeth to have been originally founded rather in the superstition of an age of extreme ignorance, than in the principles of sound reason and true policy; it hath not of late years met with great countenance in Westminster Hall.\*

Fost. Cr. Law, 266. \*Upon inquisitions, the jury find the value as small as possible.—And in some cases only the value of the identical thing moving to, or causing the death; as for example, of the wheel of a loaded wagon, &c. [This practice the Court of King's Bench have impliedly sanctioned, by refusing to reform it on an application by the crown or its grantees. Fost. 266; 2 Barnardist. 82. Nor can such inquisitions be taken by the grand jury on default of the coroner, 1 Burr. 19; and when taken by the coroner, they may be removed and traversed. Ibid.; 2 H. H. P. C. 416. ¶By st. 4 & 5 W. & M. c. 22, for regulating proceedings in the crown office in the Court of K. B., it is enacted, that no corporation or person having grants of deodands, who have enrolled and had the same allowed, shall be compelled to plead the same to any inquisition returned by the coroner; that no corporation or persons, who have or shall have such grant from the crown of deodands, felons' goods, and other forfeitures, need to enrol more of them, than to express and set forth the grant of such goods, for which they shall pay 20s. and no more; and after such enrolment, no such grantee shall be compelled to plead the same to any inquisition; that after such enrolment or entry the clerk of the crown shall not issue process against the grantee under a penalty of 5*l.*; but such penalty shall not be incurred for issuing process against any purchaser or devisee who shall not enrol and plead the same; or against the heir who shall not enrol his right by descent, and until after such pleas have been allowed and approved by the court; or where, by the coroner's inquest, the deodands, &c., shall not be found to be in the hands of such purchaser, devisee, or heir, or their respective officers in trust for them.¶]

## DESCENT.

§ By descent or hereditary succession, is understood the title whereby a person, upon the death of his ancestor, acquires the estate of the latter as his heir at law. This manner of acquiring title is directly opposed to that of purchase. §

## (A) Of Lineal Descent.

- (A) Of Lineal Descent: And herein of the Exclusion of the ascending Line.  
 (B) Of Collateral Descent.  
 (C) Of the Half-Blood, and the *Possessio Fratris*.  
 (D) Of Descents according to Custom.  
 (E) Where a Person shall be said to take by Purchase, and not by Descent.  
 (F) Of a Descent, its Operation to take away an Entry.  
 (G) In what Cases the Entry of the Disseissee may be lawful notwithstanding a Descent.  
 (H) Whose Entry is preserved notwithstanding a Descent.  
 (I) How the Entry may be preserved by continual Claim: And herein  
     1. *Of the Nature of continual Claim, and the Effects of it.*  
     2. *What is necessary to a continual Claim to make it effectual.*  
     3. *The Time in which it is to be made.*  
 (K) General Rules of Descent in the United States.*g*

## (A) Of Lineal Descent: And herein of the Exclusion of the ascending Line.

ANCIENTLY, the lords gave lands to such persons as had behaved themselves well in the wars, for their lives only, and sometimes they also married their daughters to them, and then they limited the lands to go not only to the tenant himself, but also to the issue of that marriage; and this first brought in the notion of succession among the northern nations where the feudal tenures prevailed.

The lands therefore in the elder times went to the immediate descendants of such marriage, and originally to none else: and in the first place they went to the (a) males as the most worthy of blood, and most capable of doing the service annexed to such donations; and the feud was united in the (b) male, because he was obliged to do the duty in the wars, and for every knight's fee was to go out forty days with his lord, so that the feud did not divide among the males, because the duty could not be commodiously divided: besides, the males were to keep up the name and grandeur of the family; and, therefore, the inheritance was not shared or broken. From hence it came to pass, that among the males, the eldest was preferred as the most worthy, since he was soonest able to go to the wars, and to do the (c) duties of the tenure.

Gillb. Treat. of Ten. 9. (a) Vide title *Co-parceners*. (b) Vide titles *Gavelkind* and *Borough-English*. (c) Also the eldest son was anciently married with the consent and approbation of the lord, for the lord always approved the first marriage of his feudatory, and of his heir apparent; and if the feudatory died, his heir within age, the lord had the total marriage of him; and if he was of full age, the lord gave license to such marriage. From hence the descent always settled in the eldest line, and the daughter of the eldest son was preferred before the second or third brother, and their male descendants, in order to encourage the best marriages with such eldest son. Spelm. Rem. 29.

When a feud escheated to the lords for felony, or want of heirs, the lords used to restore it to the old family, or grant it out again to another family *ut feudum antiquum*, and then the descent was formed in such new feud, as if it had been *feudum antiquum*. Hence, the lineal succession or succession of the father was totally excluded, because no case could happen where the ascending line could be admitted *in feudis antiquis*; for the father took before the son under the first feudatory in every ancient feudal donation; and all above such donations were excluded, so that in such donations the father could not claim as heir to his son. And this order of descent which

## (B) Of Collateral Descent.

excluded the father was the rather continued, because the father was guardian to his son; and in those barbarous times they would not trust the father with any profit from the death of his own issue, and so the father was totally excluded.

Co. Litt. 11 b.

But though the father cannot inherit his son, yet if a lease for life be made to the son, the remainder to his next of blood, the father shall take the remainder by (a) purchase under the words of designation.

Co. Litt. 10 b. (a) So if a man hath issue two sons, and the eldest dies, leaving a son, and a remainder is limited to the next of blood to the father, the younger son shall take it; yet the other is the father's heir. Co. Litt. 10 b.

Also, if the son purchases lands, and dies without issue, and without brothers and sisters of the whole blood, and the lands descend to his uncle, the father may be heir to the uncle, if the uncle was in (b) actual possession; but he claims it as heir to his brother who was last (c) seised, according to the rule *quod seisinā facit stirpem*.

Litt. § 3; Co. Litt. 11 b. (b) Therefore, in case of a reversion upon a lease for life, made of the lands by the son, the father cannot be heir, because the son was last actually seised; otherwise, of a reversion upon a lease for years; for the possession of the tenant is the possession of the uncle. Co. Litt. 11 b.—If a son be enfeoffed with warranty, and the uncle enter into the lands after the death of the son, and die; my Lord Coke says, that the father cannot take benefit of such warranty, because it was never actually possessed by voucher, or *warrantia chartæ*. Co. Litt. 11 b.—If an advowson be granted to the son and his heirs, and the son die without issue, and the advowson descend to his uncle, and he die before he can or does present to the church, the father shall not inherit, for before a presentation there is no actual seisin of the advowson. The same law of a rent. Co. Litt. 11 b. (c) The evidence of seisin, or defect thereof, shows when it will or will not descend to the father from the uncle.

[But, if the father happened to be also cousin to the son, and as such his heir, he may, in that remoter capacity, inherit immediately after the son.

Eastwood v. Vinke, 2 P. Wms. 614.]

But here we must take notice, that if, after the descent to the uncle, the father has issue a son or daughter, that issue shall enter upon the uncle; for the land descended originally upon the uncle, because he was then the next heir; therefore, if an heir nearer than he is springs up, by the same rule that he succeeded to the land at first, that heir must now take place and exclude him. And by the same rule, if a man hath issue a son and a daughter, and the son purchases lands in fee, and dies without issue, the daughter shall inherit; but, if the father hath afterwards issue a son, this son shall enter into the land as heir to the brother; and if he hath issue a daughter and no son, she shall be coparcener with her sister.

Co. Litt. 11 b.

## (B) Of Collateral Descent.

If a man purchased the *feudum novum ut feudum antiquum*, and died without issue, it went first to the father's side, because the lords in such feudal donations were presumed to respect the father's side, who had been the ancient tenants of the manor; for where it was given *ut feudum antiquum*, it must be presumed to be meant as if it had been an ancient feud of that manor, and therefore it went to the father's side *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were presumed rather to respect the female blood of their former tenants, than the blood of the mother who was newly introduced into the family of their feudatory, because

(C) Of the Half-Blood, and the *Possessio Fratris*.

the feud was given as an ancient one, and, by consequence, the blood of the precedent tenant was preferred to any other. But the blood of his mother's side was preferred to the blood of his grandmother; because, being both female bloods, and both coming under the consideration of ancient tenants, the (a) nearer tenant's blood was preferred to the more remote. But, if the father's side wholly failed, then the blood of the mother was admitted, *to wit*, first the male line, and then the female of such blood, since the lord must be presumed to introduce the blood of the mother, when he had given an indefinite right of representation.

Plow. 444 to 429. Clere and Brook, Co. Litt. 12. (a) Co. Litt. 10 b. *Hæres in linea rectâ præfertur hæredi in linea transversali, et propinquior excludit propinquum, propinquus remotum, remotus remotiorem.*

Agreeably to this scheme of descent upon the purchase of the *feudum novum ut feudum antiquum*, if a son purchase land in fee-simple, and die without issue, they of the blood of his father's side shall inherit as heirs to him before any of the blood of his mother's side; for the old rules, formerly settled for the directing of the descents of such feuds as were purchased, still prevail; and all new purchases made now of lands in fee shall be considered as the purchases formerly made of the *feudum novum ut antiquum*.

Litt. § 4.

If the son purchases land, and dies without issue, and it descends to any heir of the part of the father, and then the line of the father (after entry and possession) fails, it shall never resort to the line of the mother, though in the first instance, or first descent from the son, it might have descended to the heir of the part of the mother; for now by this descent and seisin, it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, because he can never show that he was heir to him that was last actually seised; which being a rule to be strictly observed, he must entitle himself by it, otherwise be excluded.

(C) Of the Half-Blood, and the *Possessio Fratris*.

NONE shall be heir of land in fee-simple, or to a warranty, or sue an appeal of death as heir, unless he be of the (b) whole blood, viz., both of the father and the mother.

Co. Litt. 14 a. (b) In a long course of time the feudal donations were worn out, and then it became impossible to compute up to the first marriage, where such donations were originally settled, and therefore they changed the computation, and computed from the last possessor, provided the heir that claimed was of the blood of the first purchaser, and then the rule was taken *quod seisinâ facit stirpem*; for since the feudal donation was lost, they could not regularly compute the descendants from the first feudal marriage; and therefore they computed from the last feudatory; and since both bloods of the first marriage were necessary to any person that would claim under the first donation, they required that a man should be of the whole blood of the last feudatory, that would claim as heir to him; for if any person was of the whole blood of such feudatory, then he must of necessity be of both bloods of that remote feudal marriage, where the feud was originally placed; and thus the half-blood came to be excluded. Gilb. Ten. 13.  $\beta$  In the United States the common law principle in relation to the half-blood may be considered as not being in force, though in some states some distinction is still preserved between the whole and the half-blood. 4 Kent, Com. 403, note; Karwon v. Lowndes, 2 Desaus. 210; Pinkard v. Smith, Litt. Sel. Cas. 331; Wren v. Carnes, 4 Desaus. 405; Gardner v. Collins, 3 Mason, 398; S. C. 2 Pet. 58.  $\gamma$

Therefore, if an elder brother purchases lands in fee, and dies without issue, his sister of the whole, not his younger brother of the half-blood, shall be his heir.

Co. Litt. 14 a.

(C) Of the Half-Blood, and the *Possessio Fratris*.

So, if a man seised in fee hath issue a son and a daughter by one venter; and a son by a second venter, and dies, and the eldest son enters and dies, his sister shall inherit according to the rule *quod possessio fratris de feodo simplici facit sororem esse hæredem*.

Co. Litt. 15.

¶ For when the old donations came to be lost, the possession was the only *indiciu*m of who was feudary; therefore any person that claimed as his representative must show a descent from the same stock; and therefore the rule was taken as to lands in fee-simple, and not as to lands in tail. For there a man must claim as heir *per formam doni*, as they did in the old feudal donations *de feudis novis*.

Gilb. Ten. 15; 3 Co. 41 b.

So, of a remainder after an estate for life that never fell in possession, a man must claim by virtue of the contract, as heir to him to whom the remainder was limited; for no man in such case can make himself heir to the last feudary, since the feudal possession was in tenant for life.

Gilb. Ten. 15; 3 Co. 41 b.

So, of a reversion on an estate for life, upon which no rent was reserved; for a man must make himself heir to the last feudary before the estate for life was created. But, if a rent had been reserved, it had been doubted, whether he must make himself heir to the last possessor of the estate, or to him that last received the rent; and whether the receipt of rent make such a feudal possession as may be laid as esplees in a writ of right.

Gilb. Ten. 15; 3 Co. 41 b. It is now apparently settled, that the receipt of rent in these cases will not make a *possessio fratris*. Gilb. Ten. by Watk. 16, note (m).]

If a father makes a lease for years, and the lessee enters, and dies, the eldest son dies during the term, before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because the possession of the lessee for years, who was formerly considered only as a bailiff to the lessor, is the (a) possession of the eldest son.

Co. Litt. 15 a, 243 a; And. 47; Keilw. 110; 3 Atk. 471. (a) So, if a guardian by knight's service, or socage, enters, for the possession of the guardian is the possession of the infant. Co. Litt. 15 a. [And see the cases of *Whitcombe v. Whitcombe*, Pr. Ch. 280; *Goodtitle v. Newman*, 3 Wils. 516. ¶ 2 Bl. Rep. 938, S. C.] So, the entry of a devisee for years, it is said, will make a *possessio fratris*. Jenk. 242.]

But, if a man makes a lease for life, and dies, leaving a son and a daughter by one venter, and a son by a second wife, and the eldest son dies before the lease for life is determined, the youngest son shall inherit, because the eldest was never seised.

Co. Litt. 15; Cro. Car. 411; Jon. 361; {8 Term, 211, *Doe v. Wichelo*. See 5 Ves. J. 338, *Wheldale v. Partridge*.}

So, if a father makes a lease for life, and after recovers against his lessee by default, and dies, and the eldest son enters, against whom the lessee recovers by a *quod ei deforceat*, and then the eldest son dies, the brother of the half-blood, and not the sister, shall have the reversion; for when the tenant for life has recovered his estate, he hath entirely defeated all possession in his lessor, which he acquired by the judgment on default, and all possession in the eldest son likewise by virtue of that judgment, and is entirely in of his old estate; so that there is no actual seisin left in the elder brother whereon to found a *possessio fratris*.

8 Ass. 6. ¶ Qu. for I do not find the case there, and yet it is cited as from thence in Hal. MSS. note 7; Co. Litt. 15, 13th edit.]



(C) Of the Half-Blood, and the *Possessio Fratris*.

¶ If a man has a son and daughter by one venter, and a daughter by another venter, and he makes a lease for life of land without reserving any rent, and the father dies, and the reversion descends to the son, and the son has issue a son, and dies, and the reversion descends to his son, who dies without issue; and afterwards the lessee for life dies; the two sisters by different venters shall have the land, as heir to their father, and not the sister of the first venter only. And this by the opinion of the justices of the Common Bench.

N. Benl. 143.¶

There is *possessio fratris* of an advowson or (a) rent, after actual receipt of the rent, or presentation of the clerk; so of (b) a use, because equity follows the rule of the common law; so likewise of a copyhold, where the eldest son receives the profits, and dies, though before admittance.

Co. Litt. 14 b. And so of other hereditaments, as a seignory, &c.; 3 Co. 41 b, 42 a. —Of offices, courts, liberties, franchises, and commons of inheritance. Co. Litt. 15 b; 3 Co. 42 a. (a) Co. Litt. 15 b, S. P.; 3 Co. 42 a, S. P. (b) Dyer, 10, pl. 40, 274; pl. 43; Ro. Abr. 502, pl. 3, [i. e. of a use *not* executed by the statute; for uses executed are legal estates. Co. Litt. 14 b, note 5, 13th edit.]

[So, of a trust (c) and (seemingly by the better opinion) of an equity of redemption. (d)]

(c) 1 Co. 121 b; 2 P. Wms. 713; Hardr. 488. (d) 1 Atk. 604; Co. Litt. 205 a, note (1), 19th edit.]

But, though the eldest son enters, and gets an actual possession of the land, yet if the father's relict be endowed of the third part, and the eldest son die, the brother of the half-blood, and not the sister, shall have the reversion of the third part, because the actual seisin which the brother obtained, was defeated as to the third part, by the widow's entry into it, who is esteemed in law to be in, in continuance of her husband's estate, without any interruption.

Co. Litt. 15 a.

But, if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, who afterwards died, the daughter should have the reversion, and not the half-brother; for the widow's acceptance of dower from the tenant for life, and the existence of his estate in the land after her decease, show that the tenant for life had an interest in the land; but such an interest always presupposes an actual seisin in the lessor; otherwise he could not make that livery which is necessary on the passing of a freehold; therefore, notwithstanding the dower, this actual seisin in the brother shall establish a *possessio fratris*.

Co. Litt. 15 a.

Lands are given to a man and his wife in special tail, the remainder to the heirs of the husband, and they have issue a son, and the wife dies, the husband marries again, and hath issue a son, and dies, the eldest son enters, and dies without issue; the second brother of the half-blood shall inherit the remainder, because the eldest brother was not seised of a fee-simple, but only of the special tail, and so no ground for a *possessio fratris* of the fee expectant on the tail.

Co. Litt. 14 b; Ro. Abr. 628.

If a man dies seised of several parcels of land in one county, and after his death his eldest son enters into one parcel generally, and, before any actual entry into the rest, dies; this general entry into part shall vest in him an

(C) Of the Half-Blood, and the *Possessio Fratris*.

actual seisin in the whole sufficient to establish a *possessio fratris* upon; for since the freehold in law is cast upon him by the death of his father, and since the possession is in nobody, and so no particular estate to be defeated, a general entry into parcel, in the name of all, may well serve to reduce the whole into an actual possession. But, if his entry into parcel be special, it shall only reduce that parcel into possession; for it is reasonable to bound the operation of his act by the intention which he appears to have had in doing it.

Co. Litt. 15.

The advantages of this rule of *possessio fratris* do not only extend to the sister, but to her issue, who shall be preferred to the half-brother, because they represent the ancestor, and therefore shall succeed to those advantages which their ancestor would have enjoyed if she had lived.

Co. Litt. 15 a.

There can be no *possessio fratris* of dignities, as duke, marquis, and the other honours annexed to the peerage, but the brother of the half-blood shall (a) inherit them. And this difference seems to be founded on a strict regard to the public good, which is the better consulted when such persons are promoted to those dignities as are capable of discharging the great duties annexed to them.

Co. Litt. 15 a; 3 Co. 42 b; Cro. Car. 601. (a) The Lord Grey being a baron by writ, was created Earl of Kent, to him and the heirs male of his body, and had issue two sons by several venters, the eldest of whom had issue a daughter. The barony shall go to the daughter *jure representationis*, but the earldom to the second son, according to its original limitation. Cro. Car. 601. [Coll. Proc. on Claims of Bar. 195. But, if it was of a feudal title of honour, as of the earldom of Arundel, or barony of Berkeley, there *possessio fratris* should hold well; because the title is annexed to the land.—So, of an office of dignity, and *ad ratione* the office of High Chamberlain of England descended to the Earl of Lindsey of the whole blood, and departed from the line male of the Earl of Oxford; and adjudged accordingly in parliament. Hal. MSS.; Coll. Proc. on Claims of Bar. 173; Sir W. John. 96.] [Lord C. J. Brampston, in delivering his opinion in the above case of the barony of Grey of Ruthyn, observed, that one of the reasons why there could be no *possessio fratris* of a barony was, because the title to every barony must be by record. Baron or no baron must be tried by record: so that whosoever shall make a title to a barony must resort to the record, and begin his title there, and so, consequently, must make himself heir to the person first ennobled by that record, which the daughter could not do, notwithstanding the possession of the brother; for she was not heir to the first ancestor, but to the brother of the whole blood. Collins, 255; Cruise, 139.]

Also, the policy of the kingdom hath established laws and rules for the government of the possessions and descent of the crown, different from those which guide and direct the descents of private property: therefore, if the king hath issue a son and a daughter by one venter, and a son by another venter, and purchases lands, and dies, and the eldest son enters and dies without issue, the daughter shall not inherit those lands, nor any other fee simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Litt. 15 a.

The rule of *possessio fratris* does not apply to estates tail, nor to inheritances in fee simple, without an actual possession of the brother of the whole blood.

Doe v. Wichelo, 8 Term R. 211.

J A devised all his lands to S A, (his son by the first venter,) when he should come of age of twenty-one years; but if he should die before twenty-

## (D) Of Descents according to Custom.

one years, and D A (testator's daughter by a second *venter*) should be living, he gave the same to her when she should attain twenty-one years. Testator died, and S A died under age, and without issue; and it was held that on S A's death the inheritance in fee vested in D A, the sister by the half-blood, in preference to the testator's brother of the whole blood; for S A was never possessed of the reversion expectant on the sister's life-estate, so as to make a *possessio fratris* to exclude the half-blood.

Doe v. Hutton, 3 Bos. & Pull. 643. In this case Lord Alvanley denied the authority of the case of Smith v. Parker, 2 Black. R. 1230; and see 2 Saund. R. 8, *notd*; Doe v. Kean, 7 Term R. 386.

## (D) Of Descents according to Custom.

THERE are several customs as to descents, which having been allowed time out of mind, must be presumed to be coeval with the common law, and therefore cannot be altered without an act of parliament, as that of *gavelkind* in Kent, by which the descent is first to all the male children, then to the females, then to collateral relations. But in this, according to the civil law, regard is to be had to the *stirpes*, and therefore if the eldest son had issue a daughter, she should inherit her father's share with the younger sons.

Litt. § 910; Co. Litt. 140 a; Lamb. 608; Vide head of *Gavelkind*, and Lamb. 628, that it is probable that most lands in England were thus partible.

But, if a remainder of lands of the nature of *gavelkind* be limited to the right heirs of J S, the heir at common law shall take it, and not the heirs in *gavelkind*; for this remainder being (a) newly created, cannot be reckoned (b) within the custom.

Co. Litt. 10; Lamb. 607; Hob. 31. (a) Also, for a condition broken, the heir at common law shall enter, because the condition is a thing of a new creation, and altogether collateral to the land. Lamb. 608; Co. Litt. 11, 12. (b) This custom, like all other customs that are derogatory from the common law, is to be construed strictly, because, as far as the particular custom hath not derogated from the common law, the general custom of the whole kingdom ought to prevail. Ro. Abr. 568.

If a rent be granted out of *gavelkind* lands, it is of the nature thereof, and shall (c) descend to all equally; for the rent is part of the profits of the land, and issues thereout.

2 Lev. 87, adjudged; Mod. 96, S. C. adjudged. [1 Freem. 105, 345, S. C.; 3 Keb. 165, 214, S. C.; 1 Vern. 489, S. C. cited.] Vide Noy, 15, and Bro. tit. *Customs*, 58, *contr.*; but vide 14 H. 8, 9; 26 H. 8, 4; Noy, 15. (c) That a trust shall descend accordingly. 2 Ro. Abr. 780.

The general custom of *gavelkind* lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good.

Co. Litt. 140 a.

By the (d) custom of borough-english, the youngest sons only shall inherit.

For this, and the reasons thereof, vide title *Borough-English*. (d) Where the custom was laid, that if a copyholder dies seised, his youngest son should inherit, and the copyhold was granted to a man and his wife, and the heirs of the man, and he died, whether within the custom? 2 Leon. 208, *dubitatur*.

If borough-english lands be let to a man and his heirs, during the life of J S, and the lessee die, the youngest son shall enjoy them.

Co. Litt. 110 b; 2 Lev. 138, S. P. adjudged upon a special verdict.

If the custom be, that the youngest son shall inherit, the youngest (e) brother shall not inherit by force of this custom.

Ro. Abr. 623; 4 Leon. 242; Cro. Ja. 198; Cro. Car. 411. (e) If the custom of a

## (D) Of Descents according to Custom.

copyhold be, that the eldest daughter shall have the land, the eldest sister shall not have it by the custom. Godb. 166; Ro. Abr. 623; 4 Leon. 242. [So, if the custom be, that lands shall descend to the eldest sister, where there is neither a son nor a daughter, an eldest niece is not within it. Denn v. Spray, 1 T. Rep. 466.]—But by some customs the youngest brother shall inherit, and *consuetudo loci est observanda*. Co. Litt. 110 b.—Special custom, that lands in fee shall descend to the younger son, but lands in tail to the elder, is good. March 54.—So, that lands shall descend to the younger son, if not of the half-blood; and if he be, then to the eldest. Co. Litt. 140 b.

If a custom be, that if a man dies without heir male, his eldest daughter shall have the land; and if he have no daughter, that the eldest sister shall have the land; and if he have not a sister, the eldest cousin; but, if he have an heir male, that he shall have it before any of them; and the tenant of the land have several daughters, but no heir male, and the eldest daughter die in the life of the tenant of the land, having issue a daughter; this grandchild is within the custom, and shall have the land by descent upon the death of the grandfather.

Ro. Abr. 623; Godfrey and Bullock.

But, if the custom be, that the youngest son shall inherit, and a man have issue two sons, and the eldest have issue two sons, and die, and the lands descend to the youngest son, who dies without issue; the eldest son of the eldest brother shall have the land, because the custom holds not in the (a) transversal line, but only in the lineal descent.

Ro. Abr. 624; resolved *per Cur.* (a) If a copyholder of the nature of borough-english surrenders to the use of himself and his wife, and his heirs, and dies, leaving issue three sons, and the youngest dies in the lifetime of the wife; the eldest brother shall inherit, as heir to the younger brother; for the custom cannot extend to the collateral descent. Ro. Abr. 624; Cro. Car. 411; Jon. 360, S. C. by two judges against two.

If there be a custom within the manor of T. that if the father dies, leaving no son, but two or more daughters, that the eldest daughter shall have his land for her life only, and after her death it shall descend to the next heir male that can derive by males; and for want of such, that it shall escheat to the lord; and there is another custom, that if the tenant dies, and leaves a wife, that she shall have it for her life; and a copyholder of the manor dies, leaving a wife and two daughters, and no son, and his wife enters, and the eldest daughter dies, and after the wife dies; the second daughter shall have the lands for life, within the custom; for though she was not the eldest at the death of her father, yet she was so at the death of her mother, whose estate was a continuance of the father's estate, as in case of freebench.

Lev. 172, between Newton and Shaftoe, adjudged, and that the custom was good, according to Co. Litt. 140 b; Keb. 925; 2 Keb. 111, S. C.; Sid. 267, S. C. adjudged, and that the custom was good; though said in the report thereof, that it seemed to be admitted by all, that such custom, as to fee simple lands, would be void; it being wholly against the nature of a fee to escheat as long as there are heirs. And in Sid. 268, another case was said to have been adjudged accordingly, upon debate in B. R. in 20 Car. 2, between Sampson and Quinsey, which see. Lev. 293, adjudged without argument, because the court said, the point had before been adjudged in the case of Newton and Shaftoe.

If A hath issue five sons, and the youngest dies in the lifetime of the father, leaving issue a daughter; after which the father purchases copyhold lands of the nature of borough-english; those lands shall, at the death of the father, go to the daughter of the youngest son *jure representationis*, and not to the fourth son, although he was the youngest son at the time of the purchase, and death of the father.

Salk. 243, between Clements and Scudamore, adjudged; 6 Mod. 120, S. C. adjudged; 1 P. Wms. 63, S. C.; 2 Ld. Raym. 1024, S. C.

(E) Where a Person shall be said to take by Purchase, and not by Descent.

It is an established rule in descents, that none can inherit as heirs, but those who are of the blood of the purchaser; and, therefore, if lands descend to the son of the part of the father, and he enters, and after dies without issue, the lands shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother; and if there be no heirs on the part of the father, then they shall go to the lord by escheat.

Litt. § 4; Co. Litt. 13. *§* If the legal estate in fee descend *ex parte maternâ*, and the equitable estate in fee *ex parte paternâ*, the equitable is merged in the legal, and both go in the line of descent of the legal estate. *Nicholson v. Halsey*, 1 Johns. Ch. 417. See *Hawkins v. Shewen*, 1 Sim. & Stu. 257; *Butler v. King*, 2 Yerg. 115. In New Hampshire, lands descend without reference to the stock from which they were inherited. *Parker v. Nims*, 2 N. H. Rep. 460.*g*

In the same manner, if a man marries an (a) inheritrix of lands in fee, who has issue a son, and dies, and the son enters into the tenement as son and heir to his mother, and after dies without issue; the heirs on the part of the mother are to inherit; and for want of such heirs the lands shall escheat.

Litt. § 4. (a) But, if a man gives lands to another and his heirs of the part of the mother, yet the heirs of the father's part shall inherit; for no man can institute a new kind of inheritance, not allowed by the law. Co. Litt. 13. But vide Co. Litt. 220, that lands may be given to a man and his heirs, on the part of the father; in which case none of the heirs of the part of the mother shall ever inherit; but the inheritance, as long as it continues, descends according to the rules of law, though it be determinable for want of heirs on the part of the father.

So, if a grandfather had purchased lands in fee, and the lands had descended from him to the father, and from him to the son; if the son had entered, and died without issue, his father's brothers or sisters, or their descendants; or for want of them, his grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandmother's brothers or sisters, or their descendants, might have inherited; but none of the line of the mother or grandmother, viz., the grandfather's wife, should have inherited, because not of the blood, either by father or mother, of the first purchaser, viz., the grandfather.

Plow. 446.

A man seised of lands as heir of the part of his mother, makes a feoffment in fee, and takes back (b) an estate to him and his (c) heirs, this is a (d) new purchase of the lands, and, consequently, if the purchaser dies without issue, the heirs on the part of the father, and not the heirs on the part of the mother, shall succeed him in it; for he is the original purchaser of that estate, which he takes back to him and his heirs; and therefore it shall descend as a new purchase.

Co. Litt. 12 b. (b) *¶* But this must be understood of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the lands; and the last regranting the estate to him. For if in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such consideration as to raise a use to the feoffee, and consequently, the use resulted to the feoffor; in either case he is in of his ancient use, and not by purchase. *Hargrave's note* (2) to Co. Litt. 126. So, if A, seised in fee of copyhold lands of inheritance by descent *ex parte maternâ*, surrender to B, a mortgagee in fee, who on payment of principal and interest surrenders again to A and his heirs, the estate will descend to A's paternal heirs. *Doe v. Morgan*, 7 T. Rep. 103; *Benson v. Scott*, 12 Mod. 49. S. P. *¶* (c) Where the ancestor takes but a particular estate, and the limitations after operate by way of purchase, and not by descent; vide head of *Remainders*, and Co. Litt. 22; *Styl.* 148; Co. 93; *Moor*, 136; *And.* 69; *Hob.* 30; *Vent.* 372; 2 *Lev.* 75; *Raym.* 228;

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Mod. 121, 226; 2 Mod. 207; 4 Mod. 380; Carth. 272. (d) So, if he levies a fine *sur cognizance de droit, &c.*, to A and B, and by the same fine they grant and render the lands to him and his wife in tail, remainder to his right heirs; this makes it a new purchase, and the heirs of the part of the father shall inherit. ¶ Price v. Langford, Carth. 140: 1 Salk. 337, S. C.; 1 Show. Rep. 92, S. C. ¶ {If a tenant in tail seised by descent *ex parte maternâ* suffer a recovery, and declare the uses to himself in fee, the estate will descend to the heir *ex parte maternâ*, as the estate tail would have descended. But had he been seised by purchase under a settlement made by his maternal ancestor, the fee obtained by the recovery would descend to his *paternal heirs*. The common recovery puts an end to the estate tail, which immediately afterwards becomes an estate in fee; and the party whose estate is converted into a fee, if he took the estate tail as a purchaser, must take the fee as a purchaser; or if he took the estate tail by descent, must take the fee also by descent as from the same ancestor. 5 Term, 104, *Roe v. Baldwere*; Ibid. 107, n., *Martin v. Strachan*; Willes, 444, S. C. in error.}

But, if a man seised as heir of the part of his mother, makes a feoffment in fee to the use of him and his heirs, the use shall go to the heirs of the part of the mother; for the use being a creature of equity, must be governed by the rules of equity, which considers in this case, that the use springs and arises out of an inheritance which belongs to the heirs of the mother, and will therefore assign it to them, as a trust which arises out of their property. (a)

Co. Litt. 13. (a) ¶ The better reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. Hargr. note (2); Ibid. 13 a. ¶

A man is seised of land on the part of his mother, and makes a feoffment in (b) fee, reserving rent to him and his heirs; this rent, since the statute *Quia emptores terrarum, &c.*, if it has a distress annexed to it, must be considered as a rent-charge; and if it wants a distress, as a rent-seck; and so either way it is the grant of the feoffee, and, consequently, a (c) new purchase; and therefore it shall go to the heir of the part of the father, and not to the heir of the part of the mother.

Co. Litt. 12 b. (b) But, if he had made a gift in tail, or a lease for life of such lands, reserving a rent, the heir on the mother's side should have had this rent, because the reversion belongs to such heir, and, consequently, the rent too, as incident to that reversion. Co. Litt. 12 b. (c) If a man seised of a manor on the part of his mother, had, before the statute *quia emptores, &c.*, made a feoffment in fee of parcel, to hold of him by rent and service; though this rent and service were newly created, yet continuing parcel of the manor, they shall, with the rest of the manor, descend to the heir on the mother's side. Co. Litt. 12 b. ¶ So, if a man has a house *ex parte maternâ*, and one grants to him that he and his heirs shall have competent estovers to be burned in such house, these, though a new purchase, shall go with the house, as appurtenant to it, to his heirs of the part of his mother. 8 Co. 54 a. ¶

If a man hath a rent-seck of the part of his mother, and the tenant of the land grants a distress to him and his heirs, and so improves the rent into a rent-charge, this distress shall go along with the rent to the heir on the part of the mother, as incident and appurtenant to it.

Co. Litt. 12 b.

If the heir of the part of the mother, of lands whereunto a warranty is annexed, is impleaded for those lands, and vouches, and judgment is given against him, and likewise for him to recover in value, and he dies before execution, the heir on the mother's side shall sue execution to recover in value against the vouchee; for the lands to be recovered in value are designed as a recompense for those lands which were recovered by the demandant from the vouchee, and so must go to that person who has sustained the loss.

Co. Litt. 13 a.

A man hath issue a son, and dies, and his wife dies also, and lands are

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let for life, the remainder to the heirs of the wife ; the son dies without issue ; the heirs of the part of the father shall inherit, and not the heirs of the part of the mother ; for the lands vested in the son as a purchaser, and therefore the descent is to be governed by the rules of law.

Co. Litt. 13 a.

If a man be seised of lands on the part of his mother, and makes a feoffment in fee of them upon condition, and dies, this condition shall descend to the heir of the part of the father ; because he is heir at common law ; but, if he enters for the condition broken, then he restores the estate to its former nature, and then the heir of the part of the mother shall enter upon him, and enjoy the land.

Co. Litt. 19 b. ¶ *Qu.* this doctrine, and vide Robins. on Gavelk. 121, and note.¶

If a man, having only two daughters, his heirs, devises his lands to them and their heirs, they take as (a) jointenants, and not as coparceners ; for the devise giveth it to them in another degree than the common law would have given it them ; and for the (b) benefit of the survivorship between them.

Cro. Eliz. 431 ; Owen, 65, S. C. ; 3 Lev. 127, S. P. admitted *per Cur.* (a) If to them and their heirs, equally to be divided between them, share and share alike, they are tenants in common. 2 Sid. 53, 78. Vide Godb. 362 ; 3 Leon. 25 ; Gouls. 18, and title *Jointenants and Tenants in Common.* (b) If a man devises lands to his son and heir apparent, and a stranger, they are jointenants for the benefit of the stranger. Godb. 94 ; Owen, 65. ¶ Where one devised to his son and heir, "but in case he died without issue, not having attained twenty-one," then over, and the son attained twenty-one ; it was holden by Lord Henley, that the son took by devise, as having, under the will, a different estate than would have descended to him ; the one being pure and absolute, the other not. *Scott v. Scott*, Amb. 383. But see *Hinde v. Lyon*, Dy. 124, and 3 Leon. 64, *contr.*¶

¶ A testatrix devised and bequeathed her leasehold, freehold, and copyhold estates to trustees, their heirs, executors, administrators, and assigns, to the use of such trustees, their heirs, &c., upon trust to sell the same and pay debts and legacies, and after payment thereof to pay and apply the rents, &c., to A for life, and after his decease gave, devised, and bequeathed all such part of her real estates, and the produce thereof, as should not have been sold, paid, or applied for the purposes aforesaid, unto the heir or heirs at law of B, and the heirs, executors, and administrators of such heir or heirs at law, and directed her trustees to convey and assign all the remainder of her said real estates to the said heir or heirs of the said B accordingly. The heirs at law of B turned out to be the heirs at law of the testatrix, known or unknown to her did not appear. By the devise to the trustees the descent is broken, and the devisees shall take as purchasers, and of course as joint tenants. And by the lord chancellor, it is impossible that the testatrix could mean that these persons should take as her heirs ; and if the devise had been to her heirs, their heirs and assigns, as in the case in *Cro. Eliz.*, [the case immediately preceding,] would that be stronger evidence of an intention that they should take a different estate from that which would pass by descent, than the fact, that she has given these estates to them, not as her heirs, but as the heirs of another person ?

*Swaine v. Burton*, 15 Ves. 365.¶

If A hath issue two daughters, one of which dies in his lifetime, leaving issue J S, a son, and A devises his lands to J S and his heirs, J S shall take the (a) whole by purchase, and not one moiety by purchase, and the other by descent.

*Reading v. Royston*, ¶ 1 Salk. 242 ; Pr. Ch. 222, S. C. ; 2 Ld. Raym. 829, S. C. ; Com. Rep. 123, S. C. ¶ (a) *Palm*. 373 ; 2 Ro. Rep. 352 ; 2 Sid. 79, S. P.

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If a man devises lands to his eldest son, and his heirs, paying 20*l.* apiece to his younger children, at their ages of twelve years; and upon non-payment of the legacies devises the lands to his younger children, and their heirs, the eldest son is in by descent.

*Hamsworth v. Pretty, Moor, 644, adjudged. Cro. Eliz. 833, 919, S. C. adjudged, that the first devise to the eldest son, and his heirs in fee, being no more than the law gave him, was void; but the devise to the younger, upon his non-payment, was good, by way of future or executory devise. Vide title Devises, and Vaugh. 271, S. C. cited; 3 Mod. 207, S. C. cited; 1 Ro. Abr. 411, S. C. cited. ¶ See Manbridge v. Plummer, 2 My. & Keen, 93.*

So, if a man devises lands to his daughter's son in fee, who is his heir at law, upon condition that should he pay 200*l.* to such person as the devisor's wife should appoint by deed; the wife makes no appointment, and the grandson enters, and dies without issue, the land shall go to the heirs, *a parte maternā*; for the grandson took by descent, and not by purchase; for the devise gave him the same estate the law would have given him under a possibility of being charged.

*Salk. 241; Clerk and Smith adjudged, and Gilpin's case, Cro. Car. 161, where it is adjudged, that a devise to the heir at law, upon condition to pay debts, and if he fails, that the executors shall sell, makes it a purchase in the heir at law, being tied with a condition, denied to be law by Treby, Ch. Just., and Powell, Just. 1 Com. Rep. 72, S. C.; Lutw. 793, S. C.; Emerson v. Inchbird, 1 Ld. Raym. 798, S. P.; Allam v. Heber, 2 Str. 1170, S. P.*

If a man, being seised of lands on the part of his mother, devises them to his executors for sixteen years, and after to one who is his heir *a parte maternā*, he shall take by descent; for the descent to the heir *a parte paternā* or *maternā* is but a consequent dependent upon the nature of the estate; though it was objected, it was better for him to take by purchase, for then the heirs of the part of the father might inherit before the heirs of the part of the mother, and so both heirs would be inheritable.

3 Lev. 127. *Hedger and Row, adjudged.*

¶ If a man seised in fee of lands descended to him from his mother make a feoffment to the use of himself for life, remainder to the heirs of his body, remainder to his right heirs, the remainder shall go to his heirs *ex parte maternā*, for that it was part of the ancient use, the feoffor having no other estate in him than what came from his mother.

*Godbold v. Freestone, 3 Lev. 406.*

If a man seised in fee of lands descended to him on the part of his mother suffer a recovery and declare the uses to himself for life, then to several other persons in tail, with the last remainder to his own right heirs, this last remainder will go to his heirs on the part of his mother, which is the ancient use; the whole estate coming to him by descent from his mother.

*Abbot v. Burton, 2 Salk. 590; Com. Rep. 160, S. C.; 12 Mod. 181, S. C.* This and the preceding case are cited and approved by Lord Macclesfield in *Harris v. Bp. of Lincoln, 2 P. Wms. 135.*

If a copyholder surrender to the use of A for life, or in tail, or to the use of his last will, and he die without making a will; or, if making a will, he limit only a portion of the estate; the residue or part undisposed of, in the first and last cases, and the whole in the second, will be the old estate, and descend to his customary heirs.

1 Watk. Copyh. 94; 9 Co. 107*a*; 1 Brownl. 181; Cro. El. 148; *Bullen v. Grant, Ibid. 442; Fitch v. Hockley, 4 Co. 29 b.*

So, if he surrender to particular uses with the ultimate limitation expressly



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to his own right heirs, they shall take such limitation as the old estate, and, consequently, by descent.

Roe v. Griffiths, 4 Burr. 1952.

A difference, indeed, has been taken as to this latter point, when the surrenderor takes a particular estate himself, and when not. As, if a surrender be made to the use of the surrenderor for life, with remainder to a stranger in tail, and the ultimate limitation be to the heirs of the surrenderor, his heirs shall take by descent; yet if the surrenderor take no particular estate himself, and the ultimate limitation then be to his own heirs, such heirs, it is said, shall be in by purchase.

Allen v. Palmer, 1 Leon. 101, and Kitch. 86 a, 88 a, b; Lex Cust. 125, c. 15.

But although this distinction is recognised in the case of *Roe v. Quartley*, by Ashhurst, J., when delivering the opinion of the court, yet such distinction has been questioned by C. B. Gilbert, and, after him, by Mr. Fearn.

1 T. Rep. 634; Gilb. Ten. 272; 3 Fearn, Cont. Rem. 48, 4th ed.

Had the ultimate limitation been expressly made to the surrenderor and his heirs, whether he himself had or had not taken a particular estate, his heirs would necessarily have been in by descent; but whether such surrenderor would have taken such ultimate estate (without taking a particular one) as a remainder, or as his reversion, seems to have been disputed. According to the distinction above noticed, and especially the case cited in Kytchin, the surrenderor would have taken it as a remainder; but according to latter decisions, and particularly the case of *Roe v. Griffiths*, he would have been in of his old estate.

4 Burr. 1952; *Thrustout v. Cunningham*, 2 Bl. Rep. 1046.

And it would seem, indeed, to have been uniformly held, that if a copyholder in fee surrender his estate to the use of his will, and devise to a stranger for life, or in tail, and so leave a portion of the fee unlimited, (without giving it expressly to his heirs,) it shall be considered as his reversion, or undisposed-of residue, and go to his heirs by descent. So, where a copyholder, seised in fee, surrendered to the use of his will, and afterwards surrendered to particular uses, with the ultimate limitation to his own right heirs, it was adjudged that he was in of his old estate, and that he might have devised his reversion without any fresh surrender or admission.

1 Watk. Copyh. 96; *Thrustout v. Cunningham*, 2 Bl. Rep. 1046.

Now the idea that when the ultimate limitation was expressly made to the heirs of the surrenderor, the heirs should take by purchase, and when it was not expressly made to them, but resulted or arose by implication, they should take by descent, originated in this, that the estate being yielded to the lord, the uses limited were new uses; and as the whole estate was thus limited, nothing remained in the surrenderor; but when the whole was not so limited, the residue, as undisposed of, resulted to him again. And a distinction similar to this was once held as to freeholds. But as such distinction, with respect to freeholds, has been now long exploded, it having been repeatedly declared, that it matters not whether the ultimate limitation to the heirs of the grantor be expressly made, or result by implication of law; and as the doctrine once entertained, that by a surrender of a copyhold the old estate of the surrenderor was destroyed, and the uses limited to his heirs on such surrender were absolutely new, and such as, if limited to his heirs, should

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be taken by purchase, is also exploded by modern decisions ; it should seem that the distinction above noticed is also antiquated as to copyholds.

Dy. 134 a ; Hob. 31 ; Godbold v. Freestone, and Abbott v. Burton, *suprà* ; Smith v. Trigg, 1 Str. 487.

But, if tenant in tail of lands *by purchase* under a settlement made by an ancestor *ex parte maternâ*, with the reversion in fee by descent *ex parte maternâ*, suffer a recovery to the use of himself and his heirs, the lands will descend to his heirs *ex parte paternâ*, the use not being the ancient use, but a new use arising out of the estate tail, and not out of the reversion in fee.

Martin v. Strachan, Willes's Rep. 444 ; 5 T. Rep. 107, n., S. C. ; 1 Wils. 66, S. C. ; 2 Str. 1179, S. C. ; 4 Br. P. C. 486, S. C. See also Roe v. Baldwere, 5 T. Rep. 104, where this case was cited and relied upon, and its doctrine applied to copyhold lands.

Where a man devised to his son and heir at law, charged with the yearly payment of 100*l.* to his daughter for her life, and at her decease, with the sum of 1,500*l.* among her children, or if no child, to be disposed of as she should direct ; and in default of payment of either of the said sums then to G P, his heirs, administrators, and assigns, in trust to raise 100*l.* out of the rents and profits, and the 1,500*l.* by sale or mortgage of a sufficient part of the lands, and subject to such charges and trust to his said son, his heirs, executors, &c. ; it was held that the son took by descent and not by purchase.

Chaplin v. Leroux, 5 Maule & S. 20. In this case Gilpin's Case, Cro. Car. 161, was again denied to be law ; and see Allan v. Heber, 2 Stra. 1170, Ford's MS.

Devise to the heir at law in fee with an executory devise over in case he does not attain twenty-one years of age ; held, that this executory devise did not alter the quality of the estate which he would otherwise have taken as heir, and therefore that he took by descent and not by purchase.

Doe v. Timins, 1 Barn. & A. 530 ; and see Langley v. Sneyd, 3 Bro. & Bing. 243.

Where a testator devised all his real and personal estate and effects to B V, his wife, in trust for the education of M V till twenty-one ; and in case of death of his daughter before twenty-one, the whole of his estate and effects to his wife ; testator died leaving B V his wife and M V his only child, and then M V died under age and without issue. The Court of Common Pleas held that the heir of M V *ex parte maternâ* was entitled to succeed.

Goodtitle v. White, 2 New R. 383 ; and see 15 East, 174.

## (F) Of a Descent, its Operation to take away an Entry.

DESCENTS which take away an entry are of two sorts : 1st. Where the descent is in fee ; as, where a man seised of certain lands or tenements is disseised, and the disseisor having issue dies seised, and the lands gained by the disseisin descend to his heirs ; this descent shall toll the entry of the disseisee, and oblige him to sue a writ of entry *sur disseisin* against the heir of the disseisor, in order to recover the right of possession which he hath lost by the descent. And the (a) reason is, because the freehold being cast upon the heir, the notions of the law make this title to him, that there may be a person in being to do the feudal duties, and to fill the possession, and answer the actions of all persons ; and since it is the law that gives him this right, and obliges him to these duties, antecedent to any act of his own, it must defend such possession from the act of any other person till it be

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evicted by judgment, which being the act of law, may destroy the heir's title.

Lit. § 385 ; Gilb. Ten. 21. (a) There are also other reasons for this : as, 1st, Because the disseisee not having claimed during the life of the disseisor, the right of possession must be presumed to be derelict. 2d, Because the relief was in the nature of a new purchase upon every descent, for the payment of which a distress was immediately taken upon the descent's being cast. 3d, The right of possession is gotten by descent, that it may be an encouragement to the tenant to be bold in war ; for that none can dispossess his children of the estate he died seised of. Spelm. Feud. 31 ; Gilb. Ten. 23. β In Connecticut, the maxim *seisin facit stipilem* has never been adopted ; on the death of the ancestor, the descent is cast upon the heir, without reference to the actual seisin of such ancestor. Hillhouse v. Chester, 3 Day, 166.

2dly. Descents in fee-tail toll entries ; as, if a man be disseised, and the disseisor grant the land in tail, and the tenant in tail having issue, die seised, and the issue enter, the possession being thrown upon the heir in tail, the law construes the right of possession to be in him, for the reasons above given, and therefore bars the entry of the disseisor.

Litt. § 386.

If a disseisor make a gift in tail, and the donee discontinue in fee, and disseise the discontinuee, and die seised ; this descent shall not take away the entry of the disseisee ; for the descent of the fee-simple to the heir is defeated by his remitter to the estate tail ; and though by virtue of such remitter the heir is seised in tail, yet there is no descent of it, because the tail was discontinued ; and the subsequent disseisin doth not regain it to the ancestor ; and though the heir be remitted into his elder title, yet such remitter places him in only above the second disseisin, and doth not tend to make a descent of the estate tail of which his ancestor never died seised ; and where a new right springs to the heir by operation and construction of law, he ought to take, subject to the same claim as ran upon such estate, before the remitter, else the act of law would work an injury to the first disseisee, who possibly was prevented from bringing his assize or ejectment, by the frequent shifting of the possession ; and the law of descents being in prejudice of an ancient right, is to be taken strictly, and therefore to take place only where the same estate descends from ancestor to heir ; and the rather, for that after discontinuance the disseisee might not watch the death of the tenant in tail, whose interest was transferred, and therefore no presumptive dereliction of the disseisee could be formed in this case.

Co. Litt. 238.

A disseisor makes a gift in tail, the donee has issue, and dies seised, the entry of the disseisee is taken away ; but, if the issue die without issue, so that the estate tail is spent, then the entry of the disseisee is revived, and he may enter upon him in reversion or remainder ; for in this case there is no relief to be demanded from him in reversion or remainder ; so that he labours under no hardship in that point, for which he might expect favour from the law. Likewise, the possession is not cast on him till entry ; which being a voluntary act, the law annexes no privileges to it, as in case where a possession is cast on an heir by descent.

Co. Litt. 238.

Grandfather, father and son, the son disseises one, and enfeoffs the grandfather, who dies seised, and the land descends to the father : the disseisee cannot enter, for the right of possession is devolved on the father (who had no hand in the disseisin) by a fair and legal descent. But, if the father dies seised, and the land descends to the son, the disseisee may enter on the

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son ; for the feoffment made by the disseisor to the grandfather is a stratagem to derive the lands gained by disseisin to the son by descent, in order to enjoy the benefit annexed to such conveyance, which the law will never cherish ; but on the contrary blast such designs, to discountenance all wrong and oppression.

Co. Litt. 238 b.

In descents which toll entries, it is required, that the ancestor die seised of a freehold and fee, or a freehold and fee tail ; for if the disseisor, at the time of his death, hath not the freehold in him, it cannot be cast on his heir, for then there is no danger that the freehold should want a possessor ; and therefore the law creates no title to such possession in the heir at law ; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor ; and if the right of possession be not transmitted at the death of the ancestor, the law will not afterwards create him a new title in prejudice of the person that has the right of propriety. If a disseisor therefore makes a lease for life, he parts with the possession, and cannot transmit it to the heir, having parted with it before ; and a descent of a reversion will not make a right of possession ; for nothing descends to the heir in reversion but a right of reversion, and that is a right against all persons but the disseisee ; for since only a right descends, the heir can be in no better case than the disseisor was at the time of his death ; and, therefore, when the tenant for life dies, he has only the naked possession, as the disseisor had it ; but, if the disseisor had died in possession, the law, for the reasons aforesaid, casting the possession on the heir, makes it a right ; for that is properly a right which a man comes to by act of law ; and since the heir in such case comes to the possession by act of law, it must be called a right of possession ; and it could not be a right of possession, if he could not defend it against all aggressors ; and therefore in such case the right of entry is taken away from every one ; and hence arose the distinction of *jus proprietatis* and *jus possessionis*.

Litt. § 387, 388, 389, 394.

If he in reversion disseise his tenant for life, and die seised, this descent shall take away the entry of the tenant for life ; for the right of possession is by law cast upon the heir.

Co. Litt. 239 a ; Hob. 323. In New York and Maryland, a person claiming lands by descent must entitle himself as heir of the person last actually seised of the fee. *Jackson v. Hilton*, 16 Johns. 96 ; *Chirae v. Reinecker*, 2 Pet. 625. But the contrary rule obtains in Connecticut. *Hillhouse v. Chester*, 3 Day, 166.

So, if there be a tenant for life, remainder in tail, remainder in fee, and tenant in tail disseise the tenant for life, and die seised, this descent shall take away the entry of the tenant for life. But, if the king's tenant for life be disseised, and the disseisor die seised, this descent shall not take away the entry of the tenant for life ; for since the king cannot be disseised, the disseisor gains but a bare estate of freehold during the life of the lessee ; and therefore the law does not cast the possession on the heir ; for if the heir comes into the possession, he must come in as an occupant, which being a voluntary acquisition, the law does not favour it, as it does a right of possession devolved by descent.

Co. Litt. 239 a.

If a disseisor make a lease to a man and his heirs during the life of J S, and the lessee die, living J S, this shall not take away the entry of the disseisee,

(G) In what Cases Entry of the Disseisee may be lawful.

because the heir is only in as a special occupant of an estate of freehold, and not of a fee or fee tail.

Co. Litt. 239 a.

If a disseisor make a lease for years, or has the land extended upon a statute-merchant, staple, judgment, or recognisance, and dies seised; this descent shall take away the entry of the disseisee, because the freehold or fee are cast on him by act of law.

Co. Litt. 239 a.

The descent of incorporeal inheritances, as advowsons, rents, &c., does not take away the entry of him who hath right, because no decision can be committed of them, but at the election of the owner thereof.

Co. Litt. 237 b.

If a disseisor make a lease for his own life, and die, this descent shall not take away the entry of the disseisee; for though the freehold and fee descend to the heir of the disseisor, yet the disseisor died not seised of both, because his death was to precede the determination of the lease, which carried the freehold to his heir.

Co. Litt. 239 b.

Descents to a brother, sister, uncle, or other collateral heir of the disseisor, take away the entry of the disseisee, as well as if the disseisor had had issue, and the descent had been to them.

(G) In what Cases the Entry of the Disseisee may be lawful, notwithstanding a Descent.

LORD and tenant; the tenant is disseised, and the disseisor aliens to another in fee, and the alienee dies without issue, whereupon the lord enters, as upon his escheat; this does not take away the entry of the disseisee, because the lord does not come to the land by descent, but by escheat, for want of a tenant, which can warrant his title no longer than such tenant is wanting, nor hinder the disseisee from entry, who is that tenant. But, if the lord by escheat die seised, and the land descend to his heir; here is a perfect descent, which shall take away the entry of the disseisee. Also, his heir upon such descent must pay relief, which the lord upon the escheat only was not obliged to do.

Litt. § 390; 2 Inst. 286; Co. Litt. 240. See Jackson v. Varrick, 7 Cowen, 238.

If a disseisor die seised, and his heir without heir, the disseisee cannot enter upon the lord by escheat, because his entry was taken away by the descent cast before, and then whoever comes to the lands shall take the benefit of it.

Co. Litt. 240 a.

A man seised of lands in fee, or in tail, upon condition, dies seised; if the condition be broken in his lifetime, or after the lands descended to his heir, yet the entry of the feoffor, or donor, or their heirs, is not taken away.

Litt. § 391.

So, if such tenant on condition be disseised, and the disseisor die seised, and the lands descend to his heir, the entry of the tenant on condition is thereby taken away; but, if the condition be after broken, the feoffor or donor, or their heirs, may enter; because the condition went along with, and was annexed and incorporated in the land into whose hand soever it came, and the feoffor or donor have no other remedy but by entry, which is their title, as the tenant on condition, who is disseised, has; for he having a right,

(G) In what Cases the Entry of the Disseisee may be lawful.

his remedy for it against the heir of the disseisor is by action; and till the condition broken, as well the *jus proprietatis* as the *jus possessionis* is in the feoffee; but, when he is disseised, and a descent cast, the heir of the disseisor has only the *jus possessionis*.

Litt. § 392; Co. Litt. 240 a.

He that hath title to enter upon a mortmain shall not be barred by a descent, because then he would be without remedy, for he can maintain no action for it. So, where a woman hath title to enter *causâ matrimonii prælocuti*, no descent shall take away her entry, because she has no remedy by action to recover it. (a)

Co. Litt. 240 b. (a) [Qu. as the writ *causâ matrimonii prælocuti* extends to all degrees? See the writ in the Register; Booth, 197; F. N. B. 205.]

If a man, seised of lands in fee, by his last will in writing devises them to another in fee, and dies, whereby the freehold in law is cast upon the devisee, and the heir, before any entry made by the devisee, enters and dies seised; this descent shall not take away the entry of the devisee, because then he would be without (b) remedy, (c) having never had possession.

Co. Litt. 240. (b) So, if one hath title to enter for consent to a ravishment, a descent cast shall not take away his entry, because he has no other remedy, nor can maintain any action for it. Co. Litt. 240 b. (c) [The devisee, it seems, is not without remedy, for according to Co. Litt. 111 a, he may either enter, or have his writ *ex gravi querela*. But see Ow. 141; 1 Leon. 209.]

If a disseisor die seised, and his heir enter and endow his mother, the disseisee may enter upon her for that third part, because she is in in continuance of her husband's estate, and not by the heir; and therefore, as to that third part, the descent is (d) interrupted or defeated; but till endowment the disseisee could not enter upon any part, nor after such endowment can he enter upon the other two parts, because as to them the descent was perfect, and continues, but as to the third part, the wife's title was paramount to the descent.

Litt. § 393. (d) So, of tenant by the curtesy. 1 Salk. 241.

If a disseisor enfeoff his father in fee, and the father die seised of such estate which descends to the disseisor as heir, yet the disseisee may enter, because coming again to the disseisor, he shall take no advantage of the descent *quia particeps criminis*; but the disseisee may either enter or have his assize against him.

Litt. § 395.

If a man seised of lands in fee hath issue two sons, and dies seised, and the younger son enters by abatement, and has issue, and dies seised, and the lands descend to his issue, who enters; yet the eldest son or his heir may enter upon them, because the entry of the youngest son shall be intended upon a claim as heir, and the eldest son claiming as heir likewise, and so by the same title, may enter upon him, or any of his issue, be there never so many descents. Also, the entry of the youngest may be intended to prevent others, and so to continue it in the family, and not with design to injure or strip his brother of it; and then his brother's entry cannot be taken away. But, if the younger brother, in this case, had made a feoffment in fee, and the feoffee had died seised, this descent had taken away the entry of the eldest brother, because the feoffment made title by livery to the feoffee, and carried it out of the family.

Litt. § 396; Co. Litt. 242; Gilb. Ten. 28.

(G) In what Cases Entry of the Disseisee may be lawful.

If the younger brother of the half-blood enters by abatement, and a descent is cast; or, if the eldest brother hath issue, and dies, and after his death the younger brother or his issue enter, and many descents are cast in his line; yet the eldest son, or his heirs, may enter; for though the brother of the half-blood cannot be heir to his eldest brother, yet he may by possibility be heir to his father if the eldest brother dies before actual possession; and therefore shall be presumed to enter only to preserve the feud in the same family, and keep out strangers, and not in opposition to the lineal heir of the family.

Co. Litt. 242 b.

But, if the elder brother had first entered, and the younger brother had entered upon him; this had been in destruction of the elder brother's possession, and as much a disseisin as if it had been committed by a stranger, and then his dying seised shall take away the entry of the eldest brother, or his issue.

Lit. § 397.

If after the death of the father a stranger abates, and the younger son enters on him, and dies seised; this descent shall bind the eldest, because *possessio terra* must be *vacua* when the youngest son enters, which here it was not; but his entry on the abator having no right was a disseisin, and, by consequence, a descent thereon will take away the entry of the eldest brother; for his entry was a disseisin, not an abatement.

Co. Litt. 242 b.

Lands are given to husband and wife, and the heirs of their two bodies; they have issue a daughter, and the wife dies, the husband has issue a son by another wife, who upon the decease of the father abates, and dies seised; this descent shall take away the entry of the daughter, for by the limitation in special tail, the son by another *venter* was utterly incapable of inheriting them; and being an estate which the son could not in any case make title to as representative of the father, his entry is an abatement; for the law cannot make that charitable construction here, that he entered to preserve the estate from strangers that might have abated upon the estate, since the son himself is a stranger, and could not inherit; but in the case of the brother of the half-blood it was otherwise, because he might have inherited his father.

Co. Litt. 242 a, b.

If a man be seised of land of the nature of borough-english, and have issue two sons, and die, and the eldest son, before any entry made by the youngest, enter into the land by abatement, and die seised; this shall not take away the entry of the youngest brother, because the eldest son shall be presumed to enter to preserve the estate in his family, which he or his heirs may some time or other, upon failure of his brother's line, happen to enjoy.

Co. Litt. 242, 243.

The same law holds likewise in intrusions as well as in abatement; therefore, if a father makes a lease for life, and hath issue two sons, and dies, and the tenant for life dies, and the youngest son intrudes, and dies seised; this descent shall not take away the entry of the eldest, for the reasons before given: otherwise, if the father had made a lease for years only, because the possession of the lessee for years made an actual freehold in the eldest son, so that the entry of the youngest cannot have such construction, but is a disseisin, because there is no *vacua possessio*.

Co. Litt. 243.

(G) In what Cases Entry of the Disseisee may be lawful.

If one coparcener enter into the whole, claiming it to herself, and take all the profits, yet such entry shall be intended only in preservation of the estate, and, therefore, a descent in such case shall not bind the other sister as to her moiety: but, if she disseise the other, after both have entered, and die seised, there such descent will take away the entry of the eldest, or her issue.

Co. Litt. 243 a.

So, if such coparcener enter, claiming the whole, and make a feoffment in fee, and take back an estate to her and her heirs, and have issue, and die seised; this descent shall take away the entry of the other sister, because the feoffment leaves no room for a presumption that her entry was to preserve the estate of the other sister; and in the other case, the claiming of the whole only makes the abatement as to her sister's moiety; for if one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of them both, and no divesting of the sister's moiety.

Co. Litt. 243 b.

If an infant disseise one, and alien in fee, and the alienee die seised, and the lands descend to his heir, the infant being under age, the entry of the disseisee is taken away; but, if the infant disseisor enter upon the heir of the alienee, as he may well do, not being bound by his alienation made under age, then may the disseisee enter upon him, because the descent to the heir of the alienee, which took away the entry of the disseisee, is now avoided, and the infant disseisor may enter at any time within or after full age.

Litt. § 407, 408.

So, if a disseisor make a feoffment in fee, upon condition, and the feoffee die seised, this gains a right of possession to his heir, and takes away the entry of the disseisee. But, if the disseisor enter for the condition broken, then is the descent defeated, and the entry of the disseisee revived, because the disseisor is then in of his defeasible estate, having only a naked possession without any right.

Litt. § 409.

A civil death, as entry into religion, does not take away an entry, for this was the voluntary act of the ancestor; and though there be a descent cast upon it, yet it is not such a descent as came by the act of God, and therefore shall not take away the entry of the disseisee.

Co. Litt. 248 b; Gilb. Ten. 34.

If I demise lands to a man for years, and am disseised, and my termor ousted, and the disseisor dies seised, and a descent is cast, I cannot enter, but my lessee may, because his entry is only to regain his term, and leaves the freehold and fee in the heir by descent, as it was before.

Litt. § 411.

So, such descent shall not take away the entry of tenant by *elegit*, statute-merchant, &c., for these are only particular interests, of which, as of a term for years, there can be no dying seised, or descent thereof to the heir; but the freehold, which did descend, they leave as it was before, in the heir by descent.

Co. Litt. 249 a.

In the times of domestic war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin were in times of peace; for then the disseisee would be without all remedy, there being no



(H) Whose Entry is preserved notwithstanding Descent.

courts open wherein to bring his action. Also, the descent, which is an act of law, can give no right, when the law itself is silent. But in the times of foreign war only, a descent shall take away an entry; for to encourage enterprising in such war was this privilege chiefly given to the heir of the disseisor.

Co. Litt. 249; Litt. § 412.

No dying seized of a bishop, abbot, dean, parson, &c., where the lands come to his successor, shall take away an entry; for the successor comes in by his own act; || it is by his own concurrent act that he comes to be installed into the rights of his predecessor, and therefore he can have no more than he had; and since the predecessor had a naked possession, and not the *jus possessionis*, the successor can have no more. Besides, the successor pays no relief, unless by grant or prescription: for ecclesiastical lands were not relieved into the hands of the lord for want of a tenant, being given in free alms, or to do service by proxy; and since the lands are not relieved into the hands of the successor for a consideration paid, he doth not acquire a right of possession. Besides, there was no reason to encourage the predecessor to dare in war, who either went not at all, or else by proxy; and therefore no reason such succession should get a right of possession.

Co. Litt. 250; Litt. § 243; Gilb. Ten. 36. ||

(H) Whose Entry is preserved notwithstanding a Descent.

As to infants and (a) feme covert, their entry is not taken away by a descent, by reason of their weakness and incapacity to claim, which is not imputed to them.

Gilb. Ten. 32; Litt. § 402, 403. (a) But if a feme sole is disseised, and after her husband dies she takes another husband, and then the descent happens; this descent shall take away the entry of the feme, for she had once an opportunity of entering. 1 Salk. 241.

If a man seized of lands in fee dies, his wife *privement enseint* with a son, and a stranger abates, and dies seized; and after, the son is born, he shall be bound by the descent, because at the time of the descent he had no right to enter, not being then *in esse*, and, by consequence, had no wrong then done him; and the lord had none to avow upon for his services at the time of the descent.

Co. Litt. 245 b.

B, tenant in tail, enfeoffs A in fee, who hath issue within age, and dies, B abates and dies seized, the issue of A being still within age; this descent shall bind the infant; because the issue in tail is remitted to his former and elder right, which is to be preferred before the defeasible title of the discontinuee's heir.

Co. Litt. 246 a.

If a feme sole seized of lands in fee be disseised, and then take husband, and the disseisor die seized, and a descent be cast, this shall take away the entry of the wife after her husband's death, because, being disseised when she was sole, she might have entered, and her taking a husband, who would not enter, was her own act and folly: but, if she were under age at her marriage, the privilege of her infancy then, and coverture after, shall preserve her right of entry, though a descent be cast.

Co. Litt. 246 a, b.

If a descent be cast, this shall bind a person *non compos*, &c., but not his

## (I) How the Entry may be preserved by continual Claim.

heir, because if any action should be brought against such person after recovery of his understanding, he could only plead his insanity in excuse at the time of such descent: and the law does not permit a man to stultify himself.

Litt. § 405; Co. Litt. 247; Gilb. Ten. 32; [F. N. B. 202; 2 Bl. Com. 291; Cro. Eliz. 398.]

A descent cast, during imprisonment, shall not bind, because during such confinement he cannot be supposed to know of the descent, and, by consequence, not capable of taking any measure to prevent it.

Co. Litt. 259 a; Litt. § 436. [But, if he were at large when he was disseised, and the descent be cast during his imprisonment, this descent shall bind. Co. Litt. *supr.*]

So, a descent cast, during the absence of one in foreign parts, shall not bind, but that on his return he may enter, because he cannot be supposed to know his affairs at home, or to take such ways as might secure it: but, if he were within the realm at the time of the disseisin, or at the time of the dying seised, then a descent cast, though in his absence after, shall bind, because he might be presumed to have had consance of it, and therefore ought to have taken care to prevent it before his departure, or before the death of the disseisor.

Litt. § 439, 440; Co. Litt. 260, 261.

If an abbot of a monastery die, and during the vacation a disseisin be committed, and a descent cast before the election of a new abbot, this shall not bind his entry after, because there was no person during the vacation that could make continual claim, (the convent being in law all dead persons,) and therefore there can be no laches imputed to any.

Litt. § 443; Co. Litt. 263.

## (1) How the Entry may be preserved by continual Claim: And herein,

1. *Of the Nature of continual Claim, and the Effects of it.*

CONTINUAL claim is where a man, who hath a right and title to enter into any lands or tenements, whereof another is seised in fee or in tail, makes continual claim to them before the person dies seised thereof; the effect of which is, that notwithstanding any descent cast after, yet he who made such continual claim may enter, because he hath done all that, perhaps, he could or durst do to regain his possession, and so no default being in him, his right of entry remains as it was before, notwithstanding any descent.

Litt. § 414; Gilb. Ten. 33.

If tenant for life alien in fee, he in reversion or remainder may enter on the alienee, or make continual claim to the land before the dying seised of the alienee, and then he may enter at any time after his death, though a descent be cast.

Litt. § 415.

Lands are let for life, remainder for life, remainder in fee; tenant for life aliens in fee, and the remainderman for life makes continual claim before the death of the alienee, and then the alienee dies seised, and then the remainderman for life dies likewise before any entry; yet in this case he in the remainder in fee may enter by virtue of the continual claim made by the remainderman for life; for since the efficacy of this continual claim, if there had been a subsequent entry made by the remainderman for life, would have extended to the remainder in fee by revesting that too; it is but rea-

## (I) How the Entry may be preserved by continual Claim.

sonable to allow the remainderman in fee a power of entry under such continual claim, especially, since by reason of the intermediate remainder he himself could not make continual claim.

Litt. § 416.

## 2. What is necessary to a continual Claim to make it effectual.

If a man hath cause to enter into lands lying in several towns in the *same county*, and enter into parcel in one town only in the name of all the rest, this shall be sufficient to secure his entry into all the rest.

Litt. § 17.

But, if the lands lie in *two counties*, the entry must be in each, because the attestation of both facts, if controverted, must be by the *parces* of each county.

Co. Litt. 252.

If three men disseise me *severally* of three several acres of land in *one county*, and I enter into one acre in the name of all the three acres, this is good for no more than that one acre; because each disseisor made a distinct entry, which being distinct acts of notoriety, require distinct solemnities to defeat them: likewise, each having an independent possession, an entry upon one of them can never affect the rest, so as to destroy their separate possessions.

Co. Litt. 252 b.

So, if one man disseise me of three acres of ground, and devise them severally to three persons for their *lives*, my entry upon one lessee in the name of the whole will only revest what belongs to that lessee; for where there are *different liveries* there must be different acts of notoriety to overthrow them, and therefore, a different entry must be made on each tenant of the freehold.

Co. Litt. 252 b; 4 Leon.; Holland and Hopkins, Dal. 88.

But, if the disseisor had demised the three acres severally to three persons for *years*, then an entry upon one of the lessees in the name of all the three acres would have recontinued and revested all the three acres in the disseisee; for though they are different demises, yet being all terms for years, they are *not different liveries* to be defeated by distinct entries; and, therefore, one entry will suffice to regain the possession from the disseisor by overthrowing his entry by an act of equal notoriety.

4 Leon.; Co. Litt. 252 b; Palm. 402, Lady Argol and Cheney.

I am disseised by the same person of one acre at one time, and of another acre in the *same county* at another time; in this case my entry into one of them in the name of both is good; for though there are two entries, yet it is but one continued act of wrong, and but one possession is gained, for which but one assize lies; therefore one entry of the disseisee is an act of sufficient notoriety to revest the possession of both acres.

Co. Litt. 252 b.

If one disseise me of two several acres in *one county*, and I enter into one of them generally, without saying in the name of both, this shall revest only that acre where entry is made; for the *intent*, which is the rule to judge of a man's actions, appearing to extend no farther than that one acre, shall not be enlarged to revest the possession of the other.

Co. Litt. 252 b.

## (I) How the Entry may be preserved by continual Claim.

Livery within view and entry afterwards is equal to an entry on the land itself, and if a man cannot enter for fear of an outrage, yet it is good. So also, a claim within view is good when a man fears to enter; for in the case both of entry and claim a man ought to take possession where he can, because it is the change of possession makes the notoriety in both cases. But, if the disseisor menace to hurt the person that has right, then the law allows him to make his claim as near the land as he dares to come.

Co. Litt. 252; Litt. § 419, 420, 421; 2 Inst. 483.

But every apprehension of danger will not warrant a claim within view; for if a man fears the burning of his houses, or the taking away or spoiling of his goods, this is not a sufficient ground to warrant a claim within view; because if he should suffer what is threatened, he may recover what he loses, or damages to the value, without any corporal hurt.

Co. Litt. 253 b; 2 Inst. 483.

The *apprehension*, then, that will justify a man's claiming within view, must be of the person's lying in wait with weapons, or by words menacing to *beat, maim, or kill the person* that offers to enter; as also the *fear of imprisonment*; for the law will never oblige a man to hazard his person in such a manner as may render him unfit to serve his country, when he may recover his right without such danger, viz., by making claim within view.

Co. Litt. 253 b; 2 Inst. 483.

In pleading, the disseisee must show some just cause of fear, that the court may judge of the reasonableness of an apprehension of danger to his person; but in a special verdict, if the jurors find that the disseisee did not enter for fear of corporal hurt, it is sufficient, and it shall be intended they had evidence for what they find.

## 3. Of the Time in which it is to be made.

In ancient times, if the disseisor had been in long possession, the disseisee could not have entered upon him: so, if the feoffee of the disseisor had continued a year and a day in quiet possession, the disseisee could not have entered upon him; for the disseisee's neglect of entry for that time formed a presumption, that either he had no right in the lands, or that he relinquished it, especially in the case of the feoffee of the disseisor, because he came in by a legal conveyance and the solemnity of livery, which gave notice to the disseisee, in whom the possession was, so that he might have entered on the feoffee immediately, and recovered the possession.

Co. Litt. 237 b, 254 b.

But the law has been altered in this point; for if a man is now disseised, and the disseisor continues in possession for forty years without any claim made by the disseisee; yet, if the disseisee at last make his claim before the death of the disseisor, it shall secure his entry for a year and a day after such claim made, to be computed from the day of the claim inclusive, notwithstanding any descent cast in that time. But, if he suffers the year and day after the claim made to elapse, then a descent after will bind him; and so *toties quoties* after a year and a day after any claim made, a descent will conclude his entry.

Litt. § 427; Co. Litt. 255 a. [By stat. 21 Ja. 1, c. 16, no man shall make entry upon any lands, but within twenty years after his right shall first accrue. And by stat. 4 Ann. c. 16, § 16, no claim or entry upon any lands, &c., shall be sufficient to avoid a fine levied of such lands, or to satisfy the statute of limitations, unless an action be commenced within one year after, and prosecuted with effect.]

## (I) How the Entry may be preserved by continual Claim.

¶The notion of the laches, in not claiming for a year and a day, is taken out of the feudal law; so are the express words of Frederick, touching the tenant's claim of his lands from his lord. *Præterea, siquis infeudatis major quatuordecim annis sua incuria vel negligentia per annum et diem steterit, quod feudi investituram a proprio domino non petierit, transacto hoc spatio, feudum amittat.* Digest. Feud. li. 2, tit. 55, fo. 543. Vigelius, 241, 255—478. And the reason why this time of a year and a day seems to be set by the feudal law, is, because the services appointed seem to be annually completed; and, therefore, that was the time for the vassal to claim from his lord; and the same time that he had to claim from his lord, he had to claim from any disseisor for the uniformity of the law; and that the lord might know who was the person that he might take for his tenant, and that the lord might receive his feudal fruits from the heir, in case the disseisor died. And if the tenant lost the whole feud, in case he did not claim within a year and a day, it is fit he should lose the right of possession, in case he neglects his claim upon the disseisor in the same space, that the heir may be in peace, and that the lord may receive him as his tenant. For that was by the ancients thought to be a violent presumption of dereliction, both in the one case and the other. But our law, since it gives a distress for all feudal duties, doth not presume the feud derelict, in case feudal services are not paid, since the lord has a power to compel the payment; and therefore the law doth not induce any forfeiture in that case. But the law gives the right of possession to the heir, in case the disseisee doth not claim within the space mentioned, because there the presumption remains of the dereliction of the disseisee, since the entry or action is the only way that he has to obtain possession. But, if the disseisee enters within a year and day before the descent cast, though there were twenty mean disseisins; yet the entry is not taken away; for there can be no *jus possessionis* in the heir, if the disseisee has continued the possession by those solemn acts that the law requires, and within the time that the law builds a presumption of a dereliction, if the disseisee neglects his entry. But, if the disseisor at common law had kept possession forty years, and the disseisee had entered but half a year before his death, yet in that law, as Littleton remarks, the heir had not gained the right of possession, because no dereliction can be presumed if the disseisee claims within the time prescribed by the law. And if the law cannot presume that the disseisee has deserted the right of possession, it cannot be transferred to the heir of the disseisor; nor ought the lord, in such cases, to accept of his services from such heir. Nay, Coke says that the feoffee of the disseisor that comes in by title after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because they come in by title; and for quiet of purchasers, this non-claim for a year and a day was held a dereliction. Hence writs of entry against the feoffee in the *per et cui*. But this was not held so in respect of disseisors, because they themselves being the wrongdoers, had no law in their favour, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession, and therefore they construed the feoffee that came in by his own act, to be a wrongdoer, and not to alter the right of possession, but the heir, for the reasons aforesaid, was left as before.

Litt. § 421, 425; Gilb. Ten. 36.]

The rules of law concerning continual claim, and the effects of it, hold  
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## (K) General Rules of Descent in the United States.

as well in relation to abators and intruders, their donees and feoffees, as in relation to disseisors, their donees and feoffees, and for the same reasons.

Litt. § 428; Co. Litt. 255, 256.

If the disseisor dies seised within a year and a day after the disseisin, and before any entry by the disseisee, this gives a right of possession to the heir, because when the disseisee yields up the possession peaceably, the presumptive right is in the disseisor, and the year and day which should aid the disseisee in such case shall be taken only from the time of the claim made by him, not from the time the title of entry accrued to him; and, therefore, it is advisable for the disseisee to make his claim as soon after the disseisin as he can.

Litt. § 426.

Since Littleton wrote, an alteration as to the entry of the disseisee on the death of the disseisor has been made by 32 H. 8, c. 33, by which it is enacted, "That except such disseisor hath been in the peaceable possession of such manors, lands, &c., whereof he shall die seised, by the space of five years next after such disseisin, &c., without entry or continual claim, &c., that such dying seised, &c., shall not take away the entry of such person or persons, &c."

32 H. 8, c. 33; Co. Litt. 238.

But still after the five years, continual claim must be made as at the common law, since the statute which is introductive of a new law does not provide for it after the five years.

Co. Litt. 238 a.

It is said that abators and intruders are not within the statute, because it is penal, and extends only to a disseisor in express words, which was the most common mischief, *et ad ea quæ frequentius accidunt jura adaptantur*.

Co. Litt. 238 a; Plow. 47 a; *Quære*.

The feoffee of a disseisor for the same reason is held to be out of this statute; but in respect of the disseisor himself the statute is construed with that latitude which may best preserve the ancient right; therefore, though the statute speaks of him that at the time of such descent had title of entry, or his heirs, yet the successors of bodies politic, so they be confined to a disseisin, are within the remedy of this act; for the statute extends clearly to the predecessor's being disseised, and, consequently, without naming the successor, extends to him, for he is the person that at the time of such descent had title of entry.

Co. Litt. 238 a, 256 a.

If a man make a lease for life, and the lessee be disseised, and the disseisor die seised within five years, the lessee for life may enter; but, if he die before he enters, it is said the entry of the reversioner is not lawful, because his entry was not lawful upon the disseisor at the time of the descent, as the statute speaks. But, if lessee for life had died first, and then the disseisor had died seised, he in reversion had been within the remedy of the statute, because he had title of entry at the time of the descent, and so within the express letter of the statute, though he was not the immediate disseisee. The same law of a remainder.

Co. Litt. 238 a; Plow. 47 a.

## §(K) General Rules of Descent in the United States.

The following rules are extracted from Bouv. L. D. h. t.

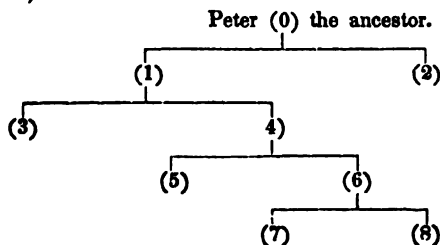
1. It is a general rule in the law of inheritance, that if a person owning,

## (H) General Rules of Descent in the United States.

real estate, dies seised, or as owner without devising the same, the estate shall descend to his descendants in the direct line of lineal descent, and if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common in equal parts, however remote from the intestate the common degree of consanguinity may be. This rule is in favour of the equal claims of the descending line, in the same degree, without distinction of sex, and to the exclusion of all other claimants. The following example will illustrate it: it consists of three distinct cases: 1. Suppose Paul should die seised of real estate, leaving two sons and a daughter, in this case the estate would descend to them in equal parts; but suppose, 2, that instead of children, he should leave several grandchildren, two of them the children of his son Peter, and one the son of his son John, these will inherit the estate in equal proportions; or, 3, instead of children and grandchildren, suppose Paul left ten great-grandchildren, one the lineal descendant of his son John, and nine the descendants of his son Peter; these, like the others, would partake equally of the inheritance as tenants in common. According to Chancellor Kent, this rule prevails in all the United States, with this variation, that in Vermont the male descendants take double the share of females; and in South Carolina, the widow takes one-third of the estate in fee; and in Georgia, she takes a child's share in fee, if there be any children, and, if none, she then takes, in each of those states, a moiety of the estate. In North and South Carolina, the claimant takes in all cases, *per stirpes*, though standing in the same degree.<sup>(a)</sup> In Louisiana the rule is, that in all cases in which representation is admitted, the partition is made by roots; if one root has produced several branches, the subdivision is also made by root in each branch, and the members of the branch take between them by heads.<sup>(b)</sup>

(a) 4 Kent, Com. 371; Reeve's Law of Desc. *passim*; Griff. Law. Reg. answers to the 6th interr. under the head of each state. (b) Civil Code, art. 895.

2. It is also a rule that if a person dying seised, or as owner of the land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children and grandchildren as shall be dead, and so on to the remotest degree, as tenants in common; but such grandchildren and their descendants shall inherit only such share as their parents respectively would have inherited if living. This rule may be illustrated by the following examples: 1. Suppose Peter, the ancestor, had two children, John, dead, (represented in the following diagram by figure 1,) and Maria, living, (fig. 2;) John had two children, Joseph, living, (fig. 3,) and Charles, dead, (fig. 4;) Charles had two children, Robert, living, (fig. 5,) and James, dead, (fig. 6;) James had two children, both living, Ann, (fig. 7,) and William, (fig. 8.)



## (H) General Rules of Descent in the United States.

In this case Maria would inherit one-half; Joseph, the son of John, one-half of the half, or quarter of the whole; Robert, one-eighth of the whole; and Ann and William, each one-sixteenth of the whole, which they would hold as tenants in common in these proportions. This is called inheritance *per stirpes*, by roots, because the heirs take in such portions only as their immediate ancestors would have inherited, if living.

3. When the owner of land dies without lawful issue, leaving parents, it is the rule in some of the states, that the inheritance shall *ascend* to them, first to the father, and then to the mother, or jointly to both, under certain regulations prescribed by statute.

4. When the intestate dies without issue or parents, the estate descends to his brothers and sisters, and their representatives. When there are such relations, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. When all the heirs are brothers and sisters, or all of them nephews and nieces, they take equally. When some are dead who leave issue, and some are living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their immediate parents would have received if living. When the direct lineal descendants stand in equal degrees, they take *per capita*, by the head, each one full share; when, on the contrary, they stand in different degrees of consanguinity to the common ancestor, they take *per stirpes*, by roots, by right of representation. It is nearly a general rule that the ascending line, after parents, is postponed to the collateral line of brothers and sisters. Considerable difference exists in the laws of the several states when the next of kin are nephews and nieces, and uncles and aunts claim as standing in the same degree. In many of the states all these relations take equally as being next of kin; this is the rule in the states of New Hampshire, Vermont, (subject to the claim of the males to a double portion as above stated,) Rhode Island, North Carolina and Louisiana. In Alabama, Connecticut, Delaware, Georgia, Indiana, Illinois, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia, on the contrary, nephews and nieces take in exclusion of uncles and aunts, though they be of equal degree of consanguinity to the intestate. In Alabama, Connecticut, Georgia, Maryland, New Hampshire, Ohio, Rhode Island, and Vermont, there is no representation among collaterals after the children of brothers and sisters; in Delaware, none after the grandchildren of brothers and sisters. In Louisiana the ascending line must be exhausted before the estate passes to collaterals. (a) In North Carolina, claimants take *per stirpes* in every case, though they stand in equal degree of consanguinity to the common ancestor.

(a) Code, art. 910.

5. Chancellor Kent lays it down as a general rule in the American law of descent, that when the intestate has left no lineal descendants, nor parents, nor brothers, nor sisters, or their descendants, that the grandfather takes the estate, before uncles and aunts, as being nearest of kin to the intestate.

6. When the intestate dies leaving no lineal descendants, nor parents, nor brothers, nor sisters, nor any of their descendants, nor grandparents, as a general rule, it is presumed, the inheritance descends to the brothers and sisters of both the intestate's parents, and to their descendants, equally. When they all stand in equal degree to the intestate, they take *per capita*,



## Detinue.

and when in unequal degree, *per stirpes*. To this general rule, however, there are slight variations in some of the states, as, in New York, grandparents do not take before collaterals.

7. When the inheritance came to the intestate on the part of the father, then the brothers and sisters of the father and their descendants shall have the preference, and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants; and where the inheritance comes to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have a preference, and in default of them the brothers and sisters on the side of the father, and their descendants, inherit. This is the rule in Connecticut, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, and Virginia. In some of the states there is perhaps no distinction as to the descent, whether they have been acquired by purchase or by descent from an ancestor.

8. When there is a failure of heirs under the preceding rules, the inheritance descends to the remaining next of kin of the intestate, according to the rules in the statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different states as to the half-blood, to ancestral estates, and as to the equality of distribution. This rule prevails in several states, subject to some peculiarities in the local laws of descent, which extend to this rule.

It is proper, before closing this article, to remind the reader that, in computing the degrees of consanguinity, the civil law is followed generally in this country, except in North Carolina, where the rules of the common law in their application to descents are adopted, to ascertain the degree of consanguinity. §

## DETINUE.

DETINUE is an action that lies for the recovery of goods and chattels, though the party came to the possession of them by (a) lawful means, as by bailment, borrowing, or pledging; and in this action the plaintiff is to recover the thing in specie, or the value of it, and also (b) damages for the detainer.

(a) It lies against a man that hath goods either by delivery or finding. Co. Litt. 286; Roll. Rep. 128; ¶F. N. B. 138; E. Willes's Rep. 118. It is said, that this action does not lie if the plaintiff has not the general or special property at the time of bringing it; as, if the defendant took the goods as a trespasser; for, by the trespass the property of the goods is divested. Com. Dig. tit. *Detinue*, (D), cited; 6 H. 7, 9a, *per* Brian. But *qu.* of this position, and see what is said by Vavasor to the contrary, in the same case; and see also the reasoning of Anderson and Warberon in *Bishop v. Montague*, Cro. El. 824, to the same effect, but applied to the action of trover; and the final resolution of the court in that case in Cro. Ja. 50. ¶ An action of a detinue will lie for the recovery of a commission issued by the President of the United States, although it has never been delivered to the appointee. *Marbury v. Madison*, 1 Cranch, 137. An action of detinue is the proper remedy to recover a chattel which has been forfeited. *Ballard v. Bell*, 1 Mason, 243. § (b) 2 H. 6, 15; Ro. Abr. 575; Rast. Ent. 218.

But, as in this action the defendant was allowed to (c) wage his law, (for it was thought but reasonable that the bailor trusting to the bailee's honesty and integrity at first, should also trust to his oath in a court of justice, since

(A) By and against whom Detinue lies.

the restitution might have been secret,) and this was (*d*) found exceeding inconvenient, (it being often experienced that those, who were so dishonest as to retain the goods of another, would generally purge themselves on their oaths,) the action of (*e*) trover and conversion was substituted in the place thereof, which being the action usually made use of at this day in those cases, I shall but briefly consider,

(A) By and against whom Detinue lies.

(B) For what Things it may be brought

||(C) The Pleadings and Evidence.

(D) The Judgment.||

(*c*) For this vide tit. *Wager of Law*. (*d*) 10 Co. 57 a ; Moor, 481 ; Cro. Ja. 244 ; Yelv. 178. (*e*) Vide tit. *Trover and Conversion*.

(A) By and against whom Detinue lies.

If a bailee deliver the goods to another, he shall have an action of detinue against him, (*a*) because he hath his possession, and undertakes for the custody, and the original bailor may have his action against either of them, because in him is the property, which both are bound to answer to him.

Ro. Abr. 607. (*a*) A man that hath a special and limited property, as a carrier that hath goods delivered, or a sheriff by *feri facias*, shall have this action against a stranger that takes away the goods, because they are answerable in damages to the absolute owner. 2 Bulst. 311 ; Sid. 438 ; Mod. 30 ; 2 Sand. 47 ; 2 Keb. 588 ; Yelv. 44 ; Cro. Ja. 73 ; Dyer, 98, 99 ; Lev. 282 ; Vent. 52 ; Danv. Abr. 20, pl. 4, 5.  $\beta$  In detinue of charters the defendant was discharged on common bail, where it appeared he had not possessed himself of them tortiously. *Burbridge v. Turner*, 2 Yeates, 429.*g*

If A takes the goods of C, and B takes them from A, C shall have his action against A or B at his election, because both damnified C in their taking.

Sid. 438. {But if he brings his action against one of them and obtains judgment, he cannot afterwards, though judgment remains unsatisfied, sue the other. 1 Hen. & Mun. 450, *Murrel v. Johnson's Administrators*.}

If a man detains the goods of a feme covert which came to his hands before marriage, the husband can (*b*) only bring detinue, because the law transfers the property to the husband ; but both shall join in *trover*, because the wrong was originally commenced at the time when the wife was sole ; and if such injury be punished, the wife herself, who received this injury, must be party to the action, and the wife's demand is sufficient to prove a conversion in the defendant, since one of the parties to the action is denied the goods ; but, if the possession be laid in both it is ill, because if both were possessed, the law will transfer in point of ownership the whole interest to the husband.

Sid. 172 ; Keb. 641 ; Noy, 70 ; Styl. 261 ; Yelv. 165. (*b*) So, if goods come to a feme covert before marriage, detinue lies against the husband only, but trover and conversion lies against both, because both were concerned in the trespass. Ro. Abr. 607 ; but for this vide title *Trover and Conversion*.

If A delivers goods to B to be delivered over to C, either A or C may have detinue against B ; for not delivering them over, according to the undertaking, is an injury done each of them.

9 H. 6, 58 b, 60 ; Ro. Abr. 606.

||If the bailee of goods die, this action will not lie against his personal representative, unless he takes possession of them, for the gist of the action

(B) For what Things it may be brought.

is the detainer. But, if after the death of the bailee a stranger take possession of them, it will lie against him.

1 Ro. Abr. tit. *Detinue*, (D), pl. 1, 2. Bro. Abr. *Detinue de biens*, p. 19.]

{*Detinue* lies for goods lost and found, as well as for goods delivered.

Willes, 118, *Kettle v. Bromsall*; 4 Bos. & Pul. 140, *Mills v. Graham*. And if the declaration allege generally that the plaintiff lost the goods and the defendant found them, it is sufficient for the plaintiff to prove that the goods came into the defendant's possession by wrong and fraud. 4 Bos. & Pul. 140.}

β It seems that *detinue* will lie against an infant for goods delivered to him upon a special contract, for a specific purpose, after the contract has been avoided.

*Penrose v. Curren*, 3 Rawle, 453.

*Detinue* will not lie for a horse, without any description of the particular horse demanded.

*Boggs v. Newton*, 2 Bibb, 221.

When the defendant came tortiously in possession of the goods, the plaintiff may waive the tort and maintain *detinue*.

*Owings v. Frier*, 2 Marsh, 269.

*Detinue* may be maintained against one who had possession of the property of another, although he may have parted with it at the time when suit is brought.

3 Monro, 103. See *Tunstall v. McClelland*, 1 Bibb, 186; *Haley v. Rowan*, 5 Yerg. 301; *Merrit v. Warmouth*, 2 Hayw. 12; 1 Hayw. 122; 1 Dana, 118.

*Detinue* will lie to recover slaves who had been obtained by means of a fraudulent contract.

*Mansell v. Israel*, 3 Bibb, 510.

One who has the absolute property, and the right to immediate possession, may maintain *detinue*, although he has never had actual possession.

*McDowell v. Hall*, 2 Bibb, 610.

To entitle the plaintiff to recover in an action of *detinue*, he must have the right of possession when the action is brought.

*Shepard's Adm'rs. v. Edwards*, 2 Hayw. 186; *Bell v. Hogan*, 1 Stewart, 536.

The manner in which the defendant obtained possession is immaterial, he is liable if he unlawfully detain the property.

*Johnson v. Pasteur*, Conf. Rep. 464.

An executor holding slaves in whom his testator had only an estate for life, terminable upon his dying without issue living at the time of his death, which event actually took place, may be sued in *detinue* personally and not as executor.

*Royall v. Eppes*, 2 Munf. 479.g

(B) For what Things it may be brought.

It has been (α) holden formerly, that *detinue* will not lie for money, unless in a box or bag, nor for corn out of a sack, because these things have no mark whereby they may be known in order to be redelivered to the plaintiff.

(α) 7 H. 4, 3 b; Co. Litt. 286; Cro. Eliz. 457; Moor, 394; N. Dyer, 22; 2 Bulst. 306; Ro. Rep. 59, 60; Litt. Rep. 242; Noy, 12. β For a commission issued by the President of the United States. *Mabury v. Madison*, 1 Cranch, 137.g

It seems, however, clear, that if a man lends a sum of money to another,

## (C) The Pleadings and Evidence.

detinue does not lie for it, but he must bring debt on the contract, or *assumpsit*.

18 H. 6, 20 b; Ro. Abr. 606.

So, where a man comes to buy goods, and they agree upon a price, and a day for the payment, and the buyer takes them away, detinue does not lie, but an *assumpsit* for the money, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due. But, if a man comes to buy goods, and they agree on a price for present money, and the buyer takes the goods away without payment, detinue lies, because the property is not altered; and, therefore, the taking away the goods without payment of the money is an injurious taking, for which the action lies. And, if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer.

Cro. Eliz. 867

Detinue lies for writings in a box, or for writings themselves though not in a box, and though the date be not mentioned, or the delivery of the writings, as a deed. And it lies for a husband and wife for a deed by which an annuity is granted to the wife, for every man that has a property in deeds may bring his action for the (a) detaining of them.

Co. Litt. 286; 17 E. 3, 45; Ro. Abr. 606. (a) In detinue of charters, if the issue be upon the detinue, and it be found that the defendant hath burnt the charters, the judgment shall not be to recover the charters, for it appears he cannot have them; but he shall recover the value of the land in damages. 17 E. 3, 45 b; Ro. Abr. 607.

Detinue lies not for a house, and therefore where the plaintiff had declared *de una domo vocat.* a bee-house, upon a writ of error the judgment for this default was reversed.

Coupledike v. Coupledike, Cro. Ja. 39.

By the act of navigation, 12 Car. 2, c. 17, certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same: it was adjudged, that, in this case, the subject may bring detinue for such goods, as the lord may have replevin for the goods of his villein distrained, for the bringing of the action vests a property in the plaintiff. (b)

Roberts v. Withered, 5 Mod. 193; 12 Mod. 92, S. C.; 1 Salk. 223, S. C.; Comb. 361, S. C. (b) || This case was recognised in Wilkins v. Despard, 5 T. Rep. 112, where it was holden, that if a ship be seized as forfeited under this act by a governor of a foreign country under the dominion of Great Britain, the owner cannot maintain trespass against the governor, although there has not been any sentence of condemnation, because the forfeiture is complete by the seizure, and the property is thereby divested out of the owner. || § See 3 Cranch, 337, 356, n.g

§ Detinue may be maintained for an "infant negro, the child of A B," without another description.

Bass v. Bass, 4 H. & M. 478.g

## ||(C) The Pleadings and Evidence.

THE manner in which the goods came into the defendant's possession is matter of inducement only; so that if the plaintiff declare on a bailment, the defendant cannot plead that he did not bail them, for the bailment is not traversable. So, where the plaintiff declared that the goods came to the hands of the defendant by finding, and the evidence was, that the plaintiff had delivered the goods to the defendant (an infant) for a special purpose,

Devises.

and the defendant refused to redeliver them ; it was holden, that the evidence supported the declaration.

Selw. N. P. 610 ; Bro. Abr. *Detinue de Biens*, pl. 60 ; Mills v. Graham, 1 N. R. 140. *¶* It is immaterial how the goods came to the defendant's hands. Conf. Rep. 464.*g*

If an action be brought for several articles, the separate value of each need not be set forth in the declaration ; it is sufficient if the jury sever the values by their verdict.

Pawly v. Holly, 2 Bl. Rep. 853.

In detinue for a bond of 100*l.* upon bailment, if the defendant plead, that he did not receive a bond for such sum, and it is found that he received a bond for a greater sum, there must be a verdict for him ; because the bond is not the same as that which the plaintiff demands.

2 Ro. Abr. 703, tit. *Trial*, (C), pl. 11.

The defendant cannot give in evidence upon the general issue, *non detinet*, that the goods were pawned to him for money which has not been paid ; for this should be pleaded specially ; but he may give in evidence a gift from the plaintiff, for that proves that he does not detain the *plaintiff's* goods.

Co. Litt. 263 a.

*¶* A count for detinue of the note may be joined with a count in debt for the amount of the bill.

Kirkpatrick v. Bank of England, 8 Dowl. 981.*g*

(D) The Judgment.

THE form of the judgment is, that the plaintiff do recover the goods in question ; or, if he cannot have the goods, the value thereof, and his damages, that is, for the detention.

Peters v. Hayward, Cro. Ja. 681 ; Keilw. 646, *per* Frowick, C. J. Aston's Entr. 202, pl. 8.

The judgment being in the alternative, it is incumbent on the jury to find the value of the goods : for an omission of this kind cannot be supplied by a writ of inquiry of damages.

Cheney's Case, 10 Co. 119 b, *per* Coke, recognised by Holt, C. J., in Herbert v. Waters, 1 Salk. 206, where he says, that he thought that a contrary determination in Burton v. Robinson, Sir T. Raym. 124, and 1 Sid. 246, was not law. *¶* The plaintiff who recovers in detinue, has the right to the specific property recovered, if it can be had ; the defendant cannot therefore elect to pay the assessed value, instead of surrendering the property. Vines v. Brownrigg, 1 Dev. & Bat. 239 ; Bates v. Gordon, 3 Call, 555. See Keith v. Johnson, 1 Dana, 604.*g*

*¶* In detinue the jury having found for the plaintiff, the slave mentioned, &c., but that she had died since the suit was brought, the court must nevertheless give judgment for the slave, or for her value, the death not having been put in issue by plea *pais darrein continuance*.

Austin's Extr. v. Jones, Gilm. 341.*g*

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DEVISES.

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## DISCONTINUANCE.

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DISCONTINUANCE of an estate in lands signifies (a) such an alienation of the possession, whereby he who has a right to the inheritance cannot (b) enter, but is driven to his action.

Co. Litt. 325, and note (1), *ibid.* 13th edit. ¶ The peculiar import of the word discontinuance, where applied to the cases mentioned by Littleton, is shortly, but forcibly expressed by M. Howard, who explains it, "*Interruption du droit, qu'on a sur un fonds, par la vente qu'un autre, chargé de conserver ce droit, en a faite.*" See *Anciennes Loix des François*, 2 vol. 435. Our doctrine of discontinuance, Mr. Butler observes, bears some analogy to the doctrine of interruption in the civil law.—There, interruption, when applied to real property, signifies the ousting of a person from the possession of his land; and if he does not renew his possession, but permits the dispossessor to retain it, he absolutely loses his right to it, and the disseisor is said to acquire it by prescription. Co. Litt. n. 278.¶ (a) To every discontinuance it is necessary there should be a divesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. Co. Litt. 327 b, and 332, same rule. (b) But he, who claims by title paramount above the discontinuance, may enter. Co. Litt. 327.

[It began in the case of husbands' alienations of their wives' land. By the civil law, the father gave the *dos*, which was the estate of the wife given on the marriage; and if it consisted of matter movable, the husband had the possession, but was bound to restitution at his death; and even an action was allowed to the wife, in case the husband fell to decay, to recover during his life. If it consisted of things immovable, the husband could not alien without the consent of his wife, by the Julian law. And by Justinian's reformation, he could not alien, though with her consent. *Constante matrimonio rei dotalis dominium civile penes maritum est, naturale penes uxorem.* Dig. li. 23, tit. 2, *De jure dotium*; *Ibid.* tit. 5, *De fundo dotali*.

Gilb. Ten. 107.]

¶ When the feudal law allowed the inheritance to descend to women, then began the rights of the husband to be settled. Now, since all the feudal estates were reckoned civil rights, therefore there was no room for the distinction of the civil law, that placed the civil right in the husband, as the head and governor of the family, and the natural right in the wife, as the legitimate owner. The German and northern nations were the strictest observers of the rules of marriage, tying only one man to one woman, and enjoining strict obedience to the husband, even before their receiving Christianity, and much more so afterwards. Then when the woman was allowed to succeed into the feud, when she took husband, she had no separate property, but the whole power was lodged in the husband, and they were reckoned as one in interest; therefore the husband had the right of possession, and the wife the right of propriety; or, in other words, the husband was seised in the right of his wife. This distinction was before known in the feudal law; for every person that came in by descent, or by lawful alienation in manner before mentioned, by the ancient feudal law, had the right of possession; therefore the husband being possessed of the wife's lands, by the marriage contract, was supposed to have the right of possession; and, by consequence, the husband having aliened such right of possession, she was anciently driven to her writ of right, by the opinion of Sir William Herle,

## (A) Made by Ecclesiastical Persons.

and as I think by the better opinion. 5 E. 3, 58; 2 Inst. 343. For the wife could not complain of disseisin done to the husband, because they were one in estate and interest, and the husband could not do her wrong; and it would have been very absurd for the law to have allowed her to complain on the memory of her husband, as though he had been guilty of a violent disseisin; therefore the ancient law gave no possessory action, which complained of a violation of possession, but only allowed her to controvert the right. But, when the writs of right grew so tedious, and the trial by battail grew out of repute, the law gave her a recovery by the writ of entry of *cui in vita*; and the husband was the rather supposed to have the right of possession in him, for that being the superior and governing power, he might defend the possession by all actions; and therefore if the husband lost by default in a possessory action, this put the wife to a writ of right, as before, till the statute of Westminster, c. 3. But now an actual entry is given to the wife and her heirs, by the 32 H. 8, c. 28, and, consequently, the writ of *cui in vita* has since become unnecessary; and see F. N. B. 193, in margin.||

Under this Head we shall consider,

- (A) Of Discontinuances made by Ecclesiastical Persons.
- (B) Made by Tenants in Tail.
- (C) By Husbands seised in Right of their Wives.
- (D) Of Discontinuances by Women of Lands of the Gift of their Husband, or his Ancestor.
- (E) What Estate or Interest may be discontinued.
- (F) By what Act or Conveyance a Discontinuance may be made, and the Effect thereof.

## (A) Of Discontinuances made by Ecclesiastical Persons.

In ancient days, abbots and prelates were supposed to be married to the church, and, as husbands and representatives of the church, were allowed to have a fee in right of the church, that they might maintain actions, and hold courts within their manors and precincts. Therefore, at common law, a bishop, abbot, or any other person, seised in fee in right of his house or church, might have discontinued, and thereby put his successor to his action to recover the right of possession.

Co. Litt. 325 b; Comp. Incumb. 484; Gilb. Ten. 102.

But, as the right of property was in the church, the bishop could not alien without the consent of the chapter, who represented the clergy of the diocese; nor could the abbot alien without the consent of his house.

Co. Litt. 325.

And at this day, by the 1 Eliz. c. 19, and 13 Eliz. c. 10, and 1 Ja. c. 3, no bishop, dean, master of an hospital, &c., can discontinue any of their possessions, or bar their successors of their right of entry.

Co. Litt. 325 b, 342; Ro. Abr. 633.

As to parsons, vicars, prebendaries, and others who are presentative, they were considered only as having a qualified right, and their estate by the common law only an estate of life, the fee being in abeyance; and therefore they could not discontinue, or do any other act to the prejudice of their successors, though they could alien with the consent of the patron and ordinary.\*

Co. Litt. 341 a; Dyer, 239, pl. 41; Hetl. 88. \* By 13 El. c. 20, charges made upon benefices with cure are declared void.

## (B) Made by Tenants in Tail.

If a bishop leases parcel of the demesnes of a manor for life, not warrant- ed by the statute of 1 Eliz. c. 19, and after leases the manor to another for life; the parcel so leased shall pass with attornment of the first lessee; for the said lease did not make any discontinuance, but the reversion thereof con- tinued parcel of the manor.

2 Ro. Abr. 58. But for this vide under head of *Leases and Terms for Years, Leases made by Ecclesiastical Persons.*

## (B) Of Discontinuances made by Tenants in Tail.

If tenant in tail makes a *feoffment* in fee, this is a discontinuance; for he has the right of possession inheritable in him; for although the statute *de donis* preserves the right of the inheritance to the issue; yet it does not pre- serve the right of possession, and (a) therefore the issue is put to his action.

Litt. § 595. (a) Also, the entry of the issue is taken away, because the feoffment had anciently a warranty annexed unto it, which defended such right of possession; and when a man had a warranty to cover his possession, it was not fit he should be put out of possession by any act *in pais*, without bringing in his warrantor by voucher; and therefore the entry was disallowed in such cases, that a man might not be obliged to the expense of getting his judgment in the writs of *warrantia chartæ*. Co. Litt. 327.

So, if tenant in tail, remainder to his right heirs, makes a *feoffment* in fee; this is a discontinuance.

13 H. 7, 22 b; Ro. Abr. 633; Cro. Car. 387, 405, 406; Jon. 358; Hut. 126, S. C. and S. P. admitted.

If tenant in tail be disseised, and *release* to the disseisor all his rights; this works no discontinuance; for a *release* being a conveyance in secret, cannot pass the possession; and therefore a conveyance, that cannot pass the possession, cannot pass the right of possession.

Litt. § 598, 599; 3 Co. 85, S. P. But *quæ* after such release, what estate or interest the disseisor has. ¶ Some have said, that he has an estate to him and to his heirs during the life of tenant in tail; so that then he has only a freehold, and the heir is a special occupant, and has no fee in him, because a less estate by right will drown a greater by wrong; for a man shall never be presumed to do wrong, when he may hold by right. Took v. Glascock, 1 Saund. 260; Cart. 108, S. C. Others have holden, that the disseisor has in such case a fee simple, that his wife is dowable, but that it is determinable by the entry of the issue in tail. And the reason is, because when a disseisin is committed, the whole fee is notoriously in the disseisor by his possession, which cannot be abridged and turned into an estate for life without an act of notoriety. For if there could be such transmutation of estates without the solemnities of entry, no man would know in whom the fee resides; so the release leaves the disseisin *in statu quo*, as to the entry of the heir on him. For this see Co. Litt. 106, and 108 b; Sey- mour's case, 10 Co. 96, revived by Holt in the case of Machell v. Clarke, 1 Ld. Raym. 778; 2 Salk. 619, S. C.; 7 Mod. 18, S. C.; Com Rep. 119, S. C.; 11 Mod. 19, S. C.; Gilb. Ten. 119.]

But, if tenant in tail, being disseised, releases all his right to the disseisor, and binds himself and his heirs to warranty, and dies, and the warranty de- scends (b) upon the issue in tail; this is a discontinuance, (c) by reason of the warranty.

Litt. § 601; 3 Co. 85, S. P. (b) So that it is not the warranty only that makes the discontinuance, but the warranty and descent upon him that hath right to the lands. Co. Litt. 328 a. (c) Viz., That if assets descend, he to whom the release is made may plead the same, and bar the demandant. Co. Litt. 328 a, b.

If tenant in tail leases for years, and after levies a fine, this is a discon- tinuance, for a fine is a feoffment upon (d) record, and the freehold passes.

Co. Litt. 332 a; Bulst. 162; 2 Roll. Rep. 484. (d) But, if tenant in tail levies a fine *sur convauance de droit tantum*, this is not any discontinuance till execution; for if he dies before execution, the tenant may enter. 36 Ass. 8; Ro. Abr. 632, S. C. So, if a



## (B) Made by Tenants in Tail.

fine be levied to tenant in tail, and he grant, and render the land to the conusor and his heirs, and die before execution, this is no discontinuance; otherwise, if executed in the life of tenant in tail. Co. Litt. 333 b.

But, if tenant in tail leases for his own life, and after levies a fine; this is no discontinuance, because the reversion expectant upon an estate of freehold, which lies only in grant, passed thereby.

Co. Litt. 332.

If tenant in tail leases for the life of the lessee, by this the tail and reversion thereupon is discontinued, and if the tenant in tail by deed grants his reversion in fee to another, and the tenant for life attorns; and (a) after the tenant for life dies, (b) living the tenant in tail, &c., (c) this is a discontinuance in fee.

Litt. § 630. (a) So, if tenant for life surrenders to the grantee, or the grantee recovers in waste, and enters for the forfeiture, &c. Co. Litt. 333 b; Litt. § 621, 629; Jon. 210; Latch. 65. (b) If tenant in tail leases for the life of the lessee, and after levies a fine with warranty; though this is not any discontinuance, so as to take away the entry of him in reversion after the death of the tenant for life, unless executed in the conusor by the death of tenant for life in the life of tenant in tail; yet the grantee hath an absolute fee, to which the warranty being annexed, and descending upon the reversioner, will be a bar; Jon. 210, adjudged; Cro. Car. 156, adjudged; for by the estate for life the tail was discontinued, and a new fee gained; which reversion in fee being granted with warranty, the warranty was annexed to the fee, and bound those that had right. Vide Latch. 64, 79; Salk. 245; Lutw. 770, 782. (c) Where the reversion is executed in the life of tenant in tail, it is equivalent in judgment of law to a feoffment, for the estate for life passed by livery. Co. Litt. 333 b.

If tenant in tail leases for (d) life, the remainder in fee, this is an absolute discontinuance, though the remainder is not executed in the life of tenant in tail, because all is but one estate, and passed by one livery.

Co. Litt. 333 b. (d) So, if he leases for years, the remainder in fee, and makes livery of seisin accordingly. Litt. § 631.

But, if tenant in tail leases for three lives, according to 32 H. 8, c. 28, this is no discontinuance of the estate tail, or of the (e) reversion, (g) because it is authorized by act of parliament, wherein every man's consent is involved.

Co. Litt. 333 a. But for this vide head of *Leases*. (e) But, if tenant in tail levies a fine, and after dies without issue, the donor is put to his formedon. 4 Leon. 191; Co. 96; Cro. Ja. 696; Sid. 83. (g) Dyer, 57, pl. 1; Owen, 28; 2 Leon. 46.

If tenant in tail leases for life, and after disseises lessee for life, and makes a feoffment in fee, and the lessee dies, and then tenant in tail dies; though the fee was executed, yet, because it was not executed by (h) lawful means, it is no discontinuance.

Co. Litt. 333 b. (h) Where by custom an infant above the age of 15 may make a feoffment, and being tenant in tail, he makes a feoffment; it is no discontinuance, because the custom will not enable one to do a tort. Cro. Ja. 80.

If there be tenant for life, remainder in tail, remainder in tail, &c., and tenant for life and he in the first remainder in tail levy (i) a fine, this is no discontinuance of either of the remainders, because each of them passed only what he lawfully might.

Co. 76 a; Co. Litt. 302 b; Cro. Eliz. 827; Moor, 634; Owen, 129; vide 2 Lev. 254; 2 Jon. 58. (i) So, if they make a feoffment. Co. 76; Cro. Eliz. 135; Leon. 127. But *quod* and vide Dyer, 324; And. 286; Cro. Eliz. 36; 6 Co. 15, and Sid. 83, where this opinion is denied; because a feoffment differs in its nature from a fine.—If such feoffment be made by parol, it will be the surrender of tenant for life, and the feoffment of him in remainder, *ut res magis valeat*, and, consequently, a discontinuance. Co. 77.—But a naked consent of the tenant for life will not amount to a surrender, so as to make it a discontinuance. Carth. 110.

## (B) Made by Tenants in Tail.

If tenant in tail enfeoff the donor, this is not any discontinuance, because the donor hath the (a) immediate estate, and it operates as a surrender; it passes no more than it lawfully may pass.

Litt. § 65; Co. 140, S. P. † (a) But, if there be tenant in tail, the remainder in tail; and the tenant in tail enfeoff him in reversion in fee, this is a discontinuance, Co. 140; Co. Litt. 335, S. P., because there is a mesne estate. Keilw. 42 a, S. P. *per* Frowick *con.* Dyer, 10, pl. 32.

If the donee enfeoff the donor and a stranger, (b) this is a discontinuance of the whole land.

Co. Litt. 335 a. (b) Conditionally, viz., if the stranger survive. Dyer, 12; Cro. Car. 406.

If a man covenants to stand seised to the use of himself for life, remainder to his wife for life, the remainder to the heirs male which he shall beget on the body of his wife, remainder to his eldest son by a former wife, &c., and after the husband and wife levy a fine with warranty, and die without issue; this is no discontinuance of the remainder, because the estate tail was not executed by reason of the intervening estate limited to the wife, which estate is not drowned, but remains distinct.

Stephens v. Bittridge, 1 Lev. 36; Raym. 36, S. C.; Sid. 83, S. C. adjudged. But it was agreed, that if the estate tail had been executed, this fine had been a discontinuance of the remainder in tail, and so the warranty descending upon him in remainder would have barred.

If a man has the right of possession, and is not possessed by virtue of the entail, he cannot discontinue otherwise than by (c) warranty.

Litt. § 637, 641; Carth. 110, S. P. *post*, letter (E). (c) As, if tenant in tail is disseised, and dies, and the issue in tail releases to the disseisor with warranty, though the issue was never seised by force of the entail, yet it hath the effect of a discontinuance by reason of the warranty. Co. Litt. 339; Dyer, 55; Moor, 256.

As, if there be grandfather, father, and son, and the grandfather be seised in tail, and the father disseise the grandfather, and make a feoffment in fee, and die, this works no discontinuance, because the father was not possessed of the entail, but of a fee simple by disseisin, which was subject to the entry of the tenant in tail, and, consequently, the alienee is subject to the entry of the issue in tail, inasmuch as the father, who made the alienation, had only the naked possession by disseisin, and not the right of possession by virtue of the entail.

Litt. § 658; Ro. Abr. 634; Raym. 37.

So, if tenant in tail lease to one for life, and have issue and die, and the reversion descend to the issue, and the issue (d) grant the reversion to another in fee, and the tenant for life attorn, and die, and the grantee enter, and be seised in fee in the life of the issue, and the issue in tail have issue a son, and die, this is no discontinuance; but the son may enter, &c., for that his father had never any thing in him by force of the entail.

Litt. § 638. (d) So, though the grant had been with warranty. Co. Litt. 339; yet vide Jon. 210; Cro. Car. 156; Latch. 62.

So, if there be tenant for life, the remainder in tail, and he in remainder enter upon the lessee, and disseise him, and make a feoffment over, this is not any discontinuance, because he was never seised by force of the entail.

Ro. Abr. 634, and vide 2 And. 110; Roll. Rep. 188; Moor, 747; Styl. 158; Bulst. 162.

But, if there be lessee for years, the remainder in tail to J S, and (e) J S enter upon the lessee, and make a lease for life, or feoffment in fee, (g) this

## (C) Of Husbands seised in Right of their Wives.

is a discontinuance, for he was seised by force of the entail at the time of the feoffment.

Ro. Abr. 634. (e) So, if he make a deed of feoffment with a letter of attorney to J N to make livery, and he enter and oust the lessee, &c. Moor, 91; Dyer, 363. (g) Though the lessee re-enter. Moor, 281.

## (C) Of Discontinuances by Husbands seised in Right of their Wives.

ANY alienation made by the husband of the wife's land, whether by feoffment or fine, was a discontinuance, and after his death, she was put to her *cui in vita* to reinstate herself.

2 Inst. 681.

But now by the 32 H. 8, c. 28, § 6, "No fine, feoffment, or other act or acts, made, (a) suffered, or done by the husband (b) only, of any manors, &c., being (c) the (d) inheritance or freehold of his wife, during the coverture, shall in any wise be or make a discontinuance thereof or be prejudicial or hurtful to the (e) wife or her (g) heirs, or to such as (h) shall have right, title, or interest to the same by the death of such wife; but that the (i) wife or her heirs, and (k) such others to whom such right shall appertain after her decease, shall and may then lawfully enter into such manors, &c., according to their rights and titles therein; any such fine, feoffment, or other act to the contrary notwithstanding; fines levied by the husband and wife (whereunto the wife is party and privy) only excepted."

(a) The husband causes a *præcipe* to be brought against him and his wife upon a feigned title, and suffers a recovery without any voucher, and execution to be had against him and his wife, this is an act within the statute suffered by the husband. Co. Litt. 326. (b) Though a feoffment be made by the husband and wife, for this in substance is the act of the husband only. Co. Litt. 326 a. (c) Where during the coverture lands are given to the husband and wife, and the heirs of their two bodies, this is the inheritance of the wife within the act; so that if the husband makes a feoffment, and dies, she or her issue may enter. 9 Co. 138; 2 Inst. 681; Cro. Car. 477; Co. Litt. 326; 2 Inst. 681; 8 Co. 72; Brown. 131.—But, if the husband levies a fine with proclamations, the issue is barred, though the wife is helped by this statute. Keilw. 205, 213; Dyer, 351, pl. 24; And. 39; 8 Co. 72.—But, if the husband is tenant in tail, remainder to the wife in tail, and the husband makes a feoffment in fee, if the husband die without issue the wife may enter. Co. Litt. 326 a; 8 Co. 72. But there said, if he suffers a recovery, she is barred. (d) This extends not to the wife's copyhold of inheritance. Moor, 596.—But though the statute does not extend to it, yet the husband cannot at common law discontinue the wife's copyhold. 4 Co. 23; Cro. Ja. 105; Poph. 138; Moor, 596; Ro. Abr. 632. (e) If after a feoffment made by the husband they are divorced *causa præcontractus*, she may enter within this act, and is not driven to her *cui ante divortium*, as at common law; though by the statute the entry is given to the wife, and now upon the matter she was never his lawful wife; yet at the time of the alienation she was his wife *de facto*; and where the husband dies, she is not the wife at the time of the entry. Co. Litt. 326 a; 8 Co. 73 a. She may enter though her husband is living, but vide Moor, 58. (g) But her heirs by the common law could have no remedy, nor by this act can they enter during the life of the husband. Co. Litt. 326; 8 Co. 72, 73. (h) But, if the wife before entry dies without heirs, the lord by escheat shall not enter; for though an entry is given by the act, yet the feoffee, &c., is in by title as before. Hob. 243, 261. (i) But, if the husband makes a feoffment, and dies, and the wife before entry levies a fine, this so strengthens and fortifies the discontinuance, that she or those in remainder can never enter; and though by the statute it is enacted, that the feoffment of the baron shall not be a discontinuance, but the wife may enter, yet it is a discontinuance till entry. 2 Ro. Rep. 311; Cro. Car. 320, and vide Ro. Abr. 632. (k) By these words the entry of him in reversion or remainder is preserved. Co. Litt. 326; Hob. 261.

Although the words of this act are very general, and seem to give the wife and her issue an entry, to avoid any fine levied by the husband of her lands, yet if the husband levies a fine with proclamations, and five years

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pass after his death, without any entry or claim by the wife, her entry is not only taken away, but her right is forever extinguished; because the statute was intended to provide only against the discontinuance, which was a grievance particular to feme coverts, but not to invalidate fines duly levied, according to 4 H. 7, c. 24, as to femes covert; because they by that statute have a remedy in common with others, which is by entry or claim to avoid the fine; whereas before the statute of 32 H. 8, c. 28, it was not in their power to prevent the discontinuance; and therefore the statute relieves them in that particular. Besides, though the words of the act be general, that such fine shall not be prejudicial to the wife or her heirs, yet the following words, *viz. but that she may lawfully enter according to her right and title therein*, are explanatory, and allow her an entry only in cases where she had a right before the statute, and it is plain that by 4 H. 7, c. 24, she had no right after the five years were lapsed from the death of the husband.

Co. Litt. 326; Dyer, 72, 162, 191; Plow. 373; 8 Co. 72; 2 Inst. 681; 9 Co. 140.

If husband and wife are tenants in (a) special tail, and the husband aliens in fee, this is a discontinuance; for though the words of the statute are, *of any lands being the freehold and inheritance of the wife*; yet, as this joint estate may without any impropriety be called the inheritance of the wife, the mischief being equal, it shall be intended to be provided against.

Co. Litt. 326; 8 Co. 71 b. (a) If lands are given to baron and feme, and the heirs of the body of the baron, and the baron makes a feoffment in fee, this is a discontinuance; for the baron is seised by force of the entail. Cro. Car. 320; Jon. 324; 3 Co. 5; Ro. Abr. 632, 633; 2 Ro. Rep. 311.

If a husband levies a fine of the wife's lands to the king, she may after the death of her husband enter upon the king; for although the statute does not expressly name the king, yet being made to prevent an injury and wrong, he shall be bound by it, the rather because it is his most immediate concern to relieve his subjects from any grievance or wrong.

2 Inst. 681.

## (D) Of Discontinuances by Women of Lands of the Gift of their Husband, or his Ancestor.

THE learning hereof depends upon the statute 11 H. 7, c. 20, which provides against discontinuances and disherisons by the wife, to the prejudice of the heir of the husband, and seems to be well explained by the following notes and observations of Mr. Danvers.

Dan. Abr. 579.

By 11 H. 7, c. 20, "If any woman which shall have any (b) estate in dower, or for term of life, or (c) in tail, jointly with her husband, or only to herself, or to her use, in any manors, lands, tenements, or other hereditaments (d) of the (e) inheritance (g) or purchase of her husband, or given (h) to the said husband and wife in tail, or for term of life, by any of the ancestors of the said husband, or by any other person seised to the use of the said husband, or of his ancestors, and shall, being sole, or with any other after taken (i) husband, (k) discontinue, (l) aliene, release, or confirm (m) with warranty, or by covin suffer (n) any recovery of the same against them, or any of them, or any other seised to their use, or to the use of either of them, after the form aforesaid, all such recoveries, discontinuances, alienations, releases, confirmations, and warranties so to be had and made, shall be utterly void (o) and of none effect. And it shall be lawful (p) to every (q) person

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and persons, to whom the interest, title, or inheritance, after the decease of the said woman, of the said manors, lands, and tenements, or other hereditaments, being discontinued, aliened, and suffered to be recovered, in the form aforesaid, shall appertain, to enter into all and every of the premises, and peaceably to possess and enjoy the same, in such manner and form as he or they should have done, if no such discontinuance, warranty, nor recovery had been had or made. And if any of the said husbands and women, or any other that shall be seised, to the use of them of the estate afore specified, do make or cause to be made, or suffer any such discontinuance, alienations, warranties, or recoveries in form aforesaid, that then it shall be lawful to the person (r) or persons to whom the said manors, lands, or tenements should or ought to belong after the decease of the said women, to enter into the same, and them to possess and enjoy, according to such title and interest as they should have had in the same, if the said women had been dead, no discontinuance, warranty, nor recovery had, as against the said husband during his life, if the said discontinuance, alienation, warranties, and recoveries be hereafter had by or against the same husbands and women during the coverture and espousal betwixt them. Provided alway, that the said women, after the decease of their said husbands, may re-enter into the same manors, lands, and tenements, and them enjoy according to their first estate in the same. And if the said woman, at the time of such discontinuance, alienations, recoveries, warranties, in form aforesaid, to be had and made of any of the premises, be sole, then she shall, be barred and excluded of her title and interest in the same from thenceforth. And the person and persons to whom the title, interest, and possession of the same should belong after the decease of the said woman, shall immediately after the said discontinuances, alienations, warranties, and recoveries, enter into the same manors, lands, tenements, and other hereditaments, and them possess and enjoy according to his or their title in the same. Provided also, that this act extend not to any such recovery or discontinuance to be had (s) where the heirs (t) next inheritable to the said woman, or he or they that next after the death of the same woman should have estate of inheritance in the same manors, lands, or tenements, be assenting or agreeable to the said recoveries, where the same assent and agreement is of record, or enrolled. Provided also, that it shall be lawful to every such woman being sole, or married after the death of her first husband, to give, sell, or make discontinuance of any such lands for term of her life only, after the course and use of the common law before the making of this present act."

(b) So, if a woman, having only title of dower, enters before she is endowed, and levies a fine. 2 Leon. 168; 3 Leon. 78, cited by Rhodes to have been adjudged. (c) But this extends not to estates in fee. Dyer, 248; 4 Co. 3; Moor, 716; Bridg. 136; Cro. Eliz. 594, adjudged; for they may go to a collateral heir. (d) Extends not to copyholds. 2 Sid. 41, 73, adjudged. [But it does to a use or an equity of redemption, for uses are here expressly mentioned, and a trust is now what a use was then. 2 Vern. 489; 1 Ab. Eq. 220.] (e) If one seised in the right of his wife levies a fine, and the conusee grants and renders the land to the husband and wife in special tail, the remainder to the heirs of the wife, and they have issue and the husband dies, and the wife takes another husband, and they levy a fine, this is directly within the words, but out of the meaning of the act, because the estate of the land moved from the wife. Co. Litt. 366 a; Easton and Stud.; Plow. 459, adjudged; Keilw. 214, adjudged; N. Bendl. 230, pl. 266; and with this agrees Cro. Eliz. 524; Moor, 715, pl. 1000; Nay, Cro. Eliz. 2, it is said to have been adjudged, if baron and feme levy a fine of such land, and the conusee grants a rent to them in tail, it is out of the act, for the rent is in lieu of the land. — So, if the ancestor of the baron makes a feoffment in fee, upon condition that the feoffee shall give it to the baron and feme in tail, &c., this is within

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the meaning of the act, though out of the words, for they are in by the feoffment, and not by the ancestor of the baron. Moor, 93, pl. 231. *Per* Plowden said to have been so adjudged, Linch and Spencer, Cro. Eliz. 514; 2 And. 44; Moor, 455; 3 Co. 50. — It is within the act, though the gift by the husband or his ancestors, by which the feme takes, was made as well in consideration of money paid by the feme, or her father, as of the marriage. Dyer, 146 a, b; Keilw. 208; Moor, 93, pl. 231; Cro. Ja. 474. — Otherwise, if the lands had moved from the ancestor of the feme, as, if settled by the father of the feme in consideration of the marriage, and of money paid by the baron for the lands moving from her father, it shall be intended that her advancement was the principal cause of the gift, and not the money. Kynaston and Lloyd, Cro. Ja. 624, adjudged; Jon. 13, adjudged; Palm. 213, 218, adjudged; Copland and Pyot, Cro. Car. 244, adjudged; Jon. 254, adjudged; and vide Moor, 93, pl. 231; 2 And. 45. — But, where conveyed by a stranger in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the baron; this is the purchase of the husband within the act. Moor, 250, pl. 398. — If A, in consideration of good service done by B, conveys land to B his man, and C his cousin, and the heirs of their bodies, &c.; this is not within the act, not being made by the baron or his ancestor; and being in consideration of service done, it is not such a purchase as the act intends. Ward and Warthew, Cro. Ja. 173, adjudged. And though C was named cousin by the deed, it was said that was not material, because it did not appear to be any part of the consideration; however, being found in fact that she was his cousin, and that a marriage was intended; it was said it should be presumed the marriage was as well the cause of the gift as the service. Noy, 122, adjudged; Yelv. 101, adjudged; Moor, 683, adjudged. (g) Baron and feme being joint copyholders in fee, the baron purchases the freehold thereof to him and his wife, and the heirs of their bodies; they have issue; the baron dies; and the feme enters and suffers a recovery, &c., this is a forfeiture within the act, for the copyhold by the acceptance of the new estate was extinct. Cro. Eliz. 24, agreed *per Cur.* (h) If a man devises lands to his wife in tail, this is within the words, but not within the meaning of the act. Foster and Pitfal, Leon. 261; Cro. Eliz. 2. [Hughes v. Clubb, Com. Rep. 369, S. P.] (i) A man seised in fee levied a fine to the use of himself for life, and after to the use of his wife, and the heirs male of her body by him begotten, for her jointure; and after he and his wife levied a fine, and suffered a recovery, and the husband and wife died; and it was held, the issue upon this act might enter, for though it was not within the words, yet it was within the remedy intended to prevent the disherison of heirs. Co. Litt. 365. But in the case of Kirkman and Thompson, Cro. Ja. 474, this point is adjudged *con.*, and that such alienation was neither within the words nor intention of the act, which seems clearly to be law. (k) Vide Jones and Philpot, Lev. 49; Sid. 63. (l) If such feme tenant in tail accepts a fine *sur conuissance de droit*, and thereby renders the land for 1000 years, &c., this is an alienation within the act, else it would be to little purpose. 3 Co. 51, said to have been so resolved. Moor, 250, adjudged; 2 Leon. 168, adjudged; 3 Leon. 78, adjudged, and vide Cro. Eliz. 514; 2 And. 58. — Diversity where such lease made by fine, where by deed only. Cro. Ja. 629; Bridg. 28; 1 Jon. 60, and vide 2 Ro. Rep. 490, where it is said by two judges, that though such lease be made by fine, yet it not being any discontinuance, or prejudicial to the issue, he cannot enter till after her death. (m) This relates only to releases and confirmations, which are no discontinuance without, so that a lease by such feme tenant in tail made for three lives without warranty, if not pursuant to 32 H. 8, c. 28, is a forfeiture within the act. Sir George Brown's case, 3 Co. 50 b; Cro. Eliz. 514. (n) Extends to such, where she comes in only as vouches. Moor, 716, pl. 1000. (o) Yet it continues as to the parties, and all others, except him to whom the interest, &c., by whose entry it is to be avoided. 3 Co. 59 b, 60; Hob. 166. (p) Unless he hath disabled himself by levying a fine, suffering a recovery, &c. Ward and Warthew, Cro. Ja. 175, adjudged; Yelv. 101, adjudged; Noy, 122, adjudged. — And where he hath concluded himself by suffering a recovery, &c., his issue whom he had power to bar shall not enter. Lincoln College, 3 Co. 61; 2 And. 31. — But, if after such feme tenant in tail suffers a recovery, the issue in tail releases to the recoveror, yet the issue of that issue is not barred thereby. 3 Co. 59, cited from Doctor and Student, and 3 Co. 61, agreed to be law. But, if the issue in special tail, the remainder being to him in fee, levies a fine with proclamations, (though not found,) and after his mother (being tenant in tail within this act) leases for three lives, (not warranted by 32 H. 8, c. 28,) living the issue, the conusees may enter; for the tail was extinct by the fine, and the conusee was the person to whom the interest, &c., belonged after the death of the woman. Sir George Brown's case, 3 Co. 51, adjudged; Cro. Eliz. 514, adjudged; Moor, 455, adjudged; 2 And. 44, adjudged. And there said that the record of the fine being in the same court, they might inspect it to see the procla-

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mations. Ro. Abr. 878, pl. 7; 3 Co. 61. But, if the reversion in fee had been in another, then the conusee taking nothing by the fine, but by estoppel, could not enter; nor could the heir, because concluded by the fine. Ward and Warthew, Cro. Ja. 175, adjudged; Yelv. 101, adjudged; Noy, 122, adjudged. But in this last book the case is not fully stated, for there is no notice taken of the last fine levied by the woman alone after the death of her second husband, which made the forfeiture. (g) The statute intended only to prevent such prejudice as might arise to the heirs of the baron, by whom advanced, and not where the immediate interest upon the death of the wife was so limited as to belong to a stranger. Foster and Pitfal, Cro. Eliz. 2; Leon. 261. [Hughes v. Clubb, Com. Rep. 369, S. P.] (r) But, if such woman be tenant for life—remainder for life, remainder in fee; and the two tenants for life join in a feoffment, the entry of him in remainder in fee is lawful by this act, *per* Leon. 262. But this seems to be such a forfeiture, for which the remainderman in fee might by the common law enter. Co. Litt. 251 b. (s) If the baron, being seised to him and his feme, and the heirs of the body of the feme, dies, and in the life of the wife his issue (then being tenant of the freehold, as pleaded, which must be intended by disseisin, no surrender or forfeiture being alleged) suffers a recovery, (which binds not the tail, he being in of another estate,) by agreement that the recoverors should enfeof J S, and that the wife should release to him with warranty, which she does accordingly, and dies, and the warranty descends, &c., this shall bind; for not being prejudicial, but intended to perfect the assurance of the heirs, it is not restrained by this act; for the woman, joining with the heir by fine or recovery, might have barred the tail; and it was never intended to prevent a warranty being made to him that had the land, by the conveyance of the heir himself. Lincoln College's case, 60 a, b, adjudged. (t) But, if such heir, being a daughter, joins, and after a son is born, he may enter. 3 Co. 61 b.

[By stat. 32 H. 8, c. 36, § 2, it is enacted, that no fine levied by any woman of any such estate as is mentioned in the above statute, 11 H. 7, shall be of any effect.]

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THERE can be no discontinuance of things which lie in grant; and therefore, if tenant in tail of a rent, (a) advowson, common, or remainder, or reversion expectant on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with (b) warranty; this is no discontinuance of the entail, for nothing passes but during the life of tenant in tail, which is lawful, but every discontinuance works a wrong.

Litt. § 627, 628; Co. Litt. 327; 3 Co. 85. (a) Tenant in tail of an advowson in gross grants the same in fee, and after, a collateral ancestor releases to the grantee with warranty, and dies, this is a good bar forever. 1 Leon. 111, said by Anderson to have been adjudged, but vide 2 And. 110. (b) But, where the issue by bringing a formedon admits himself out of possession, and shall be barred by the warranty and assets, vide Co. Litt. 332 b.

A copyhold estate cannot be discontinued by surrender, for the tenant gives up no more than he had, and the surrenderee is in by the lord's admittance; and this is not (c) like a feoffment at common law, which being so notorious a way of conveying estates, takes away the entry for the benefit of strangers, who otherwise would be at a loss to know against whom to bring their *precipe*.

Ro. Abr. 632; Co. Copyh. 141; 4 Co. 23 a. (c) For a warranty is usually annexed to it; and if the rightful owner might enter, the benefit of the warranty would be lost, but warranty cannot be annexed to copyhold estates. Leon. 95, 352.

But by custom, a copyhold estate may be discontinued by surrender, and by such surrender an estate tail in copyhold lands forever.

Roll. Abr. 632. For this vide Stephens v. Eliot, Cro. El. 484; Erish v. Rives, *Ibid*. 717; Dell v. Higden, Moore, 358; Oldcot v. Levell, *Ibid*. 753; Knight and Footman's case, 1 Leon. 95; Reyner v. Poel, Brownl. 44, 79; 4 Co. 23.

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Also, if there hath been a custom in a manor, that plaintiffs should be prosecuted there in the nature of real actions; if a recovery be had upon such plaintiff against tenant in tail, it is a discontinuance; for since the custom warrants the recovery, it is an incident to such a recovery by the common law, that it should be a discontinuance, which it seems is drawn from the nature of the thing, that a judgment given in a court of judicature ought not to be avoided, but by matter of as high nature, viz., a recovery in a court of justice, and not by the entry of the party that hath right.

4 Co. 23 a. || Eylet v. Lane, Cro. El. 380; Ciun v. Pease, Ibid. 391.||

If the reversion or remainder be in the king, the tenant in tail cannot discontinue the estate tail.

Co. Litt. 335; 2 And. 156; 2 Leon. 157; 3 Leon. 75.

But, if there had been tenant in tail, the reversion in the king, before 34 & 35 H. 8, c. 20, he might have (a) barred the tail by a common recovery, but that common recovery neither barred nor discontinued the king's reversion.

Co. Litt. 335. (a) And where such tail may now be barred by fine, without discontinuing the king's remainder, vide Jackson v. Darcy, Moore, 115; 4 Leon. 40, S. C.; Keilw. 213.

||Tenant in tail to him and the heirs male of his body, reversion in the crown, made a feoffment of the lands, and was afterwards attainted and executed for treason; and by a special act of parliament, by which his attainder was confirmed, it was enacted, that he should lose all his lands, &c., and that they should be vested in the queen without office found. The question was, whether there was any estate or right remaining in the tenant in tail after the feoffment, which was not forfeited by the attainder and act of parliament. The judges upon the arguing of this in the Exchequer Chamber were divided. Some held, that by the feoffment of the tenant in tail (the reversion still remaining in the crown) there could be no discontinuance of the estate tail, and therefore, being in him at the time of the attainder, was by the forfeiture vested in the king by the statute of 26 H. 8; but, if the estate tail was not in him, yet the right of the estate tail remained, which was given to the king by the 33 H. 8. The other judges argued, that though the reversion was in the king, and so no discontinuance, yet all was divested out of the feoffor as strongly as if there had been a discontinuance, and so nothing remained to be forfeited. No judgment was given in the Exchequer Chamber, but afterwards upon exceptions taken in the King's Bench to the pleadings, it was there agreed, that judgment should be entered for the plaintiff, according to the opinion of the majority of the judges in the Exchequer Chamber; and so the estate was adjudged forfeited.

Stone v. Newman, Cro. Car. 427. Cro. Car. 460. In this case it was agreed by all, that if tenant in tail of a common person, where no reversion is in the king, make a feoffment, it is a discontinuance; and if he be attainted of treason, there is no forfeiture, according to 3 Co. 3.||

If A being tenant in tail makes a gift in tail to B, and B makes a feoffment in fee, and dies without issue, and A hath issue and dies, the issue of A may enter; for though the feoffment of B did discontinue the reversion of the fee simple, which A had gained upon the estate tail made to B, yet it could not discontinue the right of entail which A had, which was discontinued before; and therefore, when B dies without issue, the discontinuance of the estate tail of B which passed by his livery ceases, and consequently the entry of the issue of A is lawful.

Co. Litt. 327 b.



## (F) What Act or Conveyance, &amp;c.

If husband and wife are seised of lands, remainder to the heirs of the body of the husband, with remainder over, they make a lease for years, not warranted by the statute, the husband dies leaving issue J S, who at the age of sixteen, with the consent of the wife and second husband, with his own hands makes a feoffment to the lessee; this is no discontinuance of the remainder over, for J S had (a) only a reversion expectant upon an estate for life, and so (b) no freehold in him at the time of making the feoffment.

Swift v. Heath, Carth. 109. (a) And it is a maxim in law, that he who hath no freehold in the land cannot by any means discontinue the estates therein. Carth. 110, *per Curiam*, vide *supra*, letter (B). (b) For though the tenant for life consented, yet such a naked assent will not amount to a surrender. *Ibid*.

Where premises were conveyed by settlement to trustees to the use of the father and mother of the intended husband for their lives, and the life of the survivor, remainder to the use of the intended husband and wife and their assigns for their joint lives, and the life of the survivor, remainder to the use of trustees to support contingent remainders during the life of the intended husband and wife and the survivor, remainder to the use of the heirs of the husband by his intended wife; it was held that the husband took an estate for life, and an estate tail in remainder, and consequently that he could not, while in possession of his life estate, discontinue the estate tail by granting a lease for lives with livery of seisin; for a discontinuance can only be made by tenant in tail in possession.

Doe dem. Jones v. Jones, 1 Barn. & C. 238.

## (F) By what Act or Conveyance a Discontinuance may be made, and the Effect thereof.

A MAN may discontinue by five sorts of conveyances, viz., (c) fine, recovery, (d) feoffment, release, or confirmation with warranty.

Co. Litt. 325 a. (c) But if he dies before execution, it is no discontinuance. Ro. Abr. 632; Co. Litt. 333 b. (d) But a feoffment with livery in law works no discontinuance. Ro. Abr. 632.

A feoffment made by tenant in tail is a discontinuance, with or without warranty; but a release or confirmation is not, for a man can pass no more thereby than he may lawfully pass: but a warranty added to a release, or confirmation to a disseisor, works a discontinuance, if it descend on him that hath the right.

Co. Litt. 328 b.

But, if one having a son, marry a second wife, and land be given to the husband in special tail, and he have issue by his second wife, and be disseised, and release with warranty, and die; or if tenant in tail of borough-english land have issue two sons, and be disseised, and release with warranty to the disseisor, and die; yet is not the entail discontinued in either case; because the warranty always descends to the heir at law.

Co. Litt. 328 b.

If tenant in tail exchanges with another, (e) this is not a discontinuance.

Perk. § 294; 9 Eq. 22; Co. Litt. 332 b, S. P.; Roll. Abr. 632, S. P. (e) Because no livery of seisin is requisite thereupon. Co. Litt. 332 b; Co. 44 b.—So, of partition between parceners. Co. Litt. 173 a.

If tenant in tail bargains and sells his lands in fee, this is no discontinuance, for only a freehold, which determines within the compass of a life, passes.

2 Inst. 644; Moor, 42.

## (A) What Acts amount to a Disseisin.

So, if tenant in tail by indenture enrolled bargains and sells to J S and his heirs, and after levies a fine with proclamations to the bargainee and his heirs, and dies without issue; this is no discontinuance of the remainder, because the remainder is not touched or (a) displaced thereby; for no freehold passes by the fine; but the fine only corroborates the estate of the bargainee by the statute.

9 Co. 96 b, Seymour's case; Bulst. 162, S. C. [But in this case it was agreed, that if the fine had been levied before the bargain and sale was enrolled, it would have been a discontinuance. So, where a fine is levied in pursuance of a covenant in a prior conveyance, as, where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly; in this case, the lease, release, and fine will be considered as only one assurance, and the fine will, therefore, operate as a discontinuance of the estate tail. Doe v. Odiarne, 2 Burr. 704.] (a) For every discontinuance it is necessary there should be a divesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. Co. Litt. 327 b.—But there may be a discontinuance, which turns the estate to a right, and yet does not take away the right of entry; and a warranty may bar where the reversion is only displaced, and turned to a right, though the right of entry is not taken away. Vide Salk. 245, *per* Powell, J.

Some discontinuances are for life only; as, when tenant in tail makes a lease for the lessee's (b) life: some are during the limitation of an estate tail; as, when tenant in tail makes a gift in tail: also, if he makes a lease for years, or for his own life, remainder in fee, with livery; this is a discontinuance in fee, because the estate in fee passes by the livery.

Co. Litt. 335 b, 336 a; Salk. 244, S. P. (b) If a feme tenant in tail within the statute 11 H. 7, c. 20, accepts a fine *come ceo*, &c., and grants and renders it for 500 or 1000 years, rendering the ancient rent, this is within the act; for though strictly a term for years can work no discontinuance, yet they are in equal mischief, and the statute would be useless if such leases were not within the remedy thereof. Moore, 250; Piggot and Palmer, 2 Leon. 168; 3 Leon. 78, S. C.; Penicock's case, Dy. 148 b; 3 Co. 51 b.

And none can make a discontinuance larger than the alienation of the tenant in tail, who made it; therefore if A tenant in tail make a gift in tail to B, and B enfeoff C and die without issue, A's issue may enter.

Co. Litt. 327.

If the estate that caused the discontinuance is (c) defeated, the discontinuance is (d) defeated also.

Co. Litt. 336, 337. (c) As by entry for a condition broken, or otherwise. 8 Co. 48 a. (d) But the reversion may be revested, and yet the discontinuance remains; as, if a feme covert had been tenant for life, and the husband had made a feoffment in fee, and the lessor had entered for the forfeiture, the reversion was revested, and yet the discontinuance remained at the common law. Co. Litt. 335 a.

## DISSEISIN.

## (A) What Acts amount to a Disseisin.

## (B) What Persons are capable of committing such Disseisins.

## (A) What Acts amount to a Disseisin.

A *Disseisin* is where a man enters into any lands or tenements where his entry is not congeable, and *ousts* him who hath the freehold; so that it dif-

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fers from an *abatement*, which is the entrance of a stranger into lands, of which an ancestor died seised before the heir has entered, whereby there is not properly an actual ouster committed of the person that was seised of the freehold, as there is in case of a disseisin; but the entry of the person who has the title to the freehold is prevented. In like manner a disseisin differs from an *intrusion*, which is when an ancestor dies seised of any estate of inheritance expectant on an estate for life, and then tenant for life dies; and between the death of the tenant and entry of the heir a stranger interposes and intrudes, and so gets possession of the freehold; so that it is rather a prevention of the heir's entry, than an actual ouster of him of his freehold.

Litt. § 279; Co. Litt. 181, 277, and note, that by a disseisin nothing more is acquired against the disseisee but a bare possession, though against all others a fee simple. *Clapp v. Bromagan*, 9 Cowen, 530; *Doe v. Thompson*, 5 Cowen, 371; *Jackson v. Davis*, 5 Cowen, 123; *Jackson v. Whitlock*, 1 Johns. Ch. R. 213; *Anthon's N. P.* 34, note a; *Smith v. Burtis*, Anth. N. P. 110; *Smith v. Burtes*, 6 Johns. 197. See also *McClung v. Ross*, 5 Wheat. 116; *Bradstreet v. Huntingdon*, 5 Pet. R. 402.

§ Making a fence around wild land by felling trees, and lapping them together, is not a sufficient act to disseise the owner of the land.

*Coburn v. Hollis*, 3 Metc. 125.

A right acquired by disseisin is to be limited by the actual occupation of the disseisor.

*Watrous v. Southworth*, 5 Conn. 305.

The making an entry into lands of a deceased husband by the widow, claiming the rents and profits for twenty-one years, is no disseisin of the heirs at law.

*Hall v. Matthias*, 4 Watts & S. 331.

If husband and wife purchase lands in fee, and then the husband is attainted of felony, and the king seizes the land, and afterwards the lord of whom it is held hath it, upon his suggestion, delivered to him out of the hands of the king, as his proper escheat; this is a disseisin of the wife who was jointenant with the husband, for the lord got possession of the freehold by his misrepresentation of the nature of the estate to the king, which being a manifest act of injustice and falsehood, the possession acquired by it must be looked upon as an acquisition of the same nature with a possession gained by open and avowed violence, and so a disseisin.

*Ro. Abr.* 658.

A man has a house, and locks it, and departs, and another comes to the house, and takes the ring of the house in his hand, and says, that he claims the house to himself in fee, without making any entry into it, this is a disseisin of the house; for the claim he made upon taking the ring into his hand, shows his intention in doing it to be a plain seisin of the entire freehold, and consequently a disseisin of the true proprietor; and his non-entry into the house, upon his seising it, will not qualify the intention of what he has done, since his seisin of part, in the name of the whole, gives him whatsoever an entry could have done, and therefore such an entry was not necessary.

*Ro. Abr.* 659.

A man has a mill, and A turns the water that used to serve the mill, so that it cannot grind; this is a disseisin of the mill, for which an assize lies against A; for to deprive a man of the means he has of obtaining the profits of his freehold, is, in effect, to disseise him of his freehold.

*Bro. Disseisin*, 25.

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If A cuts trees in his soil, and B, who has common there, says that the soil is his, and commands him not to cut there, whereupon A departs out of the land, this is no disseisin in B, for he who has no right to a freehold cannot be seised of it by bare words only, which are fleeting and transitory, and do not amount to such an act of notoriety and solemnity as is required in gaining possession of a freehold, whereof strangers are to take notice.

Ro. Abr. 659 ; Bro. *Disseisin*, 42.

If a man, who has right of entry into lands, in coming thither is disturbed and hindered from entering, this is a disseisin, such hinderance of entry being equivalent to an actual ouster of the freehold.

Ro. Abr. 659.

Where a man enters into my house by my sufferance without making any claim, this is no disseisin.

Ro. Abr. 659.  $\beta$  A mere entry upon another is no disseisin, unless it be accompanied by expulsion. Doe ex dem. Arden v. Thompson, 5 Cowen, 371.  $\gamma$

$\beta$  Whether an entry upon land by a person claiming no title to it, is a mere trespass or a disseisin, is a matter of fact depending on the circumstances of the case.

Clake v. Courtney, 5 Pet. 355.  $\gamma$

A man grants all his lands in D to A besides the chamber he lies sick in ; and after livery made pursuant to the grant, by the sufferance of A, the grantor removes into the hall without claiming anything to his own use, and dies ; this coming into the hall is no disseisin, being by the permission of the grantee, and so not unlawful.

Bro. title *Disseisin*, 28.

If the king be seised in fee of the manor of B, and a stranger erect a shop in a vacant plat of it, and take the profit of it without paying any rent to the king, and after the king grant over the manor in fee, and the stranger continue in the shop, and occupy it as before, this is no disseisin ; for the first entry of the stranger was no disseisin, but an intrusion on the king's possession ; for that the king's title appearing of record, the entry *in pais*, which is not an act of equal notoriety, will not divest it out of him : if then the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it, and, consequently, cannot be said to be disseised by the stranger who has made no entry upon him after the king's conveyance, but only continued the old interest which he had before the grant, and so remains an intruder still, and liable to an action of trespass or ejectment for it.

Ro. Abr. 659 ; Hob. 332 ; Bro. *Disseisin*, 4.

So, if a man enters into certain lands, parcel of a manor which is in ward to the king, by reason of the nonage of J S, and takes the profits as owner thereof, and J S after sues livery, and the intruder still continues in possession, and takes the profits as formerly, this continuance after the livery is no disseisin, but only an intrusion to be remedied by trespass or ejectment ; and the manor being in the king only as guardian makes no difference ; because, till it is relieved out of his hands, he is in actual possession of it as much as if it were his own.

Bro. title *Disseisin*, 6 ; Ro. Abr. 659.

Baron and feme seised in tail, the baron goes out of the country, and in his absence the feme enfeoffs A in fee, [who enters,] this is a disseisin of the

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husband by A, because the feoffment by the feme covert was void, and so his entry under it tortious.

Bro. title *Disseisin*, 24.

If a disseisor makes a lease for years, or at will, and the disseisee enters upon him, and then the lessee re-enters, claiming by virtue of his lease, though that was only a term for years, yet he is a disseisor, because he enters upon the proprietor of the soil, and ousts him of his possession, and that by virtue of a former disseisin, so that the possession of the freehold cannot be supposed to be left in the disseisee; and therefore such an entry must be equivalent to an avowed disseisin.

Ro. Abr. 662.

If a man enters into my land claiming a lease for years, or enters as tenant by statute merchant, when he has no right, he is a disseisor, the entry being unlawful, and the pretence of title unjust.

Ro. Abr. 662; Co. Litt. 271 a; Dyer, 134, pl. 11.  $\beta$  But when a man enters into possession under the belief that he has a limited lawful right, as under a lease, which turns out to be void; or when he enters as a special occupant, when he has no right to claim in that capacity, if he can be considered as a disseisor at all, it can only be at the election of disseisee. The Society for propagating the Gospel v. Pawlet, 4 Pet. 480. A mere entry upon another is no disseisin, unless it be accompanied with expulsion. Doe v. Thompson, 5 Cowen, 371.g

So, if a guardian in chivalry assigns dower to a woman, as wife of the deceased tenant, who in fact is not his wife, and she enters thereupon, she is a disseissoress, for her false title being an act of fraud and injustice, and the possession acquired by it tortious, the pretence of title, when it appears that she has none, will not avail her. And *qu.* whether the guardian in this case is not a disseisor likewise?

Bro. title *Disseisin*, 7; 1 Ro. Abr. 662.

A man makes a lease for years to another and his heirs, and the lessee dies, and the heir claiming the term enters; though the term, being a chattel, must go to the executors, and not to the heir, yet the heir is no disseisor, because he claimed only a term and no freehold, and such a term too as was in being, and actually limited to him; and therefore the heir in this case, that is named in the words of limitation, shall be only presumed to enter on behalf of the executor, to continue the term that was in being, and not to commit a disseisin on the freehold.

Ro. Abr. 662.

If there be tenant by sufferance; and a stranger, who has no right to the land, make a lease thereof for years by indenture to the tenant, without making any entry upon such tenant previous to the demise, and the tenant thereupon pay the rent reserved on this lease to the stranger, this is no disseisin of the rightful proprietor, for the tenant at sufferance was no disseisor before the demise; and after the demise, or by virtue of it, he can be no disseisor, because he still continued his old possession, without committing any actual ouster of him who had the freehold: for the acceptance of the deed of demise, and payment of rent thereupon, are not acts of sufficient solemnity and notoriety, since they may be transacted in private, to change the possession of a freehold.

Ro. Abr. 659; Prenson and Sone.  $\beta$  When a person enters upon land without title, and the tenants surrender the possession and attorn to him, this is neither a disseisin nor an ouster. Jackson ex dem. Livingston v. Delancey, 13 Johns. 537.g

If a guardian, after the full age of the heir, continues in possession, he is

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no disseisor, but an abator, (a) and an assize of mortdancestor lies against him by the heir, for he does not actually oust the heir of his freehold, which is required in a disseisin, but holds him out by an *intermediate entry* between him and his ancestor, which makes the distinction between an abatement and disseisin.

Co. Litt. 57 b, 271 a. (a) [But on the argument of the case of Blunden and Baugh, commonly called Lord Nottingham's case, Justice Barclay said, that he, whom Lord Coke calls in this place an abator, must be taken for a disseisor, as he had actual possession by the possession of the guardian. Lord Nott. MSS. Co. Litt. 271 a, n. (2), 13th edit.]

If a man enters as guardian into the lands of an infant, who has no title to be guardian, it is at the election of the infant to make him a disseisor, on account of his wrongful entry upon an actual ouster of such infant, or else to dissemble the wrong, and call him to an account as guardian.

Ro. Abr. 661; Cro. Car. 302; Blunden v. Baugh. ¶ The point decided in this case was, that a tenant at will made a lease for years, and the lessee for years entered, and the court held, that though the estate at will did not warrant the lease for years, it was only a disseisin at election. For where a person gains a possession under a title consistent with that of the person having right, and who was in possession, it is but a disseisin at election. And it was said in this case, that, admitting it to be a disseisin, the tenant at will is the disseisor, and not the lessee for years. See *Hovenden v. Lord Annesley*, 2 Scho. & Lefr. 622; *Goodright v. Forrester*, 1 Taunt. 599. ¶

An absolute feoffment is made by deed, and a letter of attorney therein to deliver seisin; the attorney makes livery upon condition; he is a disseisor of the feoffor, because not pursuing his commission it is all one as if he had none at all, and then his livery is tortious, and amounts to a disseisin.

Bro. title *Disseisin*, 34, 71.

A, seised of lands in fee, permits his son to enter into them by his consent, and to occupy as tenant at will; the son after by indenture leases them for twenty-one years, rendering rent: this was holden no disseisin, but at the election of the father, who may if he pleases call it such, because the lease for years was more than he could justify; but a disseisin being an actual ouster of another's freehold, the possession of the son, being in possession as tenant at will, gives room to the father to construe his demise no disseisin, if he thinks fit; and therefore the son, in this case, shall be presumed to act in behalf of the father, and to demise the land as attorney to him, especially if the father afterwards demand and receive the rent; for the rule is, *Rati-habito retrotrahitur et mandato equiparatur*. However, the first lessor, before he hath received any rent, may take the demise to be a disseisin at his election; for when the tenant at will takes upon him to make a greater estate than he has himself, this may be construed a disseisin, because it is an usurpation upon the right of the lessor, and in effect a seizure of his freehold; and the great reason why the lessor is allowed to make the other construction, is to avoid the inconveniences which otherwise would follow; for if a lessor was obliged to look upon leases for years of his tenant at will to be disseisins, then if a tenant at will should make a lease for a small time, and the lessor not knowing thereof should levy a fine of such lands for his wife's jointure, or other uses, the lessee of tenant at will would be necessitated to become a wrongdoer, perhaps contrary to his intent, and the disseisee would be deprived by his fine of all remedy for recovering his right, as well as the person to whom he levied it; for he himself could not set up a title to such lands, because he had transferred it to another in a court of

## (A) What Acts amount to a Disseisin.

record, and the other could not claim, because a naked right cannot be transferred.

Jon. 315 ; Cro. Car. 303, 304 ; Bro. title *Disseisin*, 68 ; Dals. 46.

In this case, if the lessor takes such a disposition by his tenant at will to be a disseisin, then both the tenant at will and his lessee are disseisors, since they both concur to the act that is the disseisin ; but in respect of all strangers, the tenant at will only is to be esteemed tenant of the freehold, and the person who as such is disseisor ; for as for the lessee of tenant at will, he, in respect of all strangers, and likewise of tenant at will, has a fair and legal interest derived out of the inheritance of his lessor, and so cannot be tenant of the freehold jointly with his lessor, but must claim under him.

Cro. Eliz. 830, Shaw and Barber *cont.* ; Jon. 317 ; Cro. Car. 302.

If a lessee for years, or at will, makes a lease for life, or a gift in tail, that creates a good lease, or a good gift in tail among themselves and all others, besides the first lessor, and as to him they are both disseisors, for they both clearly concurred in ousting him of his freehold, one by giving, and the other by receiving the livery, which passed the freehold.

Jon. 317 ; Cro. Car. 302 ; Bro. title *Disseisin*, 3, 64, 66.

Tenant at will, or for years, makes a feoffment in fee, and dies ; his wife brings dower : the feoffee cannot plead that her husband was never seised ; for since the feoffee received his estate from him, he is estopped to say that the husband was never seised : besides, in respect of the feoffee, the feoffor had an estate, though in regard to the disseisee he is to be considered as a wrongdoer.

on. 317, Mat. Taylor's case. [Vide Cro. Ja. 615 ; 1 Atk. 442.]

If a man enters into the land of an infant by his assent, the infant may proceed against him at full age as a disseisor ; for the contract made between them during the nonage of the infant may be considered by the infant as void ; and, consequently, the entry by virtue of it may be esteemed illegal ; or the infant, if he thinks it more for his advantage, may at full age ratify the contract between them, and so allow him as his tenant.

Ro. Abr. 661 ; Cro. Car. 223 ; Bro. title *Disseisin*, 30.

If A be seised of lands in fee, and a stranger enter upon him by virtue of a lease for years, which is void, and pay rent to him, A can never proceed against him as a disseisor, for his acceptance of rent at his hands is a full and incontestable allowance of the lease he claims, and, consequently, the entry by virtue of it purged and made rightful.

Dyer, 173, in margin ; Ro. Abr. 661 ; Molineux's case, Dyer, 62, pl. 33, *cont.*

A bargains and sells land by indenture enrolled to B, upon condition that on the payment of 300*l.* at the end of three years it shall be void, and that in the mean time the bargainee should not meddle with the profits of the land : the bargainor occupies, and makes a lease for five years, and at the day does not pay the 300*l.* ; the bargainee does not enter, but (the bargainor occupying it) devises the land ; it was adjudged a good devise, for the bargainor in this case was tenant at will ; and, therefore, his lease does not put the bargainee under the necessity of being a disseisee.

Palm. 201 ; Jon. 316 ; Cro. Car. 222 ; Ro. Abr. 661.

If a guardian by nurture makes a lease by indenture to one who is already in under the title of the infant, rendering rent to the guardian, which is paid accordingly ; this is no disseisin, for there is no actual ouster conse-

## (A) What Acts amount to a Disseisin.

quent on such demise; and the rent paid to the guardian must be accounted for to the infant.

Ro. Abr. 659.

[A, tenant for life, remainder to B in tail; B recovers in ejectment against A, and has an *habere facias possessionem*, and whilst in possession makes a feoffment of the estate to D with livery of seisin, that he might become tenant of the freehold, in order for the suffering of a common recovery. A recovery is accordingly suffered, and afterwards A brings an ejectment, and obtains a verdict. It was adjudged, that B by his entry in this case under the judgment was not an actual disseisor, and therefore had not in him any estate of freehold; and that the feoffment gave D an estate of freehold only at the election of A, but did not give him an actual estate of freehold.

Taylor v. Horde, 1 Burr. 60; 5 Br. P. C. 247; Cowp. 689. See Co. Litt. 330 b, n. 1, 13th edit., where the law of the case is questioned with great ability. See also 1 Prest. Conveyanc. 59, 60.]

If two or more disseise another of any lands to their own use, they are all jointenants, and all disseisors; but if they disseise another to the use of them only, he to whose use the disseisin is made, is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin.

Litt. § 278.

There are others who are called counsellors and commanders in a disseisin, viz., when any person counsels or commands another to disseise a third person. Here we are to take notice, that though the persons that concur in a disseisin have these several names given them from the nature of that part of the disseisin that they commit, yet coadjutors, counsellors, and commanders, are disseisors in respect of the person disseised, as well as the person to whose use the disseisin is made, and all equally liable to the assize of the disseisee; nay, though the disseisor, who is tenant of the land, dies, yet the assize lies against the coadjutors, counsellors, &c., and tenant of the land, although he be no disseisor. And this is a most equitable proceeding; for since they all concur in committing the injury, it is but reasonable they should all answer for it; and though the person, that succeeds the disseisor that was tenant in the tenancy, had no hand in the disseisin, yet, claiming under it, he must be liable to the remedy the law gives the disseisee for recovering his right.

Co. Litt. 180; Ro. Abr. 663; Bro. tit. *Disseisin*, 12, 40, 45.

A man makes a lease for life, rendering rent, and goes into foreign parts; tenant for life dies, and A counsels B, who is not heir to the lessor, to enter, who does it accordingly, and enfeoffs A the counsellor; the lessor returns, and is hindered to enter by A, whereupon he brings his assize against A, without naming B, and well; for A by his counsel is a disseisor, and being tenant of the land, and the person who disturbed the lessor of his entry, the lessor who was absent when the disseisin was committed, and so unacquainted with the manner of it, is not obliged to bring his remedy against any other but the person who is actually in possession, and defends that possession with force and violence.

Bro. tit. *Disseisin*, 37.

A disseises one to the use of B, who knows not of it, and B afterwards assents to it; in this case, till the agreement, A was tenant of the land, and after agreement, B is tenant of the land, but both of them are disseisors.

Co. Litt. 180 b; Bro. tit. *Disseisin*, 59.



## (A) What Acts amount to a Disseisin.

A man disseises tenant for life, to the use of him in reversion ; and after, he in the reversion agrees to the disseisin : by the better opinion, he in the reversion is a disseisor in fee ; for by the disseisin made by the stranger, the reversion was divested, which cannot be revested by the agreement of him in reversion ; for his agreement to the disseisin makes him a party to it ; and therefore if he gets any thing by such agreement, he must get it as a disseisor ; and so in this he is not seised of his old estate, but of an estate by disseisin.

Co. Litt. 180, 181. [Why disseisin of tenant for life makes a fee in the disseisor is thus accounted for by Lord Hobart : "A grant to J S and his heirs during the life of J D is no fee, but a special occupancy, as is resolved in Chudleigh's case. But a disseisin of an estate for life by necessity in law makes a *quasi* fee ; because wrong is unlimited, and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rules." Hob. 323.]

The demandant and others, in a *præcipe*, disseised the tenant to the use of others, and the writ did not thereupon abate ; for though the demandant was a disseisor, yet he gained no tenancy in the land, being only a coadjutor, and so his remedy to gain the freehold still continues ; for the design of such remedy being to recover the freehold, till that be obtained there is no reason to abate it ; and that is not obtained by the disseisin, for he gains no freehold by it, so that the writ must still continue.

Co. Litt. 180.

If a man commands J S to enter into certain lands in his name, provided he has a right to them ; if J S enters accordingly, yet if the commander has no right to the lands, he is not the disseisor, but J S only, for J S was not absolutely commanded to enter, but only conditionally, if the commander had right ; so that it was incumbent on J S to inquire into the commander's title before he entered : and the commander having no title, the entry of J S was his own act, and not the execution of the command.

Ro. Abr. 663 ; Bro. tit. *Disseisin*, 57.

For the same reason, if a man says to J S that his ancestor died seised of certain lands, and thereupon commands him to enter into those lands in his name, if his ancestor died seised in fee, otherwise not ; and thereupon J S enters, and yet the ancestor did not die seised in fee ; J S is the sole disseisor, and the commander has no share in it.

Ro. Abr. 663.

If a man says to me, that he will disseise J S to my use, and I tell him that I am content ; this does not amount to a command, but is only a sufferance of what is to be done, and so does not make me a disseisor, without an actual command ; but he only that ousts J S is the disseisor.

Bro. tit. *Disseisin*, 15.

A disseisor makes a lease for years, and the termor enters, the disseisor after leaves the kingdom, and at his departure commands his termor, that if the disseisee enter upon him, not to suffer him to continue in possession, but to maintain the possession against him as termor of the disseisor ; the disseisee enters on the termor in the absence of the disseisor, and the termor re-enters, ousts him, and pays his rent after to the use of the disseisor, being absent ; it seems the lessor is party to this second disseisin, though he did not expressly agree to it after it was done, for the precedent command and instructions sufficiently show his intent and concurrence to it.

Dyer, 141, pl. 47.

A man recovers several houses in an assize, and after the tenant reverses

## (A) What Acts amount to a Disseisin.

the judgment in a writ of error, and a writ issues thereupon to the sheriff to put him in possession of those houses; in this case, though the *tertenants* are strangers to the recovery, and therefore ought not to be ousted without a *sci. fa.*, yet if the sheriff executes the writ, and so puts them out of possession by virtue of it, he is no disseisor; for he acts under the authority of the court, which he is sworn to obey, under the penalty of being fined if he does not.

Ro. Abr. 663; Floyd and Bethell.

The same law in all cases where execution is of a judgment wherein the demand is made of a thing certain: but, if an execution is to be executed without mentioning any thing in particular, there the sheriff, at his peril, ought to make execution of the thing in demand, otherwise he will be a disseisor; for he is obliged to take notice of the thing in demand, and has no authority from the court to make execution of any thing else.

Ro. Abr. 664.

Lease for life, remainder for life, remainder in fee; the remainderman for life disseises the tenant for life, and then tenant for life dies, the disseisin is purged; for then the remainderman for life is seised of his own rightful estate for life, which was to take place upon the death of tenant for life, and the fee reverts in the remainderman in fee.

Co. Litt. 276; Palm. 202; Bro. tit. *Disseisin*, 74. [For upon the death of the disseisee, that wrongful fee is turned into a rightful estate for life by operation of law. 8 Mod. 53, *arguendo*.]

[Rights and the purging of wrongful acts are always favoured in law; and therefore, where a disseisin or abatement is made, and the disseisee brings his ejectment, and has a verdict and judgment for him, (but no execution,) yet an entry by the plaintiff being found as being in the declaration in ejectment, that entry will purge the disseisin, and the continuer in possession afterwards is only as a trespasser.

Goodtitle v. Ridsen, Vin. Abr. tit. *Disseisin*, (N), pl. 6.]

Two coheirs, one an infant, and the other of full age; she of full age enters upon the feoffee of their father, claiming the land to her and her sister; her entry being unlawful, the land vests entirely in her of full age, and nothing in the infant; and so she of full age must be the disseisor; for an infant can never be made a wrongdoer by the act of another, or injure himself by any contract entered into during his minority.

Bro. tit. *Disseisin*, 43, 76.

If my tenant at will enters into another's land contiguous to his own, claiming it to my use, and feeds his cattle there, and fells the trees, upon which the tenant of the freehold is obliged to quit his possession, and so brings his assize; and it is found that I never commanded my tenant to commit this disseisin, nor ever shared in any of the profits of it, I shall be acquitted of the disseisin, since it would be apparent injustice to charge me with the guilt of an act I never concurred in.

Bro. tit. *Disseisin*, 59.

A demises the land of B to C for years, rendering rent, C enters and pays the rent to A: it seems A by this transaction is a disseisor; for his demise to C is tantamount to a command to enter into the lands of B, and he that commands the disseisin is the disseisor.

Bro. tit. *Disseisin*, 77; 2 Scho. & Lefr. 621.

A has common in the land of B, and B comes with his family and encloses

## (A) What Acts amount to a Disseisin.

the land, so that A cannot have the use of his common: B and his family are disseisors; for they oust A of his common by the enclosure, which is plainly a disseisin.

Bro. tit. *Disseisin*, 79.

¶ A tenant in common executes a deed for the entire estate, the grantee causes the deed to be recorded, and enters into possession, claiming title to the entirety, and openly claims and exercises acts of ownership, it is a disseisin of the cotenants.

*Parker v. Proprietors, &c.*, 3 Metc. 91.*g*

A man leases for life, rendering rent, with a clause of re-entry for non-payment, and for arrears of rent distrains; and being possessed of the distress, re-enters; and adjudged a disseisor; for though he had an election upon non-payment of the rent to re-enter or distrain, yet by distraining he had determined his election, and so put it out of his power to re-enter; therefore, when afterwards he re-enters, it is unlawful, and, consequently, such an ouster of him who has the freehold as amounts to a disseisin.

Bro. tit. *Disseisin*, 81.

Land descends to an infant, and A enters as guardian only, and devises it to B and dies, B enters, and the infant brings an assize against him, and he was adjudged a disseisor; for though A was the first that entered, yet he entered as guardian, so that it was in the election of the infant to charge him as a disseisor, or call him to an account as a guardian; and therefore when the infant charges the devisee as a disseisor, it shall be presumed that he looked upon A as his guardian, otherwise B could not be charged as the disseisor, but as the devisee of the disseisor; for if he had reckoned A as his disseisor, then B must have been esteemed a person who claimed under the disseisor by legal conveyance, and so not to be charged as the actual disseisor of the infant. But, if the infant is supposed to look upon A as his guardian, then he may charge B as a person who ousted him by wrong of his freehold, since he, and not the guardian, was the person who seized the possession without title.

Bro. tit. *Disseisin*, 85.

The father enfeoffs his son within age, and after enters as his guardian, and enfeoffs J S and dies; the infant brings his assize against the feoffee, who was adjudged a disseisor for the reasons before mentioned; and likewise, because it is provided by Westm. 2, c. 25, that if lessee for years, or guardian, alien in fee, the remedy for recovering the freehold shall be by an assize of *novel disseisin*, and both the feoffor and feoffee shall be esteemed disseisors, and the survivor of them shall be liable to this remedy. So, if either happens to die, he that survives may be construed as a disseisor, and as such liable to this action.

Bro. tit. *Disseisin*, 94; 2 Inst. 409, 413.

Not only guardians in chivalry, but in socage, and by nurture, come within this law of Westm. 2. So also their alienations not only in fee, but in tail, or for life, are within this act; for wherever a freehold is transferred by the solemnity of livery, by a person who has no right to make such a conveyance, there is an actual ouster of him that has the freehold, and so a disseisin.

2 Inst. 413.

Here it will be proper to observe, that though the statute mentions only want for years, yet tenant by elegit, statute-merchant, or staple, as also

## (A) What Acts amount to a Disseisin.

tenant at will or at sufferance, are by an equitable construction brought within it, as being all equally capable, by the possession which they enjoy, of committing disseisins, by transferring the freehold by livery: but a bailiff is not within the act, because it mentions and intends only those persons who have some interest, and thereby a possession in the lands, which a bailiff has not.

2 Inst. 413.

If tenant for years, or a guardian, makes a lease for life, remainder for life, remainder in fee, and tenant for life enters, he is a disseisor, for he accepts of the livery, which transfers the freehold, and so produces the disseisin, and therefore makes himself a party to the wrong. The same law of him in remainder, if he in remainder for life or in fee enters, for such entry is an agreement to that act which makes the disseisin.

2 Inst. 413; Bro. tit. *Disseisin*, 86.

If a guardian accepts of a feoffment from his ward, the ward may bring an assize against him as a disseisor; for the guardian acts contrary to his duty when he assents to any alienation made by his infant; for it is his duty to protect the inheritance of his ward, and to deliver it up to him at full age, and not to bring it into his own family.

Bro. tit. *Disseisin*, 95.

A lets land for twenty-one years, from Michaelmas next ensuing, rendering rent, and the lessee enters 29th September, and occupies for one year; the lessor brings debt for the rent reserved; and adjudged, that though his entry, which was without title, made him a disseisor, and that this disseisin was not purged by the accruing of the term after, yet debt lay upon the contract; for though his entry, being made the day before the lease commenced, cannot be supposed to be made by virtue of the contract, yet it does not disannul the contract, for that must remain till defeated by an after-agreement of equal notoriety with it; and therefore the action in this case may well be formed upon it. And the reason why in this case the accruer of the term after entry did not purge the disseisin, is because when the lessee enters before his title accrued, he is presumed to disclaim the title of a termor, and set up another; and therefore such title shall not protect him from the notice of the law; for that would be to consider him under a title which by an express overt act he disowns.

Cro. Eliz. 169; Alexander and Dyer.

Disseisin is an act of force and always a tortious act.

Bradstreet v. Huntington, 5 Pet. 102; Doe v. Thompson, 5 Cowen, 371; 9 Cowen, 530; 6 Johns. 197.

The possession of a disseisor, to bar the plaintiff, does not in general extend beyond the limits of the particular spot occupied by him.<sup>(a)</sup> But when a person enters on the land under a deed or title, his possession is construed to be coextensive with his deed or title, though the deed may be defective and void. This exception is subject to some qualification, namely, that if the true owner is in actual possession, the person so receiving a defective title will be entitled to the possession of such part only as he has actually entered upon.<sup>(b)</sup>

(a) Lessee of Potts v. Gilbert, 3 Wash. C. C. R. 475; 5 Cowen, 371; (b) Bradstreet v. Huntington, 5 Pet. 402; Clark v. Courtney, 5 Pet. 319.

An entry in lands and taking possession under a recorded deed, by a person who claims title to entirety and who exercises acts of ownership, is

## (B) What Persons are capable, &amp;c.

a disseisin of all persons who claim title to the same land, to the extent of the boundaries in the deed.

*Prescott v. Nevers*, 4 Mason, 326; but see 5 Pet. 403.

When a tenant for years makes a conveyance in fee, this act will be considered as a disseisin or not, at the election of the landlord.

*Jackson v. Davis*, 5 Cowen, 123.<sup>N</sup> See 1 Johns. Ch. R. 85, n.

The re-entry of a disseisee places the owner of the freehold in the same situation, for most purposes, as if the possession had all along continued in him. He may therefore maintain against the disseisor.

*Dewey v. Osborn*, 4 Cowen, 329.

There can be no disseisin in fact, except by a wrongful entry by a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some act tantamount thereto.

*Varrick v. Jackson*, 2 Wend. 166.

When an entry on the land is tortious, and the tortfeasor makes improvements on it by erecting buildings and the like, his acts will be considered a disseisin.

*Smith v. Burtis*, Anth. N. P. 110. See *Smith v. Burtis*, 6 Johns. 197; *Doe v. Thompson*, 5 Cowen, 371; *Lessee of Clark v. Courtney*, 5 Pet. 320.

One tenant in common may oust or disseise his co-tenant, whenever he gives him notice that his possession is adverse, or does any act from which an adverse possession may be inferred.

*M'Clung v. Ross*, 5 Wheat. R. 116. See as to what is an adverse possession, 3 East, R. 394; 1 Pick. R. 466; 1 Dall. 67; 2 S. & R. 527; Ang. on Wat. Co. 85.

The act of driving piles into ground, which was covered by a mill pond belonging to another, and erecting and maintaining buildings on said piles for sixty years, the water of the pond flowing between the piles, was held to constitute a disseisin of the owner of the pond, and to bar his right to the land so occupied.

*The Boston Mill Corporation v. Bulfinch*, 6 Mass. 229.

The lessee of an easement may disseise the lessor during the continuance of the term, by taking exclusive possession of the land against the will of the lessor; for example, the lessee of an easement in a dock may disseise the lessor by converting the dock into a wharf.

*Tyler v. Hammond*, 11 Pick. 193.<sup>g</sup>

## (B) What Persons are capable of committing such Disseisins.

As to *femes covert*, if a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own: nor will any agreement of hers to the disseisin, during the coverture, make her guilty of the disseisin, for the same reason: but her agreement after her husband's death will make her a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee.

Ro. Abr. 660; Bro. tit. *Disseisin*, 67.

So, if a man disseise another to the use of a *feme covert*, her agreement to it signifies nothing; and though the husband's agreement to it settles the estate in the wife, yet it makes her no sharer in the guilt of the disseisin.

Ro. Abr. 660; Bro. tit. *Disseisin*, 67.

But, if a *feme covert* actually enter and commit a disseisin, either solely

## (B) What Persons are capable, &amp;c.

or together with her husband, then she is a dissesoress, because she gains thereby a wrongful possession: but yet such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors; because though by such entry she gains an estate, yet she has no power of transferring it to another.

Co. Litt. 357 b; Litt. § 678; Ro. Abr. 660, 661; Bro. tit. *Disseisin*, 15, 67; 8 H. 6, 14, *cont.*

As to infants, they are under the same restrictions with feme coverts; so that their *agreement* during minority to a disseisin committed to their use does not bind or make them disseisors, any more than if an infant *commands* a disseisin to be made; because no acts, during their minority, are so binding, but that they may at full age revoke and cancel them. But an *actual entry* by an infant into another's freehold gains the possession, and makes him a disseisor as well as it does a feme covert.

Bro. tit. *Disseisin*, 5, 16, 35; Ro. Abr. 660.

Two infants jointenants, one releases to the other, by which the other holds the whole: this seems a disseisin, because the release, being in no manner for the advantage of the infant, is utterly void, and then the entry of the other, being without title, is tortious and a disseisin. But, if there had been livery made upon it, though between jointenants, this is void, yet it seems no disseisin, for the regard the law has for the solemnity of livery, which shall continue till defeated by act of equal notoriety.

Bro. tit. *Disseisin*, 19. § One tenant in common may disseise another; if a person enter into possession claiming title to the entirety, under a deed, and the title turns out to be defective as to the moiety, it is a disseisin of the parties entitled to that moiety. *Prescott v. Nevens*, 4 Mason, 326. See *McClung v. Ross*, 5 Wheat. 116; *Barker v. Salmon*, 2 Metc. 32; *Putney v. Dresser*, 2 Metc. 583.

If a man carries an infant into the lands of J S and there claims the lands to the use of himself and the infant; yet the infant seems no disseisor, because he made no claim of it himself, and then shall not be charged with the tort of another person.

Ro. Abr. 661.

If the king enters without title, or seises lands by a void or insufficient office, he is no disseisor; for being the fountain of justice, and engaged in multiplicity of affairs, his acts are not to be charged with injustice. But this privilege does not extend to any of his subjects; and therefore if the king by letters patent grants land so seised, and the patentee enters, he is a disseisor, because he has time and leisure to inquire into the legality of his title, which the prince is supposed to want leisure for.

Bro. tit. *Disseisin*, 65.

If a corporation aggregate disseise to the use of another, they are disseisors, in their natural capacity, and the persons who committed the wrong shall be charged therewith, and not the corporation, which consists of a constant succession of various persons, and as a corporation can do no act without writing.

Vide head of *Corporations*.

§ One heir, notwithstanding his entry as heir, may, by the disseisin of his coheirs, afterwards acquire an exclusive possession, upon which the statute will run.

*Ricard v. Williams*, 7 Wheat. 59.

## DISTRESS.

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|| THE distress is a remedy given to the lord to recover the rent or services which the tenant hath obliged himself by his feudal contract to pay by way of retribution for his farm.

Gilb. Dist. 1. § See for a definition of distress, 3 Bl. Com. 6; Bouv. L. D. h. t. The right of distress, it seems, does not exist in the New England states, 4 Dane's Abr. 126; 7 Pick. 105; Aik. Dig. 357; nor in Alabama, Mississippi, North Carolina, nor Ohio; and in Kentucky the right is limited to a distress for a pecuniary rent. 1 Hilliard's Abr. 156. §

These services, when the feudal tenures prevailed, were chiefly of two sorts, either military, as attending on the lord in war; or ministerial, as attending his courts in time of peace, and there assisting the lord in the distribution of justice; or ploughing and tilling his demesne.

Spel. Rem. 40; Bacon on Government, 47.

The non-performance of these services was by the old feudal law a forfeiture of the feud. This is evident from several passages in Vigellius (under title *Causæ ex quibus feudum amittitur*) *Si vassallus domino non serviat, fidelitatemque ei non præstet—Si vassallus a domino in jus vocatus non venerit—Si pactum feudi non servetur.*—These, says he, were all forfeitures, and the lord on such failures of his tenant was at liberty by that law to reassume his feud.

Vigel. 257, 271; Jur. feud. Ann. 126, 129.

The rigour of this law was mitigated with us, and these feudal forfeitures changed into distresses according to the pignorary method of the civil law, from whence the notion seems first to have been borrowed, as may be seen in the title DE DISTRACTIONE PIGNORUM—*Creditoris arbitrio permittitur, ex pignoribus sibi obligatis, quibus velit distractis, ad suum commodum pervenire*: for there appear no footsteps of it in the feudal authors.

Bacon on Government, 48; Dig. lib. xx. tit. v. leg. 8.

From whence soever the name or notion came, the remedy obtained so early in our law, that we have no memorial of its original with us; and as this power was anciently used by lords, it grew as burdensome and grievous to tenants as the feudal forfeiture, there being no difference to the tenant, between the lord's seizing the land itself, and turning the tenant out of his possession, and his stripping him of the whole produce or fruits of it at his pleasure.

And not only the produce of the farm, but the *inducta et illata*, and every thing that was brought on the land were liable to the lord's distress. By this means all the plunder of the war which the vassal had brought home was often carried off by the lord, and the distress by his power removed out of the reach of the tenant; and all this on the slightest occasions.

This power, as it was practised by the lords, did not only oppress the tenants, but put them so entirely under the power of their lords, as to enable them to bring great numbers of their vassals into the field against their prince, and thereby disturb the public peace of the kingdom.

There were yet two other inconveniences which arose from the abuse of these distresses.

## (A) Who may distrain.

The first was, that in the disputes and contests which frequently arose between neighbouring lords themselves, whilst each lord was endeavouring to enlarge his bounds and encroach on his neighbour's property, the tenants were generally distrained by both, by which the tenant was brought within the seignory, and so became subject to that feudal dependence and service which accompanied the military tenure.

The other mischief was, that when the lords had brought them under their dependence, they would distrain them for the amerciaments of their courts; and as the statute of Marlbridge expresses it, *Graves ultiones fecerint, et graves districtiones, quousque redemptiones receperint, ad voluntatem suam*. And what made these abuses the more insupportable, was, that these lords *justiciari non permittant per ministros domini regis, nec sustineant quod per eos liberentur districtiones quas auctoritate propria fecerunt ad voluntatem suam*; so that they seemed to throw off the authority of the law, and to subvert the fundamental rule, that no property was to be altered without the king's writ.

2 Inst. 102, 103.

But these oppressions ended with the distractions of the barons' wars; for towards the end of the reign of Henry 3, there were particular laws made to regulate the manner of distraining, and not to suffer the lords to extend this remedy beyond the mischief it was first introduced for, which was no more than to empower the lord, by seizing the chattel, to oblige the tenant to perform the feudal service. These were to remain in the lord's hands as pledges to compel the performance, and the detention was no longer lawful than the tenant refused to do the services which were reserved by the feudal contract. By what steps it came to be brought under the regulations which govern it at this day, we shall have occasion to observe by considering,||

(A) Who may distrain.

(B) What Things may be distrained.

(C) Of the Manner of distraining as to Time and Place.

(D) Of the Distress when seized: And herein of the Distrainer's Interest therein, and what he is to do therewith.

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.

(F) Of distraining Things Damage-feasant.

(G) Of Distresses for Amercements.

## (A) Who may distrain.

If a man seised in fee makes a gift in tail, or a lease for life, years, or at will, saving the reversion to himself, with a reservation of rent, or other services; the law gives the donor or lessor, without any express provision, remedy for such rent or services by distress.

Litt. § 214; Bro. tit. *Distress*, 5, 15, and this my Lord Coke calls a rent distrainable of common right. Co. Litt. 142 a; 8 H. 4, 15; Mo. 36; Cro. Eliz. 636. The bailiff that distrains must show in whose right he does it. Bro. *Distress*, 78. [A receiver under the Court of Chancery has power, it seems, to distrain without applying to the court for particular directions for that purpose, unless there be a doubt who has the legal right to the rent; for the distress must be in the name of the persons entitled to the legal estate. Pitt v. Snowden, 3 Atk. 750; Hughes v. Hughes, 3 Br. Ch. Rep. 87.]  
 § The following enumeration of the persons entitled to make a distress is extracted from Bouv. L. D. tit. *Distress*, § 2. "1. When the landlord is sole owner of the property out



## (A) Who may distrain.

of which rent is payable to him, he may, of course, distrain in his own right. 2. Joint-tenants have each of them an estate in every part of the rent; each may, therefore, distrain alone for the whole, although he must afterwards account with his companions for their respective shares of the rent; 3 Salk. 17. They may all join in making the distress, which is the better way. 3. Tenants in common do not, like jointenants, hold by one title and by one right, but by different titles, and have several estates. Therefore they should distrain separately, each for his share, Co. Lit. s. 317, unless the rent be of an entire thing, as to render a horse, in which case, the thing being incapable of division, they must join. Co. Lit. 197 a. Each tenant in common is entitled to receive, from the terre-tenant, his proportion of the rent; and therefore, when a person holding under two tenants in common, paid the whole rent to one of them, after having received a notice to the contrary from the other, it was held, the party who gave the notice might afterwards distrain. 5 T. R. 246. As tenants in common have no original privity of estate between them, as to their respective shares, one may leave his part of the land to the other, rendering rent, for which a distress may be made, as if the land had been demised to a stranger. Bro. Ab. tit. *Distress*, pl. 65. 4. It may be, perhaps, laid down as a general rule, that for rent due in right of the wife the husband may distrain alone, 2 Saund. 195; even if it accrue to her in the character of executrix or administratrix. Ld. Raym. 369. With respect to the remedies for the recovery of the arrears of a rent accruing in right of his wife, a distinction is made between rent due for land, in which the wife has a chattel interest, and rent due on land in which she has an estate of freehold and inheritance. And in some cases, a further distinction must be made between a rent accruing before and rent accruing after the coverture. See on this subject, Co. Lit. 46 b, 300 a, 351 a; 1 Roll. Abr. 350; stat. 32 Hen. 8, c. 37, s. 3. 5. A tenant by the curtesy has an estate of freehold in the lands of his wife, and in contemplation of law, a reversion on all land of the wife leased for years or lives, and may distrain at common law for all rents reserved thereon. 6. A woman may be endowed of a rent as well as of land; if a husband, therefore, tenant in fee, make a lease for years, reserving rent, and die, his wife shall be endowed of one-third part of the reversion by metes and bounds, together with a third part of the rent. Co. Lit. 32 a. The rent in this case is apportioned by the act of law, and therefore if a widow be endowed of a third part of a rent in fee, she may distrain for a third part thereof, and the heir shall distrain for the other part of the rent. Bro. Abr. tit. *Avowry*, pl. 139. 7. A tenant for his own life, or that of another, has an estate of freehold, and if he make a lease for years, reserving rent, he is entitled to distrain upon the lessee. It may here be proper to remark, that at common law, if a tenant for life made a lease for years, if he should so long live, at a certain rent payable quarterly, and died before the quarter-day, the tenant was discharged of that quarter's rent by the act of God. 10 Rep. 128. But the 11 Geo. 2, c. 19, s. 15, gives an action to the executors or administrators of such tenant for life. 8. By the statute 32 Henry 8, c. 37, s. 1, "the personal representatives of tenants in fee, tail, or for life, of rent-service, rent-charge, and rents-seck, and fee-farms, may distrain for arrears upon the land charged with the payment, so long as the lands continue in seisin or possession of the tenant in demesne, who ought to have paid the rent or fee-farm, or some person claiming under him by purchase, gift, or descent." By the words of the statute, the distress must be made on the lands while in possession of the "tenant in demesne," or some person claiming under him, by purchase, gift, or descent; and therefore it extends to the possession of those persons only who claim under the tenant, and the statute does not comprise the tenant in dower or by the curtesy, for they come in, not under the party, but by act of law. 1 Leon. 302. 9. The heir entitled to the reversion may distrain for rent arrear which becomes due after the ancestor's death; the rent does not become due till the last minute of the natural day, and if the ancestor die between sunset and midnight, the heir, and not the executor, shall have the rent. 1 Saund. 287. And if rent be payable at either of two periods, at the choice of the lessee, and the lessor die between them, the rent being unpaid, it will go to the heir. 10 Rep. 128 b. 10. Devises, like heirs, may distrain in respect of their reversionary estate; for by a devise of the reversion the rent will pass with its incidents. 1 Ventr. 161. 11. Trustees who have vested in them legal estates, as trustees of a married woman, or assignees of an insolvent, may of course distrain in respect of their legal estates, in the same manner as if they were beneficially interested therein. 12. Guardians may make leases of their ward's lands in their own names, which will be good during the minority of the ward, and, consequently, in respect of such leases, they possess the same power of distress as other persons granting leases in their own rights. Cro. Jac. 55, 98. 13. Corporations aggregate should generally make and accept leases or other convey-

## (A) Who may distrain.

ances of lands or rent, under their common seal. But if a lease be made by an agent of the corporation, not under their common seal, although it may be invalid as a lease, yet if the tenant hold under it, and pay rent to the bailiff or agent of the corporation, that is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for rent. 2 New Rep. 247."g

But, if the donor or lessor reserve not the reversion, he cannot distrain of common right: but he may reserve to himself a power of distraining, or the reservation of the rent may be good to bind the lessee by way of contract, for the performance whereof the lessor shall have an action of debt.

Co. Litt. 47 a; 5 Co. 3; Jewell's case, 2 Saund. 303.

A rent distrainable of common right, or by the common law, cannot issue out of an incorporeal inheritance: as, if I have a right of common in another man's soil, and I grant it to A, reserving rent, if the rent be behind, I cannot distrain the beasts of A, because the right of common, which every man has, runs through the whole common.

Co. Litt. 47 a, 142 a; 2 Roll. Abr. 446. So, of tithes, because there is no place where the distress can be taken. Cro. Ja. 111, 173; 2 Roll. Abr. 446, 451; Co. Litt. 47, 142; Bro. tit. *Distress*, 67, 80; 11 H. 4, 40; 5 Co. 5, vide Chan. Ca. 79. [A landlord may distrain for the rent of ready-furnished lodgings. *Newman v. Anderton*, 2 N. R. 224.]

A rent granted for equality of partition by one coparcener to another is good. So is a rent granted to a widow out of lands whereof she is dowable, in lieu of her dower. The like law of a rent granted in lieu of lands upon an exchange. And for these the law gives a remedy by distress, without any provision of the parties, though they have no reversion.

Co. Litt. 169 b; 3 Co. 22 b; Keilw. 104, 126.

If a termor grants all his term, rendering rent, he cannot distrain for it.

Bro. *Distress*, 7; Latch. 211; Bro. *Debt*, pl. 39; Freem. 228, pl. 226; Cro. Ja. 487; Stra. 405; Al. 57. [2 Wils. 375, — v. Cooper. Where a lease came back to the original lessor by an agreement entered into between him and the assignee of the lessee, that the lessor should have the premises on the terms mentioned in the lease, and further should pay a certain sum annually over and above the rent towards the goodwill already paid by the assignee, it was adjudged, that such agreement operated as a surrender of the whole term, and that the assignee could not distrain either for the original rent, or the sum to be paid in gross annually. *Smith v. Mapleback*, 1 T. Rep. 441.]

[Although a term be vested in an annuitant himself for securing an annuity, yet he may distrain for the arrears: as, where lands were conveyed to trustees and their heirs to the use of A for ninety-nine years, if he should so long live, upon trust that he should receive and take thereout an annuity or yearly rent of 250*l.* with power of distress, and subject thereto, to the use of the grantor for life, remainder over, it was holden that A might distrain, for that the grantor during the term was merely an undertenant to him at the above rent, to which rent distress was incident by law, exclusive of the clause in the deed.

*Fairfax v. Gray*, 2 Bl. Rep. 1326.]

If a man seised of land in fee, and possessed of other land for years, grant a rent-charge for life out of both, with a power to distrain in both, if the rent be in arrear, the leasehold as well as the lands of inheritance are subject to the distress, because a man may oblige his chattels to the discharge of the rent; but the rent, being a freehold, shall issue only out of the inheritance, because the leasehold, being only a temporary and perishing interest, is not a fund commensurate to the charge, and therefore the rent shall issue out of the inheritance, which for its duration is a more competent estate to support the charge, and render the grant effectual: and hence it was adjudged, that

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though the grantee might distrain in the leasehold lands, yet he must avow for a rent issuing out of the inheritance.

7 Co. 23-4, Butt's case; Co. Litt. 147 b; Cro. Ja. 390; Ro. Rep. 330; Cro. Eliz. 607, 622.

For an heriot service due after the death of the tenant, the lord may either distrain or seize the best beast of the tenant.

27 Ass. 24; Bro. *Heriot*, 6; Fitz. *Avowry*, 177; Cro. Eliz. 32, 590; Cro. Car. 260; Jon. 300; Ro. Abr. 665, n. 5. So may the lord distrain for relief. [Co. Litt. 83. If he claims the relief not by tenure but by custom, it seems there must be a prescription to warrant the distress. Lat. 37, 95, 130; 3 Bulstr. 323; 1 Jon. 132.] If he dies, his executors cannot distrain, but may have an action of debt for it. 4 Co. 49, Ognel's case. [Co. Litt. 83 b, 47 b; 1 Show. 36.] Where a distress might have been taken for aid to marry his daughter, or make his son a knight. Ro. Abr. 665; 2 Inst. 234.

The services or rent, for which the lord or lessor may distrain, must be certain, or such as may be reduced to a certainty; for otherwise the lord cannot, in his avowry, recover damages for the non-performance or non-payment, when the jury cannot determine what injury he has sustained. But, if the tenant holds of his lord to shear all his sheep feeding in such a manor, this is certain enough, because it is easy to compute the number within the precincts of the manor, and, consequently, what expense the lord was at in employing other hands to that work, and what damages he sustained by the omission of his tenant.

Co. Litt. 96 a. It seems that on a lease of a tract of land, with sundry slaves and other personal property, reserving by way of rent a gross sum payable annually, the remedy by distress may be resorted to without any express stipulation. *Williams v. Howard*, 3 Munf. 277. It has been questioned whether a distress could be made for a rent reserved of a share of all the grain, &c., which might be raised on the demised premises. 13 S. & R. 52. See *Grier v. Cowan*, Add. 347. But distress is inseparably incident to every service which may be reduced to a certainty. *Fry v. Jones*, 2 Rawle, 11.g

If a man seised in fee, or for life, of a rent-charge, after arrearages incur, grants over the rent to another, he cannot distrain for these arrearages, because they are by the grant divided from the freehold of the rent.

4 Co. 50 b, Ognel's case; Vaugh. 40, 41, S. C. cited; the same law of a rent service. Ro. Abr. 672.

[If the mortgagee give notice of the mortgage to a tenant in possession under a lease prior to the mortgage, he may distrain for all arrears of rent in his hands at the time of the notice, as well as for what accrues subsequent to it.

*Moss v. Gallimore*, Dougl. 266; 1 T. R. 384. See *Powell's Mortgage*, 84.]

¶ If a terre-tenant, holding under two tenants in common, pay the whole rent to one after notice from the other not to pay it, the other tenant in common may distrain for his share.

*Harrison v. Barnby*, 5 T. Rep. 246.

One tenant in common may take a distress without his companions, and avow solely.

*Willis v. Fletcher*, Cro. El. 530.

Grant of rent to a testator for years, with a clause in the deed, that the grantee and his heirs might distrain for it during the term; yet ruled, that the executor should have the rent and distrain for it, and not the heir.

*Durrel v. Wilson*, Cro. El. 644.

A person entitled to the separate herbage and feeding of a close for a

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certain time, may distrain cattle belonging to the owner of the close damage-feasant there during the time.

*Burt v. Moore*, 5 T. R. 329.

If, under an agreement for a lease at a certain rent, the tenant is let into possession before the lease is executed, without any stipulation, that in case no lease is executed, he shall hold for one year certain, the lessor cannot, during the first year, distrain for the rent; for here is no demise, express or implied; the occupier is a mere tenant at will.

*Hegan v. Johnson*, 2 Taunt. 148.

A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put on the land by the landlord for the purpose of taking possession.

*Taunton v. Costar*, 7 T. R. 431.

By 7 H. 8, c. 4, "the recoverors of manors, lands, and advowsons, their heirs and assigns, may distrain for rents, services, and customs, due and unpaid, and make avowry and justify the same, and have like remedy for recovering them, as the recoverees might have done or had, although the recoverors were never seised thereof."

By 32 H. 8, c. 37, the personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rents-seck, and fee-farms, may distrain for the arrears upon the lands charged with the payment, "so long as those lands continue in the seisin or possession of the tenant in demesne, who ought immediately to have paid the rent or fee-farm so being behind, to the testator in his life, or in the seisin or possession of any other person claiming the lands only by and from the same tenant by purchase, gift, or descent."

By § 3, husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee-farms, may distrain after the death of their wives for arrears due in their lifetime.

By § 4, tenants *pur autre vie* of any rents or fee-farms, and their personal representatives, may distrain after the death of *cestuy que vie* upon the land charged for the arrears due in the lifetime of *cestuy que vie*.

This last statute, being remedial, would seem now to be considered as extending to the executors of *all* tenants for life, as well to those executors who previously to the statute were entitled to action of debt, as to those who had no remedy whatever; though upon one (a) occasion it was restricted only to the last.

Co. Litt. 162 a, n. (4), 162 b, n. (1); *Hool v. Bell*, 1 Ld. Raym. 172; 2 Lutw. 1227, S. C.; *Lambert v. Austin*, Cro. El. 332. (a) *Turner v. Lee*, Cro. Car. 471.

This statute does not extend to copyhold rents, but only to rents out of free land.

*Appleton v. Doiley*, Yelv. 135

A, seised in fee, let to the plaintiff for twenty-one years, and afterwards dying seised of the reversion, the defendant administered and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected, that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by the administrator. And it was observed, that this was a case out of the statute of 32 H. 8, for that gives remedy by way of distress only for rents of freehold; and of this opinion

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the court seemed. Co. Lit. 162 a; Cro. Car. 471. *Wade v. Marsh, Latch*, 211, were cited.

*Reavin v. Watkins*, M. 5, G. 2; B. R. Selw. N. P. 619.

But, where in trespass for entering plaintiff's house and carrying away his goods, upon not guilty, the defendant gave in evidence, that he was executor of A, who was the plaintiff's landlord of the house, and that he distrained for rent due to his testator at the time of his decease; it was objected for the plaintiff, that the executor was empowered to distrain only by virtue of the statute of 32 H. 8, and that that statute extended to the executors and administrators of those persons only to whom rent-services, rent-charges, rent-seck, or fee-farms were due, and that the present case did not fall within any of those descriptions. *Lee, C. J.*, overruled the objection, and said, that this was a rent-service, the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty.

*Powell v. Killick*, *Middlesex sittings*, M. 25, G. 2; Selw. N. P. 619, cited from *Serjt. Hill's MSS.*; Bull. N. P. 57, S. C.]

If tenant *pur auter vie*, or tenant for years, held over, yet the lessor could not distrain them for (a) rent that became due before the determination of their respective leases, though they continued in possession of the land afterwards; for when the lease was determined, the lessor could not avow on them as his tenants, claiming under a lease, which was determined.

For this vide 14 H. 4, 31; 23 H. 7, 96; 6 Co. 64; Co. Litt. 47; Cro. Ja. 442. (a) But might distrain the cattle damage-feasant. *Keilw.* 96 a.

To remedy this, it is enacted by the 8 Ann. c. 14, § 6, "that it shall and may be lawful for any person or persons, having any rent in arrear, or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined.

§ 7. "Provided that such distress be made within the space of six calendar months after the determination of such lease and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

11 Geo. 2, c. 19.

[Where there is a custom that a tenant may leave his away-going crop in the barns, &c., of the farm for a certain time after the lease is expired, and he has quitted the premises; the landlord may distrain the crop so left after the expiration of the six months, and within the time limited by the custom.

*Beavan v. Delahay*, 1 H. Bl. 5.

If a lessee dies before the expiration of the term, and his personal representative continues in possession during the remainder and after the expiration of it, the landlord may distrain under this act for rent due for the whole term.

*Braithwaite v. Cooksey*, 1 H. Bl. 465.]

{A landlord may distrain for the rent of ready furnished lodgings. Though the rent is increased on account of the goods, yet it still continues to issue out of the house, and not out of the goods: for rent cannot issue out of goods.

5 Bos. & Pul. 224, *Newman v. Anderton*.}

|| By 4 G. 2, c. 28, § 5, "All and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same, in cases of *rent-seck*, *rents of assize*, and

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*chief rents*, which have been duly answered or paid for the space of three years within the space of twenty years before the first day of the then present session of parliament, or shall be thereafter created, as in case of rent reserved upon lease; any law or usage to the contrary notwithstanding."

A rent reserved on a grant in fee made after the statute of *quia emptores* is in its nature a rent-seck, and cannot be distrained for, except under this statute; and if granted before it, the distrainer must, in his avowry, allege, that it had been duly answered or paid for the space of three years, within the space of twenty years, before the first day of the session of parliament in which the statute was made.

Bradbury v. Wright, Dougl. 624.

A tenant in possession under a memorandum of agreement to grant a lease, with a purchasing clause, for twenty-one years at a net clear rent, the tenant to enter on or before a named day, cannot be distrained upon, as this only amounts to an agreement for a future lease; a landlord can only distrain when there is a *present demise* at a fixed rent.

Dunk v. Hunter, 5 Barn. & A. 322; and see Knight v. Benett, 4 Bing. 364.

If a lessee let another into the farm to have it for the whole term of the lease, paying rent to the lessee, he cannot distrain for the rent in arrear, for he has assigned all his interest, and there is no reversion.

Parmenter v. Webber, 8 Taunt. 593; 2 Moo. 656, S. C.

A termor who underlets cannot, after the expiration of the undertenancy, distrain on the undertenant, though he continues in possession, if the under tenant refuses to acknowledge him as landlord.

Burne v. Richardson, 4 Taunt. 720.

Where an enclosure act directed that in lieu of tithes a corn rent should be payable to the impropiator by the person having possession and occupation of the lands, and the lands were for some time untenanted and uncultivated, it was held, that a tenant afterwards coming in under the owner who owned the lands during the period while so untenanted, &c., was liable to be distrained upon for the arrears accrued during such period.

Newbery v. Pearse, 1 Barn. & C. 437.

One of several coheirs in gavelkind may distrain without an authority from his coheirs.

Leigh v. Shepherd, 2 Bro. & Bing. 465.

And so also one of several jointenants.

Robinson v. Hofman, 4 Bing. 562.

The plaintiff being about to take an apartment of the defendant's tenant, defendant promised plaintiff never to trouble him or his property so long as he paid the tenant the rent of the apartment. The plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the defendant, who had received no notice of the tender, distrained the plaintiff's goods for rent due from the tenant to the defendant; it was held, that his right to distrain was not barred.

Welsh v. Rose, 6 Bing. 638.

Avowant, who had a term which expired on the 11th of November, 1826, let the premises orally from the 11th of September to the 11th of November in that year for 270*l.*, payable immediately: held, that this was a lease of which parol evidence might be given, and not an assignment requiring

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writing; but that, being a demise of the whole of the avowant's interest, he had no right to distrain.

Preece v. Corrie, 5 Bing. 24.

A tenant from year to year underletting from year to year has a reversion which entitles him to distrain.

Curtis v. Wheeler, 1 Moo. & Malk. 493.

β When a landlord is entitled to a term of years, and dies without appointing an executor, a distress made after his death and before grant of administration cannot be justified.

Keene v. Dee, Alcock & N. 496, n.

A distress by a bailiff made by order of landlord, who died before it was made, but which was immediately adopted by the executrix as her act, was held to be valid and lawful.

Whitehead v. Taylor, 2 Perr. & D. 367.

A landlord cannot distrain goods for rent which have been previously levied on an execution or taken under a foreign attachment.

Pierce v. Scott, 4 Watts, 334.g

## (B) What things may be distrained, β and for what Rent.

## 1. What may be distrained.g

THERE must be a valuable property in some body in the things distrained; therefore, no distress can be of (a) dogs, (b) deer, coneyes, &c., which are *feræ naturæ*.

Co. Litt. 47. (a) [Qu. as to dogs, now that the legislature hath passed an act to prevent the stealing of them. See stat. 10 Geo. 3, c. 18, and Willes's Rep. 48. (b) But deer kept in a private enclosure for the purpose of sale or profit may be distrained for rent. Davies v. Powell, C. B. Hil. 11 G. 2; 3 Bl. Com. 8; Willes's Rep. 46, S. C.]

Things fixed to the freehold, or part of the freehold, as furnaces, cauldrons, doors, windows, fixed to the freehold, or corn\* growing cannot be distrained.

|| For what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal, and, consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised; but the nature of a distress is not to resume part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house.

18 E. 3, 4; Co. Litt. 47; 2 Inst. 82, S. P.; 2 Mod. 61; Gilb. Distr. 42. || β Darby v. Harris, 1 Gale & D. 234.g [So, an anvil in a smith's shop, and a millstone in a mill, are privileged from distress: and a temporary removal of the anvil out of the stock, or of the millstone out of the mill, for the purpose of its being picked, does not destroy the privilege. 14 H. 8, 25 b.] \*Cattle on the common, and corn growing, may be distrained for rent, by 11 Geo. 2, c. 19, § 8.

No man can be distrained for rent by the utensils of his trade, (c) as the axe of a carpenter, the books of a scholar, the materials for making cloth in a weaver's shop; for these the law protects under a presumption, that without them the tenant could neither be useful to others, nor gain a livelihood for himself.

Co. Litt. 47. (c) But where by prescription a toll is due for repairing a quay or harbour, which is to be levied by distress, such distress may be of those implements, by which the party gets his livelihood, for the maintaining of those is for the public good; and therefore the taking part of the loading has been adjudged good. Mod. 104; Lev. 96, 97, S. C.; Raym. 232; Ld. Raym. 385; 2 Stra. 1228. So, has the distraining part of the tackle of the ship, as where the anchor, cable, and sails were taken. Carth. 357; Ld. Raym. 384; 12 Mod. 216; 5 Mod. 359; Salk. 248, for this vide 2 H.

## (B) What Things may be distrained.

7, 16; 2 Roll. Abr. 202; 3 Co. 710; Dyer, 352. The cart of a husbandman may be distrained, though an implement of his occupation. Carth. 359, admitted *per Cur.* [And implements of trade may be distrained if not in actual use at the time, and no other sufficient distress can be found. Gorton v. Falkner, 4 T. R. 565; Simpson v. Harcourt, C. P.; Mich. 18 Geo. 2, cited by Buller, J., *Ibid.* 569; Willes's Rep. 512, S. C., by the name of Simpson v. Hartopp. The like law with respect to *averia caruce*. But *averia caruce*, or implements of trade, may be distrained for a poor's rate, although there be other sufficient distress: for the distress in this case is in nature of an execution. Hutchins v. Chambers and others, 1 Burr. 579; Com. Dig. tit. *Distress*, (C); Saund. on Conventicles, p. 39.]

Also, for the benefit of trade and commerce, some things are privileged from being distrained, as a horse in a smith's shop, a horse in an inn, sacks of corn or meal in a mill, cloth or garments in a tailor's shop, or sacks of corn or meal in a market.

10 H. 7, 21 b; Bro. *Distress*, 99; Co. Litt. 47; 3 Bulst. 270; Ro. Abr. 668; Cro. Eliz. 549, 596. [Noy, 68. But a chariot standing at a livery-stable is not privileged from distress. Francis v. Wyatt, 3 Burr. 1498; 1 Bl. Rep. 483. Nor is a race-horse in a stable belonging to an innkeeper, a mile distant from the inn. Crosier v. Tomlinson, Hertford Assizes, *coram* Ryder, C. J., cited in 3 Burr. 1500.]  $\beta$  Brown v. Shevil, 4 Nev. & M. 277; 2 Ad. & Ell. 138.*g*

So, if a horse carries corn to a mill, and is tied to the mill-door, during the grinding of the corn, he shall not be distrained.*(a)* But cattle driving to a market, and by the way put into a pasture, may be distrained.

Cro. Eliz. 550, *per Curiam arguendo*. *(a)* 2 Vent. 50. But vide 2 Vern. 130. [*Infrà*, note on the last case.]

$\beta$  Casks of a brewer furnishing beer to a public house, and left there until the beer was consumed, may be distrained.

Poule v. Jackson, 7 Mees. & W. 450.

Cattle in actual use and personal care of a party are not distrainable for damage-feasant.*(b)* But a dog in the company of the owner may be distrained.*(c)*

*(b)* Field v. Adames, 12 Ad. & Ell. 449. *(c)* Bunch v. Kennington, 4 Perr. & D. 509 a.

The goods of a boarder are not liable to be distrained for rent due by the boarder of a boarding-house.

Riddle v. Whilden, 5 Whart. 9.

Goods of an out-going tenant, which have been *bond fide* sold to the succeeding tenant, are not liable to distress by the landlord, for the arrears of the former, although the goods remain on the demised premises.

Clifford v. Beames, 3 Watts, 246.*g*

And these things are privileged, though they continue there three or four days, or are retained never so long by the tenant for his satisfaction in some thing he has done about them.

Ro. Abr. 668.

If a man rides to a place, and is there taken sick, by means whereof he is obliged to tarry there two or three days, his horse cannot be distrained for rent.

Ro. Abr. 668, *equus, palfridus*, or a horse which a man keeps for journeys, cannot, as is said, be distrained. 2 Inst. 133; 2 Ro. Abr. 160; Ro. Abr. 668. *Sed qu.?* Nor a horse upon which another rides. Co. Litt. 47; Cro. Eliz. 552. But a horse upon which a man is riding may be distrained damage-feasant, and led to the pound with the rider on him. Vent. 36; Sid. 440. [But this is not law. Things in actual use cannot be distrained, because the taking of them would occasion a breach of the peace. See what is said by Willes, C. J., on the case of Webb v. Bell, 1 Sid. 440; in 4 T. R. 569, and Storey v. Robinson, 6 T. R. 138, and Willes's Rep. 517.]



## (B) What Things may be distrained.

{ Wearing apparel, when not in actual use, may be distrained for rent.

1 Esp. Rep. 206, *Baynes v. Smith*; Ibid. 207, n., *Bissett v. Caldwell*.}

Things distrained damage-feasant cannot be distrained for rent, because they are in the custody of the law; || for it is *ex vi termini* repugnant, that it should be lawful to take goods out of the custody of the law.

Co. Litt. 47. In debt against an executor he pleads *riens in ses mains*, but certain goods distrained and impounded: adjudged no assets to charge him. Cro. Eliz. 23. [So, it seems that goods under an attachment cannot be distrained. Monk's case, 1 Vent. 221, *arguendo*.] || Or in execution, *Eaton v. Southby*, Willes's Rep. 136. But, if after seizure under a writ of execution, the sheriff abandon the possession, the goods are no longer considered as under the protection of the law, and may be distrained. *Blades v. Arundale*, 1 Maule & Selw. 711. So, if goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to the landlord's distress. *Smith v. Russell*, 3 Taunt. 400. Corn in the blade taken and sold under a writ of *feri facias*, and afterwards continuing on the demised premises before any rent due, may be distrained, it seems, for rent becoming subsequently due. *Gwilliam v. Barker*, 1 Price, 274. ||

If a clothier having put his wool to spin comes with a horse to carry it back, but because there is no beam or weights at the spinner's house to weigh it, the clothier and spinner, with the leave of a neighbour, who had a beam and weights in his house, bring the horse thither, and enter the house to weigh the yarn, the lord of the house, whilst they are there, cannot distrain the horse for services.

Cro. Eliz. 549, 596, adjudged; 3 Lev. 261, S. C. cited. A private person, who undertakes to carry all persons' goods, thereby becomes a common carrier, and the goods in his possession are privileged. Salk. 249, 250.

Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained; and for the damages, that shocks of corn,\* hay, &c., might sustain, it was held that they could not be distrained.

Ro. Abr. 667; Keilw. 145; 2 Inst. 82. [But money in a bag sealed may be distrained; for the bag sealed may be known again. 22 E. 4, 50 b.] \*But for this vide 2 W. & M. c. 5, set forth at large, letter (D), *post*. [But, notwithstanding this act, sheaves of corn, it seems, cannot be distrained for the arrears of an annuity. *Horton v. Arnold*, Fort. 361.]

*Averia caruca*, or beasts of the plough, or any thing belonging to it, cannot by common law be distrained while there are other goods or beasts (which Bracton calls *animalia otiosa*) that may be distrained. Also, a covenable distress is not of armour or vessel, or apparel, or jewels, so long as there are other sufficient or covenable, nor of sheep, saddle-horse, poultry, or fish.

Co. Litt. 47; 2 Inst. 133. See *supra* in this chapter.

By the statute *de districtione scuccarii* made 51 H. 3, s. 4, "No man shall be distrained by the beasts that 'gain his land, nor by his sheep, but until another distress or chattels sufficient be found, except for damage-feasant."

This statute extends not only to distresses between lord and tenant, but to all other distresses, as well at the suit of the king, as at the suit of the subject. 2 Inst. 133; Dal. 84. In an action on this statute, it is not necessary to show that there was a sufficient distress, *præter*, &c., but it must come on the other part, *ss.* to plead that there was not a sufficient distress, *præter*, &c. *Dyer*, 312. It must be intended there were cattle sufficient at the time of the distress, and it is not material what were before or after. 2 Inst. 133.

It is agreed that the cattle of a stranger escaping into his neighbour's grounds, and there being *levant* and *couchant*, may be distrained by the lord or lessor of those grounds for rent or services due to him; for it shall be

## (B) What Things may be distrained.

imputed the owner's folly that he did not provide against this mischief by proper bounds and fences.

27 E. 3, 80; 2 Inst. 296; Palm. 43; Dyer, 317, 318; 2 Leon. 7, 8; Co. Litt. 47; 2 Brownl. 170. But such cattle shall not be liable to a distress for an amercement. Noy, 20. Nor to a rent-charge issuing out of those lands, unless they were *levant* and *couchant*. Ro. Abr. 668; 1 Mod. 63. And by the better opinion of the books, it seems not to be material whether they were *levant* or *couchant* or not. Vide Co. Litt. 47; 2 Saund. 290; 2 Brownl. 170; Palm. 43; Hob. 265. ¶ A collector of the house and window-tax under 43 G. 3, c. 161, seems to be armed with a power similar to that which the landlord possesses, and may for the arrears of those taxes take any goods found upon the premises, whether the property of the debtor himself, or of a third person. Juson v. Dixon, 1 Maule & Selw. 601.]

Cattle which are in certain land by way of agistment may be distrained for rent.

Ro. Abr. 669.

If the tenant ought to enclose against the highway by prescription, and in driving my cattle by the way, by default of the enclosure they escape into the land of the tenant, the lord cannot distrain them. So, if he ought to enclose by prescription against my land, and my cattle escape.

22 E. 4, 49; 15 H. 7, 17 b; Ro. Abr. 668. But for this vide 2 Leon. 7; Dyer, 317.

If A and B have two closes lying contiguous, and A by prescription is bound to repair the fences between both the said closes, and A leases his close to C for years, rendering rent; and the fences between the two closes being out of repair, the cattle of B escape into the close of A, he may distrain them for rent arrear; and it is not material whether they are *levant* and *couchant* or not: adjudged, and the judgment affirmed upon a writ of error, though objected that they escaped there through the default of A, who ought to have taken care that the hedges were repaired. And by Sanders; *nota*; this was a hard case to maintain, there being a vast difference between the lord's taking a distress within his seignory, and the lessor's distraining for rent reserved upon his own lease; for the lord had nothing to do with the land or fences, and so it concerns not him whether they are in repair or not: otherwise of the lessor; for he ought to repair them, else he will have advantage of his own wrong.

Pool v. Longueville, 2 Saund. 289.

[The various cases upon this point were very fully considered in a later case, where the following distinctions were made. If a stranger's beasts escape into the land by the default of the owner, they may be distrained for rent, without being *levant* or *couchant*. But, if their escape be in consequence of the default of the tenant of the land in not repairing his fences, the lessor cannot distrain them, though they have been *levant* and *couchant*, unless he have given notice to the owner, and he suffer them to remain there afterwards. But the lord of the fee, or the grantee of a rent-charge, may in this last case distrain them, without giving notice, after they have been *levant* and *couchant*.

Kimp v. Cruwes, 2 Lutw. 1573.]

If a man, that is driving his cattle to London to sell, asks leave of the lessor to put his cattle into the ground for a night, and he gives him leave so to do, with the consent of the lessee, and the cattle are put in accordingly, the lessor is not concluded by this license, but that he may distrain them for rent: adjudged upon demurrer; and it not appearing by the pleading

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that the ground belonged to a common inn, it came not in question whether in that case they might have been distrained.

2 Vent. 50; Fowkes and Joice; 3 Lev. 260, S. C.; 2 Lutw. 1161, S. C. But in this case the party had relief in equity, the consent of the head landlord being looked upon as a fraud and contrivance to subject the cattle to a distress. 2 Vern. 129; Pr. Ch. 7, S. C. decreed for the plaintiff with costs, at law and in equity. ¶ And it should seem, says the late editor of Saunders's Reports, that at this day a court of law would be of opinion, that cattle belonging to a drover being put into a ground with the consent of the occupier to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent.¶

¶ By 7 Ann. c. 12, § 3, it is enacted and declared, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.¶

A collector of taxes cannot distrain, for taxes due for horses, carriages, &c., charged by the tax acts personally on the individual, household furniture, pictures, &c., devised by the individual's ancestor to and vested in trustees in trust to permit them to be held and enjoyed by the person for the time being entitled to the possession of the family estate, and to be kept in the mansion-house, and not removed without the trustees' consent: for though the tax act (43 G. 3, c. 99, § 38) authorizes collectors to use all remedies and powers given by the bankrupt acts to creditors, yet the goods in question would not pass to the bankrupt's assignees in case of bankruptcy, not being in the party's order and disposition within the meaning of 21 Jac. 1, c. 19; and *quere*, whether the 43 G. 3, c. 99, § 38, applies to any person not subject to the bankrupt laws?

Shaftesbury v. Russell, 1 Barn. & C. 666.

A landlord cannot distrain trees growing in a nursery ground, under the 11 G. 2, c. 19, § 8.

Clark v. Gaskarth, 8 Taunt. 431; Clark v. Calvert, Ibid. 742; 3 Moo. 96.

Growing corn sold under a *fi. fa.* cannot be distrained by the landlord for rent, unless the purchaser allow it to remain an unreasonable time after it is ripe.

Peacock v. Purvis, 2 Bro. & Bing. 362; 5 Moo. 79.

Goods of a principal in the hands of a factor cannot be distrained for rent by the factor's landlord.

Gilman v. Elton, 3 Bro. & Bing. 75.

Nor goods deposited with a wharfinger.

Thompson v. Mashiter, 1 Bing. R. 283.

Goods of an ambassador's servant, renting and living in a distinct house from the ambassador, are distrainable for poor-rates, they not being necessary for the convenience of the ambassador.

Novello v. Toogood, 5 Barn. & C. 154.

A landlord is justified in distraining and selling beasts of the plough, if there is reasonable ground to think, from the appraisement of competent persons at the time of taking, that there would not be enough to satisfy the rent and expenses without them, although it turn out *after the sale* that there would have been sufficient without them; and, therefore, in such case the landlord is not liable to an action on the case.

Jenner v. Yolland, 6 Price, 3.

A barge attached by a rope to a wharf may be distrained for rent arrear in respect of the wharf and premises attached to it; but where it was found

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by special verdict that the barge was lying in the space between high and low water-mark, and attached to the wharf by ropes, and that the exclusive use of the land between high and low water-mark was demised to the tenant of the wharf as appurtenant to the wharf, but that the land itself was not demised to him, the court held, the lessor could not distrain the barge; for either the verdict meant that the *land* between high and low water-mark was deemed as appurtenant to the land of the wharf, which could not be; or else that merely an easement was demised on the land between high and low water-mark, out of which rent could not issue, and consequently a distress could not be made on it.

*Buzzard v. Capel*, 4 Bing. R. 137; 8 Barn. & C. 141.

By 56 G. 3, c. 50, § 6, no landlord shall distrain on any corn, hay, straw, or other produce sold by the sheriff under an execution, and remaining to be consumed or threshed out on the land pursuant to agreement made between the sheriff and the purchaser, nor on any wagons, carts, or implements, horses, sheep, or cattle employed for threshing out, carrying out, or consuming any such corn, &c., under the provisions of that act.

A landlord, to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of an article on the premises early in the morning, entered and said, "The article shall not be removed till my rent is paid." The stranger nevertheless removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent: held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question.

*Wood v. Nunn*, 5 Bing. 10.

On an avowry for a distress under 11 G. 2, on goods fraudulently removed, the defendant must prove that there was no sufficient distress left on the premises.

*Parrey v. Duncan*, 1 Moo. & Malk. 533.

§2. *For what rent a distress may be made.*

Where a lease is surrendered as to part of the premises, the right to distrain continues as to the residue.

*Peters v. Newkirk*, 6 Cowen, 103.

A distress may be made for rent payable in advance.

*Peters v. Newkirk*, 6 Cowen, 103; *Russell v. Doty*, 4 Cowen, 576. But see *Deller v. Roberts*, 13 S. & R. 60.

In New York, the landlord may distrain of common right for a rent-service; but for a rent-charge only by virtue of a clause of distress. He cannot distrain for a rent-seck.

*Cornell v. Lamb*, 2 Cowen, 652.

The landlord may distrain, though he has obtained a judgment for the rent, which judgment remains unsatisfied.

*Chipman v. Martin*, 13 Johns. 240; 4 Nev. & M. 462; 2 Ad. & Ell. 623; 1 Har. & Woll. 50.

A tenant entered upon the demised premises for two years, and continued in possession for nine years, then the landlord distrained for the whole time; such distress was decided to be right.

*Sherwood v. Phillips*, 13 Wend. 479.

A tenant's growing crops taken in execution and sold, and remaining on the premises a reasonable time for the purpose of being reaped, are not distrainable by the landlord for rent become due after the taking in execution.

*Wright v. Dewes*, 3 Nev. & M. 790; 1 Ad. & Ell. 641.

(C) Of the Manner of distraining, &c.

Rent payable in iron may be recovered by distress,<sup>(a)</sup> and the landlord may also distrain for "one-third of the toll which the mill grinds;"<sup>(b)</sup> but no distress can be made for repairs, where the amount is uncertain.<sup>(c)</sup>

(a) Jones v. Gundrim, 3 Watts & S. 531. (b) Fry v. Jones, 2 Rawle, 13. (c) Grier v. Cowan, Addis. 347.g

(C) Of the Manner of distraining, as to Time and Place.

A DISTRESS for a rent-service, or a rent-charge, cannot be in the night, but one may distrain cattle damage-feasant in the night, otherwise they may be gone before morning.

Co. Litt. 142; 7 Co. 7 a; 9 Co. 66 a; *β* Aldendurg v. Peaple, 6 C. & P. 212.g

If the tenant, when the lord is in view of the cattle, to avoid the distress, chases them into a place not within the lord's distress, yet the lord may take them freshly; for the tenant shall not have advantage of his own wrong.

4 Leon. 218. But, if before the stat. 8 Ann. c. 14, and 11 G. 2, c. 19, the tenant, before the lord had view of them, had chased them away; or if the tenant, for other lawful reason, even after view, had chased them away; or if, after view, the cattle went out of themselves, the lord could not distrain them. 44 E. 3, 20; Co. Litt. 161 a, 268 a; 2 Inst. 131. [But now by 11 Geo. 2, c. 19, goods, &c., may be distrained in 30 days after removal.]

[If by the custom of the country, or by express stipulation between the parties, the rent be payable on the day on which the tenant enters, the landlord may distrain for it on that day. So, it seems, by the usage of a parish, a quarter's rent may be distrained for before the end of the quarter.]

Buckley v. Taylor, 2 T. R. 600; 6 Mod. 214.]

By the statute of Marlbridge, made (d) 52 H. 3, c. 2, "None shall distress any to come to his court,<sup>(e)</sup> which is out of his fee, or upon whom he has no jurisdiction, by reason of a hundred or bailiwick, nor take distresses out of the fee or place where he hath (g) jurisdiction."

(d) This is declarative of the common law. 2 Inst. 104. (e) This is intended of suit-service in respect of a seignory, and not of suit-real in respect of reliance. 2 Inst. 104. (g) But no distress is prohibited by this act in any place where he hath power, by custom or otherwise, to distrain. 1 And. 71, 72.

By the same statute, c. 15, it is enacted, "That from (h) thenceforth (i) it shall be lawful for no man (k) for any manner of cause to take distresses out of his fee, or in the king's highway, or in the common street, but only to the king and his officers, having special authority so to do."

(h) But this is only in affirmance of the common law. 2 Inst. 131. (i) This must not be taken *simpliciter*, so as to take advantage thereof in bar of an avowry, but *secundum quid*, viz., that the tenant may have an action against the lord upon this statute, in which he shall be fined. 2 Inst. 132. And if it may be pleaded in bar of the avowry, the king shall lose his fine. (k) This must be intended only of distresses by reason of a seignory, and not of distresses for rent-charges, &c., or by reason of a leet. 2 Inst. 131; And. 72. Nor of such things for which no distress can be taken but in the highway, as for toll-thorough due by custom. Cro. Eliz. 710. But a heriot custom may be seised in the highway, for that is not a distress, but a seizure: but a distress cannot be taken there for a heriot service. 2 Inst. 132; Gouls. 97.

If the lord coming to distrain hath a view of the beasts within his fee, and before he can distrain them the tenant chases them into the highway, the lord, notwithstanding the statute of Marlbridge, c. 15, may distrain them there.

2 Inst. 332. *β* But the property of a third person cannot be distrained off the premises. Davis v. Payne's Admr., 4 Randolph, 332. See 3 Call. 439.g

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## (C) Of the Manner of distraining, &amp;c.

A distress for rent may be taken in a house, if the door be open; so may it be taken out of a window.

46 E. 3, 26 b; Ro. Abr. 671; 5 Co. 92. One cannot break open the outer door to distrain; and Ld. Hardwicke, C. J., held that a padlock put on a barn door could not be opened by force, to distrain the corn. 9 Vin. Abr. 128, pl. 6. If the outer door be open, one may break open the inner door to distrain. Comb. 17. ¶ So by Lord Hardwicke, Ca. temp. Hardw. 168. Where a landlord, who occupied an apartment over a mill demised to his tenant, from which it was separated only by a boarded floor without any ceiling, took up the floor, and entered through the aperture to distrain for the rent; it was adjudged he was no trespasser; and where a man can get in without a trespass, he may lawfully distrain. Gould v. Bradstock, 4 Taunt. 562. ¶ [See the stat. 11 G. 2, c. 19, § 7, which empowers the landlord in the case of goods being fraudulently removed to prevent a distress, to break open a dwelling-house, taking a constable with him, and having first made oath before a justice of a reasonable cause to suspect that they are therein. See *infra*, tit. *Rent*, (K).] ¶ See Davis v. Payne's Admr. 4 Rand. 332 g

The statute 8 Ann. c. 14, § 6 & 7, is not confined to cases of tortious holding over by tenants, or of holding over the whole farm; therefore, where a tenant by permission held over a *part* of the farm, it was held the landlord might distrain on that part.

Nuttall v. Staunton, 4 Barn. & C. 51.

Where, by agreement or by custom, the tenant has the use of barns, &c., for a certain time after the end of the term, the landlord may distrain during that time; for the tenancy is *continued* independent of the statute of Anne.

Knight v. Bennett, 4 Bing. 364.

Where commissioners had a power to make a rate yearly on lands, and they omitted to make one for several years, and then made an assessment for one year, and added to it the arrears of the omitted years; it was held, that no arrears could be due for the years for which no assessment had been made, and the distress was held bad.

Newton v. Young, 1 New R. 187.

By 11 G. 2, c. 19, § 1, in case any tenant or lessee shall fraudulently convey away from the premises his goods, to prevent the landlord distraining for arrears, it shall be lawful for the landlord, or any person by him empowered, within thirty days next after the carrying off of the goods, to seize them wherever found, as a distress for the arrears, and to sell the same as if distrained on the premises, provided that no landlord shall seize any goods as a distress which shall be sold *bond fide* to any person not privy to the fraud; and by § 3, all tenants fraudulently conveying away their goods, and all persons assisting them, shall forfeit to the landlord double the value of the goods, to be recovered by action of debt.

11 G. 2, c. 19, § 1, 2. See tit. *Rent*, (K).

This statute applies only to the removal of the tenant's goods, and not to those of a stranger.

Thornton v. Adams, 5 Maule & S. 38.

A creditor may, with the assent of the debtor, take possession of his goods to satisfy a *bond fide* debt, without incurring the penalty of the statute for fraudulently carrying off the goods; and this, although it be done under an apprehension that the landlord is about to distrain.

Bach v. Meats, 5 Maule & S. 200; and see 9 Price, 301.

By 11 G. 2, c. 19, § 16, if a tenant at rack-rent, or where the rent shall be three-fourths of the yearly value, shall be in arrear one year's rent, desert the demised premises, and leave them uncultivated or unoccupied, so

## (D) Of the Distress when seized.

as no sufficient distress can be had to countervail the arrears of rent, two or more justices of the peace, at request of the landlord or his bailiff, may view the premises, and affix, on the most notorious part thereof, a notice (fourteen days at least) of a second view; and if, on the second view, the tenant, or some person for his behalf, does not appear and pay the rent, and there is no sufficient distress on the premises, then the justices may put the landlord into possession of the demised premises, and the lease shall be void.

The landlord may proceed under this statute, though he know where the tenant is, and though the justices, at the first view, find a servant on the premises. The landlord must have a right of re-entry in order to proceed under the statute; (a) but this need not appear on the record of the magistrate's proceedings.

*Ex parte Pelton*, 1 Barn. & A. 369. (a) By 57 G. 3, c. 52, the remedy is extended to cases where only half a year's rent is in arrear, and where there is no power of re-entry reserved.

It is not necessary in such case that a complaint should be made on oath to the magistrate.

*Basten v. Carew*, 3 Barn. & C. 649.

[If the demises are several, there must be separate distresses upon the several premises subject to each distinct rent; for one distress cannot be taken distributively, and the law gives no right to enter into any premises but those whence the rent issues.

*Rogers v. Berkmore*, Ca. temp. Hardw. 245; 2 Str. 1040, S. C.]

β Barges on a river attached to the leased premises (a wharf) cannot be distrained.

6 Bing. 150.g

## (D) Of the Distress when seized: And herein of the Distrainer's Interest therein, and what he is to do therewith.

By the common law, a man might have driven a distress whither he pleased, which was very mischievous; 1st, Because the tenant was bound to give the beasts sustenance, if impounded in an open pound, and being driven into another county, he could not by intendment of law know where they were. 2dly, He could not tell where to have a replevy; but now,

By the statute of Marlbridge, made 52 H. 3, c. 4, "None shall cause a distress to be driven out of the county where taken, on pain of fine," &c.

This statute is confirmed by Westminster the 1st, made 3 E. 1. 2 Inst. 191. Yet if the tenancy is in one county, and the manor in another, the lord may drive the distress taken in the tenancy unto the manor in the other county; for the tenant doing suit to the manor, by common intendment knows what is done there. 2 Inst. 106; Keilw. 50; Bro. *Distress*, 33. Where he who will take advantage of this act must do it by way of action, so as to entitle the king to a fine, vide 3 Lev. 48.

Also by the statute of the 1 & 2 of Ph. & Mary, c. 12. "No distress shall be driven out of the (b) hundred, rape, wapentake, or lath, where taken, except to a pound overt within the same shire, not above (c) three miles distant from the place where taken; and no distress shall be impounded in several places, (d) whereby the owner shall be constrained to sue several replevins, upon pain that (e) every person offending shall forfeit to the party grieved 5*l.* and treble damages."

(b) Not into the county of the city Litchfield, though till 1 Mar. part of the hundred in which, &c. Gouls. 100. (c) Godb. 11; Gouls. 101. (d) As if impounded in seve-

## (D) Of the Distress when seized.

ral liberties, &c., else it is no offence within the statute. Noy, 52; Dyer, 177, in margin. (e) But, where three persons distrain a flock of sheep, and severally impound them in three several pounds, whereby, &c., yet they shall forfeit but one five pounds and one treble damage. Cro. Eliz. 480; Moor, 453, pl. 620; Noy, 52, 62; Dyer, 177, in margin. But Noy, 62, by Fenner, if the plaintiff brings his action against them severally, every one shall pay 5*l.*; but *qu.* [Trespass will not lie for impounding a distress in another county, but the action must be upon this statute. Gimbart v. Pelah, 5 Str. 1272.] || If the hundred in which the cattle were distrained, be in one county, and the hundred into which they were driven, be in another, the venue may be laid in either county. Pope v. Davis, 2 Taunt. 252.]

If a man distrains dead goods, as utensils of a house, or such like, which may take damage by wet or weather, and the like, he ought to impound them in a house or other pound covert within three miles in the same county; for if he impounds them in a pound overt he ought to answer for them.

Co. Litt. 47. A pound overt is a pinfold made for such purposes, or the close of him that distrains, or the close of a stranger with his consent, where the distress is taken: a pound covert or close is when the distress is impounded in a house. Co. Litt. 47.  $\beta$  The landlord's agent going into a field where the tenant's cattle were grazing, and putting his hand on one, distrained it and the rest in its name for a distress for rent, and went away, leaving the cattle there, and sent notice to the tenant of his having distrained, was held to amount to a sufficient impounding to make a tender after notice too late. Thomas v. Harries, 1 Scott, N. S. 524; 1 Mann. & Gr. 695.*g*

If a man distrains cattle, and puts them in a pound overt, the owner ought to keep them at his peril, for it is lawful for him to come there for this purpose; but, if put in a pound covert or close, there the distrainer ought to keep them at his peril, and yet he shall not have any satisfaction for it.

Co. Litt. 47; 2 Inst. 106, S. P.

He who distrains cannot make use of the distress, so as to work a horse, &c., for he hath no property therein, but a bare power by act of law to take it; so, if a man hath a return irreplevisable, yet he cannot work it, for the judgment is to remit it to the pound *ibidem remansur*, &c.

Owen, 124; Dyer, 280, pl. 14. But cattle taken in withernam may be used. Owen, 46; 1 Leon. 220.

If a man takes a cow for a distress, he cannot milk her; for though the cow be the better for this, yet he ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, he who took the distress may distrain again.

Ro. Abr. 648, 879; Owen, 124; Cro. Ja. 147; Yelv. 96.  $\beta$  Under the 5 & 6 Will. 4, c. 56, s. 4, the person who is bound to support the animal impounded with food, is the party at whose instance the animal is put in the pound; but, semble, the pound-keeper is not obliged to do so, although, if he do by direction of the party impounding, they are to be considered as one. Mason v. Newland, 9 C. & P. 575.*g* Where a man distrained a trunk for rent, and being informed that there were things of value in it, he caused it to be corded to prevent damage; he was for this adjudged a trespasser *ab initio*; cited by Twisden to have been adjudged before Roll, C. J., 1 Vent. 37. [It is said by Popham, C. J., that the distrainer may meddle with a distress where it is for the owner's benefit, as by scouring armour, or fulling raw cloth. Cro. Eliz. 783.] A hide distrained may not be tanned, for the property is thereby *quasi* altered; the marks whereby the owner might know it being thereby taken away. Cro. Eliz. 783. If a man distrains for several barrels of beer, and draws beer out of one of them, he is a trespasser *ab initio* as to that barrel only. 6 Mod. 216, *per* Holt, C. J.

If a man distrains a horse, and impounds him, and the horse leaps three times over the pound, which is as high as it used to be, and thereupon he



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who distrained ties the horse to a post in the pound, by reason whereof he strangles himself, the owner may have an action of trespass.

27 Ass. 64; Ro. Abr. 673. Where one distrained a hog damage-feasant, which afterwards escaped, but it did not appear that it was by the distrainer's fault; in an action of trespass brought by him for the trespass done by the hog, it was adjudged that the action would not lie, for he might choose what pound he pleased, and it was his folly not to choose one that would hold him; which is not like a distress dying in pound, that being the act of God; and his default must not entitle him to another action, nor subject the defendant to a double punishment for the same cause, viz., the loss of his pig, and the damages and costs in this action. *Vaspar v. Eddowes*, 1 Salk. 248; 1 Ld. Raym. 719, S. C.; 12 Mod. 658, S. C.; 11 Mod. 21, S. C. by the name of *Jasper v. Eadowes*.

¶ By 11 G. 2, c. 19, § 19, where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser (a) *ab initio*; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at his election, (b) and if he recover, he shall have full costs. But by § 20, no tenant or lessee shall recover in such action, if tender of amends has been made before the action brought.

(a) It has been determined that since this act trover will not lie against a party making an irregular sale of a distress, as it tends to place the distrainer in the same situation as before the passing of it, by considering him as a trespasser *ab initio*. *Wallace v. King*, 1 H. Bl. 13. *A fortiori* not trespass for irregularity in omitting the appraisal. *Messing v. Kemble*, 2 Campb. N. P. 115. (b) This election does not give the option of either of these remedies in every case of an unlawful act or irregularity, but must be determined by the subject of the grievance, that is, the party may have trespass, in those cases where by the general rules of law trespass would be the proper remedy; and case, where case would be so. If on making a distress the landlord turns the tenant's family out of possession, and continues in possession after the rent has been paid, trespass may be maintained against him. *Etherton v. Popplewell*, 1 East, 139. So, if he remain in possession of the goods in the plaintiff's house beyond the five days, the time allowed by 2 W. & M. *Winterbourne v. Morgan*, 11 East, 395.

By 17 G. 2, c. 38, § 8, 9, 10, where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser on account of any defect or want of form in the warrant of appointment of overseers, or in the rate or assessment, or in the warrant of distress thereupon, nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him, but the party grieved shall recover satisfaction for the special damage in an action of trespass or on the case, with full costs; unless tender of amends is made before action brought.¶

Distresses for rent being in nature of pledges, and the person distraining having no power to sell or dispose of them, they oftentimes proved of little or no benefit towards hastening the payment of the rent; for remedy whereof it has been enacted,

“That where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five (c) days next after such distress taken, and notice (d) thereof (with the cause of such taking, left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law; that then after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may with the sheriff, or under-sheriff of the

## (D) Of the Distress when seized.

county, or with the constable of the hundred, parish, or place where such distress shall be taken, (who are hereby required to be aiding and assisting therein,) cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom the sheriff, under-sheriff, or constable, are hereby empowered to swear) to appraise the same truly, according to the best of their understanding; and after such appraisement shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner's use.

2 W. & M. sess. 1, c. 5. (c) [The five days are inclusive of the day of sale. *Wallace v. King*, 1 H. Bl. 14.] (d) The five days are to be computed five times twenty-four hours. A distress made on Friday at 2 P. M., and the goods sold on the Wednesday following at eleven A. M. was held to be wrongful. *Harper v. Taswell*, 6 C. & P. 166. (d) It is not necessary to set forth in the notice at what time the rent became due. *Moss v. Gallimore*, Doug. 280, *per Buller*, J.]

§ 4. "And that upon any pound-breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case, for the wrong thereby sustained, recover (a) treble damages and costs of suit against the offender or offenders in any such rescous or pound-breach, any or either of them, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession.

(a) [The plaintiff under this clause is entitled to treble costs as well as damages. *Lawson v. Story*; *Carth.* 321; *Ld. Raym.* 19.] A tender of the rent after the impounding of the distress, is no bar to an action on this statute. *Firth v. Purvis*, 5 T. R. 432.]

§ 5. "Provided, that in case any such distress and sale be made by virtue or colour of this act, for rent pretended to be arrear, and due, where in truth no rent is arrear, or due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double the value of the goods or chattels so distrained and sold, together with full costs of suit."

Also, the same act, § 3, empowers "any person, having rent arrear, to seize and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with such rent, and to lock up or detain the same in the place where the same shall be found, in the nature of a distress, till the same shall be replevied, upon such security to be given as aforesaid; and in default of replevying the same within the time aforesaid, to sell the same after such appraisement thereof to be made; so as such corn, grain, or hay be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized; but be kept there *as impounded*, till the same shall be replevied or sold, as aforesaid."

A reasonable time, after the expiration of the five days from the distress, is allowed to the landlord for appraising and selling the goods.

*Pitt v. Shew*, 4 Barn. & A. 208; and see 7 Price, 690.

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Where goods are distrained, and at the end of five days appraised, but not sold, the appraisement does not take away the plaintiff's right to replevy.

Jacob v. King, 5 Taunt. 451; 1 Monk, 135, S. C.

The sale of growing crops distrained, without appraisement and before they are ripe, is wholly void, being unauthorized by the statutes; and therefore the tenant cannot recover damages for such a sale, on a declaration alleging that he was thereby hindered from replevying, no replevin being necessary in such case.

Owen v. Legh, 3 Barn. & A. 470.

If a distress is pleaded in bar to an action for use and occupation, the plea must show that the rent was satisfied, or it is bad on special demurrer.

Lear v. Edmonds, 1 Barn. & A. 157; and see 1 Bro. & B. 36.

¶ By 8 A. c. 14, § 5, "all distresses thereby empowered to be made, shall be liable to such sales and in such manner, and the money arising by such sales to be distributed in like manner as by the preceding act of W. & M. is in that behalf directed and appointed."¶

An action was brought, wherein the plaintiff declared against A and B *in custod. mar., &c., de eo quod ipsi*, such a day and year, *apud, &c., in com. prædict. vi et armis, &c., bona et catalla, viz., quadraginta quarteria hordei ipsius C (pl.) ad valentiam 40 librarum adtunc et ibidem invent. nomine districtionis pro redditu per ipsum C præfat. A super dimission. messuag. et quarundem terrar. eidem C per ipsum A ante tunc. fact. debit. et in arretro fore supposit. et prætens. colore cujusdam actus parliamenti in hujusmodi casu nuper editi. et provis. ceper. et distrixer. et bona et catalla illa sic district. adtunc et ibidem detinuer. quousq; postea ss. 23 die, &c., præd. bona et catalla colore actus illius vendider. et disposuunt. ubi revera et in facto tempore captionis bonorum et catallor. præd. aut tempore venditionis eorundem nullus redditus per ipsum C eidem A debit. aut in arretro fuit, et alia enormia, &c., B. One defendant pleads not guilty, and issue thereupon, and judgment is given against the other defendant by default, &c., and it was now moved in arrest, &c., that there must be a lessor and lessee to bring this case within the act, and that if there be no demise, this act gives no remedy; and here no demise is sufficiently set forth in the declaration; nor is it said that the goods were distrained for rent arrear, but that they were taken *nomine districtionis*, which is not a good averment that they were distrained. But *per Cur.*, the declaration is good.*

Salter v. Brundsen, 4 Mod. 232.

In trover, on not guilty pleaded, it was found, that A was seised in fee of certain lands lying in two hundreds, and demised them to the plaintiff's father for two years at 40*l.* per annum rent, and that for 50*l.* arrear of rent, the defendant, by order of the bailiff or steward of A, who was beyond sea, distrained the goods in the declaration, being *levant* and *couchant* upon the lands, and gave notice thereof to the plaintiff,\* who did not replevy them; and that after five days after such notice, the defendant, with the constable of one hundred, in the presence of the constable of the other hundred, caused the said goods to be appraised by two persons, sworn for that purpose, by the constable of one hundred, in the presence of the constable of the other hundred; and that he after sold some part, but not to the value of the rent arrear, and carried away the other goods in order to sell, when he should have an opportunity, *et si, &c.* The first exception taken to the verdict was,

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That it was not found, that the goods were sold with the concurrence of the sheriff or constable, who ought to be present as well at the sale as at the appraisement; because, if any overplus, it is to be left in their hands. 2dly, That it was not found the goods were sold for the best price that could be gotten; and if sold at an underrate, the party shall not be concluded. 3dly, That it was not found that the defendant had any direction to sell the goods, but only to take them, and it may be the landlord would have kept them still as a distress. But principally it was insisted, that notice to the plaintiff himself, who was owner of the goods, was not sufficient, but it ought to have been left at the most notorious place, by the express words of the act; and so the authority given by this act not pursued; and then the defendant is a trespasser *ab initio*, as he who works a distress: and the notice ought to have been given to the tenant of the land, because he might have paid the rent and saved the goods; or if not, he might have replevied them, which he might have done, though he were not the owner thereof. Also, the goods are not duly appraised, for they were appraised by two persons, sworn by the constable of one hundred only; and though it were in the presence of the constable, yet that was not sufficient, because this distress was in the nature of an execution; and being taken in several hundreds, the constables of both hundreds ought to have caused the appraisement to be made; this act being an authority to them both for that purpose, where the distress happens to be in two hundreds, the constable of one hundred having no power over the goods taken in another hundred. But *per Cur.*: This statute was made for the benefit of the landlord, not of the tenant; and therefore notice to the owner of the goods was sufficient; for the only reason of directing the notice to be left at the mansion-house was, that the owner might have notice by the tenant to replevy them. And no need of notice to both, because either of them might replevy them; and as the owner of the goods is principally concerned, notice to him is much the best. And though the distress be taken in two hundreds, yet it is but one distress taken at one time, and for one entire rent; and both constables being present, there is a sufficient concurrence of both, though one only administer the oath, for two oaths were not to be administered. And the chief design of directing the presence of the constable, was for the sake of the landlord, to prevent any breach of the peace; and the presence of the other constable made it his act, though he were out of his own hundred; for the statute to this purpose gives him power to act in any place. It was therefore adjudged for the defendant.

Walter v. Rumball, 4 Mod. 385 to 395; Comb. 336, S. C.; 1 Ld. Raym. 53, S. C.; 1 Salk. 247, S. C.; 12 Mod. 76, S. C. by the name of Walker v. Rumbald. \*Who was the owner of the goods distrained, though not the tenant of the land.

If a landlord comes into a house, and seizes upon some goods as a distress, in the name of all the goods in the house, that is a sufficient seizure of all; and though by the common law the landlord was to remove them in a convenient time, yet since the statute 2 W. & M. c. 5, they are to be removed immediately, except corn or hay, though the things in their own nature are not easily or without damage removable, as barrels of beer, &c.(a)

6 Mod. 214, *per* Holt, C. J.; Ld. Raym. 54; 2 Ld. Raym. 1424; Barnard. K. B. 3, 4; 2 Stra. 717. {They may be left on the premises during the five days allowed to the tenant to bring a replevin. 2 Dall. 69, 70, Woglam v. Cowperthwaite.} (a) By 11 Geo. 2, c. 19, § 10, they may be secured and sold on the premises chargeable with the rent, in like manner and under the like directions as under the statute of 2 W. & M. § See 2 Dall. 68.¶

(E) Where a Distress said to be wrongful, &c.

¶ This statute does not affect distresses damage-feasant; consequently, they remain, as they were at common law, mere pledges; and the sale of them will make the party distraining a trespasser *ab initio*.

*Per* Lord Hardwicke, C. J., in *Dorton v. Pickup*, sittings after M. T. 9 G. 2; Selw. N. P. 624.]]

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.

By the statute of Marlbridge, distresses must be reasonable, and not too great.

52 H. 3, c. 4. If the landlord takes an unreasonable distress, an action lies upon this statute, but not an indictment or information, because a private offence. Mod. 71, 288; Lev. 299; Raym. 205; Vent. 104. [Nor will trespass lie for an excessive distress, except in one case, where the things distrained are of certain known value, as gold or silver; in all other cases the action must be on the statute. *Hutchins v. Chambers*, 1 Burr. 590. *Moir v. Munday*, Hil. 28 G. 2, B. R., cited in the last case, and by Lord Kenyon in *Crowther v. Ramsbottom*, 7 T. R. 658; *Lyne v. Moody*, Fitzgib. 85; 2 Str. 851.] No distress for homage or fealty shall be said to be excessive, for the high esteem these are of in the law; but *qu.* and vide 42 E. 3, 26; 4 Co. 8 b. *Bevill's case*, 2 Inst. 107, where, notwithstanding it is said, that the statute of Marlbridge is general. In 13 H. 4, Fitz. tit. *Avowry*, 239, it was held, that a distress of more than the value shall not be said excessive, for the expenses of knights of parliament; because the king is party. β In a question of excessive distress, the question is whether the goods taken are more than sufficient to satisfy the sum really due, not whether the warrant is for a greater sum. *Crowden v. Self*, 2 Moody & R. 190.γ

If forty sheep are taken for 2*d.* and sixteen oxen for 9*d.*, this is excessive.

41 E. 3, 26; 1 Ro. Abr. 674.

So, if two oxen are distrained for four pair of gloves, ten sheep for one pair, and ten for another, it is an excessive distress.

29 E. 3, 24; Ro. Abr. 674.

But, if a man takes five horses joined in a cart for 3*d.* rent, this is not excessive for the entirety.

8 H. 4, 15; 2 Vent. 183, S. P.

So, if the lord distrain an ox or a horse for a penny, if there were no other distress upon the land holden, the distress is not excessive; but if there were sheep or swine, &c., then the taking of the ox or horse is excessive, because he might have taken a beast of less value.

2 Inst. 107.

If for 10*l.* rent due at one day, a man distrains goods of the value of 40*s.* only, and at the time of taking the distress there are goods of a sufficient value upon the premises, he cannot, for the same rent, distrain again; for it was his folly, that at the first he distrained no more; but, if there be rent in arrear at several days, a distress may be taken for what was due at the other days.

Moore, 7; Cro. Eliz. 13, S. C.; Bro. *Distress*, 98; vide 17 Car. 2, c. 7, § 4, by which it is enacted, that where the value of the cattle distrained shall not be found to be to the full of the arrears distrained for, the party to whom the arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears. [Whether or not there shall be more distresses than one depends upon the entirety and identity of the thing distrained for, not upon the value of the goods taken. One entire duty, or sum, shall not be split, and distrained for, part at one time and part of it at another time; for instance, if, as was the case in *Lutwyche*, the whole sum due be 77*l.* 10*s.*, a man shall not distrain for 62*l.* 10*s.* at one time, and afterwards distrain again for 15*l.*, the residue of the 77*l.* 10*s.*, but he shall distrain for the whole 77*l.* 10*s.* at once. But if, from mistake or ignorance of their value, the goods at first distrained for the whole 77*l.* 10*s.* be not sufficient to satisfy it, he may distrain again in order to supply the deficiency, and to make up that sum. *Wallis v. Savill*, 2 Lutw. 1532; *Hutchins v. Chambers*, 1 Burr. 589.]

(E) Where a Distress said to be wrongful, &c.

[A distress may be taken for rent under a lease, though the tenant entered before the commencement of it.

Macdonald v. Welder, 1 Str. 550; 8 Mod. 54, S. C.]

If a distress be taken of goods without cause, the owner may rescue them.

Co. Litt. 47 b. But a stranger cannot. 39 E. 3, 35 b; 1 Ro. Abr. 673. If a man distrains my cattle, together with the cattle of J S, without cause, J S or I may justify the rescue of all. 39 E. 3, 35 b, *per* Thorpe.

||So, if the owner tender the rent before the distress taken.

Co. Litt. 160 b.]]

But, if a distress be taken without cause, and put into a pound, the owner cannot break the pound and take it out, because it is in the custody of the law.

Co. Litt. 47 b; And. 31, S. P.; N. Bendl. 30, pl. 48, S. P.; Co. Litt. 47, where the writ *de parco fracto* will lie. F. N. B. 100; Winch, 80, 81.

If the lord, or another that has a rent, distrains several times for his service or rent, where none is in arrear, the tenant may by the common law have an *assize de sovent distress*.

F. N. B. 178. But, if the lord distrains for homage or fealty so often that the tenant cannot manure his land, yet the tenant shall not have an *assize de*, &c. 4 Co. 8 b.

This action lay at common law, in which the writ is general and count special, that the lord distrained, &c., and judgment, not that the demandant *recuperet seisinam*, for he hath that, but *quod teneat absque multiplici distractione*.

8 Co. 50 a, b.

An action on the case for an excessive distress may be maintained, though the rent was tendered before the distress; for the plaintiff may waive the trespass.

Branscomb v. Bridges, 1 Barn. & C. 145.

In an action for an excessive distress, the plaintiff is not bound to allege or prove the precise amount of rent due, and it is no bar to such action that the parties came to an arrangement as to sale of the goods seized.

Willoughby v. Backhouse, 2 Barn. & C. 821; Sells v. Hoare, 1 Bing. 401.

By 6 G. 4, c. 16, § 74, the landlord's right of distraining in case of the tenant's bankruptcy is limited to one year's rent, and for the rest he must come in as a common creditor.

Where a landlord's agent went upon the premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear for rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession, this was held a sufficient seizure to give the tenant a right of action for an excessive distress, and that quitting the premises without leaving any one in possession was not an abandonment of the distress, the 11 G. 2, c. 19, § 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent arrear.

Swann v. Earl of Falmouth, 8 Barn. & C. 456.

Where a party distrains for more rent than is due, but takes only a single chattel, he is not liable to an action for distraining for more than is due, though the thing taken be of greater value than is necessary to cover the rent actually due, unless there were others of less but sufficient value to be found. (See 57 G. 3, c. 93, for regulating the costs of distresses for rent not

## (F) Of distraining Things Damage-feasant.

exceeding 20*l.*; the provisions of which are extended, by 7 & 8 G. 4, c. 17, to distress for all taxes, rates, or assessments not exceeding 20*l.*)

*Avenall v. Croker*, 1 Moo. & Malk. 172.

## (F) Of distraining Things Damage-feasant.

SHOCKS of corn may, by the common law, be taken damage-feasant.

21 H. 7, 39 b; 11 H. 7, 14 a; Lat. 8, S. P. admitted *per Cur.*; Fitz. *Avowry*, 363, S. C.; Bro. *Distress*, 30, S. C.

A greyhound may be taken damage-feasant running after conies in a warren: so may a ferret brought into a warren.

2 E. 3; Fitz. *Avowry*, 182; Ro. Abr. 664.

But, if a man brings nets and gins through my warren, I cannot take them out of his hands.

7 E. 3; Ro. Abr. 664; Cro. Eliz. 552, S. P.

If men are rowing upon my water, and endeavouring with their nets to catch fish in my several piscary, I may take their oars and nets, and detain them as damage-feasant, to stop their further fishing.

Cro. Car. 228. But adjudged he could not cut their nets.

If a man rides upon my corn, I cannot take his horse damage-feasant.

7 E. 3, *Avowry*; Ro. Abr. 664. *β* Field v. Adames, 12 Ad. & Ell. 449. But a dog, accompanying a man, may be distrained damage-feasant. *Bunch v. Kennington*, 4 Perr. & D. 509, n. *g*. But *per* Sid. 440, it is said by the chief justice, that the horse upon which one is riding may be distrained damage-feasant; and it seems he shall be led to the pound with the rider upon him. See Vent. 36. Vide *suprà*, letter (B), *contr.*

If a man takes my cattle, and puts them into the land of another man, the tenant of the land may take these cattle damage-feasant, though I who was the owner was not privy to the cattle's being damage-feasant; and he may keep them against me till satisfaction of the damages.

Ro. Abr. 665; Robinson and Waller, *per totum Curiam*. Ro. Rep. 499, S. C. and S. P. *per* two justices.

If a man coming to distrain damage-feasant, sees the beast on his soil, and the owner, on purpose, chases them out before they are taken, he cannot distrain them.

Co. Litt. 161; 9 Co. 22 a, S. P., that the owner of the soil is not obliged to take the cattle damage-feasant, but may chase them out with a little dog. Vide 4 Co. 38 b; 2 Ro. Abr. 566, pl. 15.

A commoner may justify the taking of the cattle of a stranger upon the land damage-feasant.

30 E. 3, 27; vide head of *Common*, *suprà*.

So, if a man hath common for ten cattle, and he puts in more, the surplusage above the ten may be taken damage-feasant.

46 E. 3, 12 b; Bro. *Avowry*, 29, S. C. [*Secūs*, where the number is uncertain. *Hall v. Harding*, 4 Burr. 2426.]

Though one commoner cannot in general distrain the cattle of another, yet if A has land in a common field, and a right of common over the whole field, and B has common over the whole field, and they, by agreement, agree not to exercise their mutual rights for a certain time, and during the time the cattle of B come on A's land, he may distrain them; for B may then be regarded as a stranger with respect to A.

*Whiteman v. King*, 2 H. Black. 4; and see 1 Taunt. 529.

An action on the case does not lie against a party distraining the plain-

## (F) Of distraining Things Damage-feasant.

tiff's cattle, and refusing a compensation tendered *after* the cattle have been impounded; and it seems that it does not lie though the tender be made before impounding, for then replevin is the proper remedy.

*Anscomb v. Shore*, 1 Camp. R. 285, S. C.; 1 Taunt. 261; *Sheriff v. James*, 1 Bing. R. 341; and see *Cowper*, R. 414.

Where cattle distrained damage-feasant are put in a private pound previous to being taken to a public pound, a tender of amends while they are in the private pound is held not too late.

*Browne v. Powell*, 4 Bing. R. 230.

A, having the exclusive right to dig stone in a close, avowed distraining the cattle of B, who had the exclusive right of pasture there, as damage-feasant for having broken the stones. B pleaded that there was no fence to keep them off, nor did A otherwise guard or protect the stones. A replied that he was not bound to fence; on demurrer the replication was held bad.

*Churchhill v. Evans*, 1 Taunt. 529.

A man may distrain cattle damage-feasant in the night, for otherwise, perhaps, the cattle will be gone before he can take them.

Co. Litt. 142; 7 Co. 7 a, S. P.; 9 Co. 66 a, S. P.

If turves lie upon a common damage-feasant; though for this a commoner may distrain them, yet he cannot burn them.

9 Jon. 193. [The commoner's power of distraining is not mentioned in the case cited.]

[Goods brought to a market to be sold, cannot be distrained by the owner of it for toll as damage-feasant.

*Wigley v. Peachey and others*, 2 Ld. Raym. 1589. *Sawyer v. Wilkinson*, Cro. El. 628.

If a man hath a freehold in a market, and corn is brought thither on a market-day, and set down, he cannot justify the taking if there damage-feasant.

*Mayor of Launceston's case*, Cro. El. 75.]

[A demised to B the milk of twenty-two cows, to be provided by A, and to be fed at A's expense, on certain closes belonging to A; and A covenanted that B might turn out a mare, and that no other cattle should be fed there. B may distrain other cattle of A there, for the separate herbage and feeding of the closes passed to B.

*Burt v. Moore*, 5 Term Rep. 329.]

|| If tithes are left upon the land an unreasonable time after they have been set out, it would seem, that the owner of the land may distrain them as damage-feasant.

*Williams v. Ladnor*, 8 T. R. 72; *Baker v. Leathes*, Wightw. Rep. 113.]

{A tenant holding over after the expiration of his term cannot distrain the landlord's cattle (as damage-feasant) which were put on the premises by way of taking possession.

7 Term, 431, *Taunton v. Costar*.}

§ When beasts damage-feasant have been distrained, or even impounded, the distrainer may relinquish the proceedings before satisfaction for the damages sustained, and may bring his action of trespass.

*Colden v. Eldred*, 15 Johns. 220.

A purchaser of lands under a decree of the Court of Chancery, who enters into peaceable possession without writ, may distrain cattle damage-feasant.

*Orser v. Storms*, 9 Cowen, 687.



## (G) Of Distresses for Amercements.

Every person may distrain cattle on his close damage-feasant, unless the owner can protect himself by the provisions of the statute respecting fences, or by a written agreement, or by prescription.

Rust v. Low, 6 Mass. 90; Melody v. Reab, 4 Mass. 471.

A owned a close on one side of the highway, and B owned another, on the other side, both adjoining the highway. A's cattle strayed into the highway, through defects of his fence, and thence went into B's close, through defect of B's fence; held, that B might lawfully take the cattle damage-feasant.

Mills v. Stark, 4 N. H. Cas. 512.*g*

## (G) Of Distresses for Amercements.

Of common right, a distress is incident to every fine and amercement in a sheriff's torn, or court-leet, whether the same belong to the king or to a subject; if the offence, for which they were imposed, be of common right incident to the jurisdiction of such courts.

Ro. Abr. 665, 666; Ro. Rep. 201; 11 Co. 45 a; Cro. Ja. 382; 10 H. 7, 15, pl. 12; 10 H. 6, 7, *cont.*; 11 H. 7, 14 a; 21 H. 7, 40 b; Salk. 175; Doct. & Stud. 138.

But, if such offences were only the neglect of a duty created by custom, it is questionable whether it doth not require the like custom for a distress, though the duty be of a public nature: as, if there be a leet belonging to the manor of A, and by custom time out of mind, the inhabitants of B have used to send a constable to the said leet, and they make default, upon which they are fined by the steward; whether a distress could be taken for this fine, without a special custom to distrain, was doubted, and the case adjourned, no special custom to distrain being alleged.

Vent. 105; Raym. 204; 2 Keb. 701, 739, 745. By the report of the case in Vent. the court inclined, that where a custom only enabled to set a fine, it cannot be distrained for without a custom: also in Raym. it is said by Twisden, that when a duty is raised by custom, a distress for that duty must be maintained by the like custom.

But, if it be for the private benefit of a subject, no distress is incident to it without a special custom.

Ro. Rep. 76; 11 Co. 44 b; 2 Hawk. P. C. 60.

The sheriff or lord of a leet may, for such fines or amercements, distrain the goods of the offender in (a) any lands within the county or precinct of the leet, of whomsoever they shall be holden, except (b) only in such lands as shall be in the king's hand; these being wholly out of the jurisdiction of such courts.

(a) 2 H. 4, 24 b; 47 E. 3, 13 a; Bro. *Leet*, 28, 41; Fitz. *Acquarry*, 194; Ro. Abr. 670; 2 Inst. 104. (b) 47 E. 3, 12, 13; Fitz. *Distress*, 15; Ro. Abr. 670.

And such a distress may be taken in the highway; for the statute of Marlbridge, c. 15, which prohibits the taking of a distress there, is to be intended only of distresses taken for services due by way of tenure of lands.

2 Inst. 131; 47 E. 3, 13; And. 72.

Such fines and amercements being for a personal offence, no stranger's beast can lawfully be distrained for them, though they have been *levant* and *couchant* on the lands of the offender.

47 E. 3, 13 a; 41 E. 3, 26 b; Bro. *Distress*, 3; F. N. B. 100; Owen, 146; Noy, 20, *contra*; Ro. Abr. 669, pl. 20. [Ro. cites for the contrary opinion the case in 41 E. 3, 26 b, which seems an authority (if any) the other way.]

It seems to be agreed, that where any such court is in the king's hands, the goods distrained for such fines and amercements may lawfully be sold,

## Dower and Jointure.

after they have been kept a reasonable time, as the space of sixteen days. And it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a public nature, they may be sold of common right, without any special custom for that purpose.

Hetley, 62; Finch, 476; 3 H. 7, 4 b; 1 Ro. Rep. 76; Noy, 17; 1 Bulst. 53.

No bailiff can lawfully distrain for any such fine or amercement, without a special warrant for so doing: which must be set forth by him in an avowry or justification of such a distress.

3 Mod. 138; Cro. Eliz. 698, 748; Moor, 574; 2 Keb. 745; Salk. 107, pl. 2. [In replevin the officer must state that "the defendant was guilty;" in trespass the conviction is a sufficient justification. It must appear, too, that the amercement was by the jury, and not by the court. *Stephens v. Haughton*, 2 Str. 847.]

By prescription there may be a distress for toll in a fair or market. But toll is not incident of common right to a fair; and, therefore, if the fair is a new one, and toll is not expressly granted, a custom cannot support it.

Hob. 187; Ro. Abr. 66; Holloway v. Smith, 2 Str. 1171.

If goods are fraudulently sold out of a market, in order to evade the toll, the owner of the market cannot distrain them for it.

*Blakey v. Dinsdale*, Cowp. 661.

## DOWER AND JOINTURE.

DOWER is the part of the husband's estate that comes to the wife upon the death of the husband.

Vide 2 Bl. Comm. 129.  $\beta$ In the United States, the estate which the wife takes in the lands of her deceased husband varies essentially from the right of dower at common law. In some of the states she takes one-third of the profits, or, when there are no children, one-half; in others she takes the same right in fee, when there are no lineal descendants; and in one, she takes two-thirds in fee, when there are no lineal ascendants or descendants, or brothers or sisters of the half-blood.  $\gamma$ Dower by the civil law was the portion the wife brought to her husband, either in land or money, whereof the *naturale dominium* belonged to the wife, and the *dominium civile* to the husband; so that the husband had only the *usus fructus* during his life in things immovable, but could not alien them; in things movable he might alien them, but must restore to the value; for these, upon the dissolution of the marriage, by the death of the husband, or divorce, came back to the wife. Vide Vin. 249; Corvin. lib. 23, tit. 3; Honorius, 114, 115. Donations *inter sponsum et sponsam propter nuptias* began about the time of Constantine, and were made before marriage; but by the Justinian constitution they were good after marriage, and were gifts from the husband to the wife, which, upon the dissolution of the marriage, came back to the husband as the dower did to the wife. Vin. 245; Inst. of Imperial law, 43, 117, 118, 119. Among the feudists, the rule was, *non uxor marito, sed uxori maritus affert*; and the reason was, that the husband and eldest son of the family being brought up in military exercise, the wife and youngest sons tilled and improved the land, and in their expeditions found provisions for the army; and having the third part in labour, she had the third part of the feud for the maintenance of her and her younger children during her life. Spelm. tit. *Doarium*, 175.

Dower is of five sorts: 1. At common law. 2. By custom. 3. *Ad ostium ecclesiæ*. 4. *Ex assensu patris*. 5. *De la plus belle*. We shall begin with the first and chief.

Co. Litt. 33 b, 39 b.

## Dower and Jointure.

Dower, at common law, is the third part of all the lands whereof the husband has been seised during the coverture, of such an estate as the children by such wife might, by possibility, have inherited, and to which, by the death of the husband, the wife is entitled for her life. For the better understanding thereof, I shall consider it under the following heads :

Co. Litt. 30 b ; Perk. 301.

- (A) Who may have Dower, and who not: And herein of the Age, and other Disabilities of the Husband or Wife.
- (B) Of what Estate a Woman may have Dower.
  1. *Of the Quarantine.*
  2. *Of the different Kinds of Inheritances.*
  3. *Of the Nature and Quality of such Estate, whether sole, joint, or in common.*
  4. *Of its Continuance; wherein, of Estates conditional, suspended, determined, or extinguished; and herein of Remitter to the Heir, and Recoveries by Title Paramount.*
  5. *Of the Value and Improvement of the Husband's Estate, either in his Lifetime, or after his Death.*
- (C) Of the Things requisite to the Consummation of Dower, viz., Marriage, Seisin, and the Death of the Husband.
  1. *Of the Marriage, how long it must continue; and herein of the several Sorts of Divorces.*
  2. *Of the Seisin, either in Fact or in Law; and herein of the Seisin in Fact, as it is continuing, or not continuing, as instantaneous.*
  3. *Of the Death of the Husband.*
- (D) Of the Assignment of Dower.
  1. *By what Persons.*
  2. *Of the Manner; and herein of assigning it by Metes and Bounds, &c.*
  3. *By what Court.*
- (E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.
- (F) What shall be a Bar of Dower, and what not: And herein of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after: And herein of Elopement, and Detinue of Charters, or Heir.
- (G) Of Jointures: And herein of their Origin; the Statute of 27 H. 8; and the Rules to be observed so as to make them an effectual Bar of Dower.
  1. *The Estate must take Effect immediately after the Death of the Husband.*
  2. *It must be for Term of the Wife's Life or greater Estate.*
  3. *It must be made to herself, and not to others, in Trust for her.*
  4. *It must be in Satisfaction of her whole Dower.*
  5. *It must be expressed to be in Satisfaction of her Dower; and therein how far a collateral Recompense shall be a Bar of Dower or Jointure.*
  6. *It must be made during Coverture.*
- (H) How far the Wife's own or her Husband's Acts may defeat her of her Jointure.
- (I) How far a Jointress is entitled to the Aid of a Court of Equity.
- (K) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her.
- (L) To whom the Tenant in Dower shall be attendant, and by what Services.
- (M) Of the Proceedings and Damages in Dower *unde nihil habet*.
- (N) Of the Admeasurement of Dower.
- (O) Of the other Species of Dower.
  1. *By Custom.*
  2. *Ad ostium ecclesie.*
  3. *Ex assensu patris.*
  4. *De la plus belle.*

(A) Who may have Dower at Common Law, and who not: And herein of the Age, and other Disabilities of the Husband or Wife.

As to the age of the husband, it is not material, but only the age of the wife; and if she be of the age of nine years (*a*) or more at the death of her husband, she shall have dower, though her husband be then but four years old. The reason the law would not allow women before this age to demand dower seems from their incapacity of having issue sooner.

Litt. § 36; Co. Litt. 33 a; Doct. & Stud. lib. 1, c. 7; F. N. B. 149; 1 Ro. Abr. 675; 2 Inst. 234; Brook, tit. *Dower*, 36, 45. ¶(*a*) Vide Rast. Entr. 228, *novem annorum et dimid.* She ought to show how much more she is than nine years. Hal. MSS.¶

The support of the children is part of the consideration whereon this allowance of dower is founded: and as on the one hand it would be unreasonable to extend it to such women as are incapable of performing the conditions; so on the other hand it would not be reasonable to exclude women of sufficient age, by reason of the incapacity of their husbands; since that is the act of God, which ought in no sort to prejudice the wife. Much less can the husband, by his own act, prevent his wife of dower if she attains the age of nine years during the coverture; and therefore, though he aliens his land before, yet, if she after arrives at nine years of age, her title is now consummate *ab initio*, and overreaches his alienation: for dower being intended a provision for the wife and children, whenever she attains such an age as the law adjudges her capable of children, nothing farther is required; and therefore, though the husband die before he or his wife are of age of consent, yet, if she be nine years old, this is a sufficient marriage to entitle her to dower, and so ought to be certified by the bishop.

13 Co. 22; Co. Litt. 33 a; Dyer, 313, 369; Co. Litt. 33 a.

If a man marries a woman of one hundred years old, and dies, she shall be endowed; for the law cannot determine the precise time of the failure of her capacity to have issue, which may vary according to the strength and other circumstances of the woman.

Co. Litt. 40; Ro. Abr. 675, S. P.

If a woman alien, be she friend or enemy, marry a subject, she shall not be endowed, because by the policy of the law all aliens are disabled from acquiring any freehold amongst us.

7 Co. 25; Co. Litt. 31 a. But by the law of the crown, if the king marry an alien she shall be endowed. ¶The widow of an alien resident, who dies in Missouri, is entitled to dower. *Stokes v. O'Fallon*, 2 Misso. 32.g

If a Jew born in England marry a Jew born also here, and the husband be converted to the Christian faith, and after purchase lands, and enfeoff the other, and die, the wife shall not have dower.

Co. Litt. 31. For R. 1 erected a court where all the real and personal estate of the Jews was registered, and upon the death of any Jew came to the king, though it was redeemable by their children paying a fine; and in this court she could not demand dower but against a Jew, and she could not demand it at common law against a Christian; and for this reason it shows, if the husband had not aliened, yet she could not recover against the heir of a Christian. Hollingshead, vol. 3, p. 15.

Women Papists seem not disabled to demand and recover dower within the words of 11 & 12 W. 3, c. 4.

If a woman be attainted of treason or felony,\* she shall not have her dower; but, if pardoned, she shall be received to demand it, though the husband has aliened in the mean time, because by the marriage and seisin

(A) Who may have Dower at Common Law, &c.

of her husband she was entitled to dower, and when the impediment is removed, her capacity is again restored.

Perk. 349; Co. Litt. 33 a; 13 Co. 23. But, if she be only convicted of treason or felony, this seems no impediment of her dower, for this forfeits no freehold, nor title to any freehold, though the king shall have the profits during the conviction. \*See *infra*.

At common law if the husband was attainted of treason, murder, or felony, the wife lost her dower; because it was a condition annexed to all feuds, that the feuditary should not commit such crimes.

Perk. 308, 387; F. N. B. 150; Brook, 82; Co. Litt. 40 b; Plow. 262.

But afterwards the statute 1 E. 6, c. 12, § 17, ordained, that in all cases where the husband was attainted of treason or felony, the wife should notwithstanding have her dower: but 5 E. 6, c. 11, § 13, repeals that in all cases of treason; the words of which act being general, exclude the wife as well in case of petit treason as in case of high treason. But in case of misprision of treason, or attainder of felony only, the other act stands in force, and therefore she shall have dower in all such cases.

Stanf. 195; Co. Litt. 37 a, 392 b; 13 Co. 19; 3 Inst. 216; Finch. 71; Moor, 639; Dyer, 97, 263.

If the husband seised of lands in fee makes a feoffment, and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee.

Bendl. 56, Gate's case; Dyer, 140, S. C.; Co. Litt. 111 a, S. P. And though the husband had been pardoned, yet should not the wife recover dower. Leon. 3, Mayne's case. But of land purchased by the husband after the pardon, the wife shall be endowed. Perk. 391.

The wife of a *felo de se* shall have dower.

Plow. 261 a, Dame Hase's case.

So if the husband be outlawed in trespass, or any civil action; for this works no corruption of blood, or forfeiture of lands.

Brook, 82; Perk. 388; Co. Litt. 31 a.

So, if the husband be attainted of heresy, yet his wife shall be endowed; for this works no corruption of blood, or forfeiture of lands, being only a spiritual offence.

Co. Litt. 31.

If the husband or wife be excommunicated, yet the wife's dower is not hurt; because, being a spiritual punishment only, it does not affect their temporal possession.

Co. Litt. 31. If the husband be attainted in the *præmunire*, my Lord Coke says that she shall be endowed. Ibid.

After the making of the statute 1 E. 6, c. 12, it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; and therefore, where several offences have been made felony since, care has been (a) taken to provide for the wife's dower.

(a) As in 5 Eliz. c. 14, which makes a second forgery, felony without clergy. So 8 Eliz. c. 3, which makes it felony to transport sheep, &c. So also in 31 Eliz. c. 4, which makes it felony to embezzle the king's armour to the value of 20s. So in 3 Ja. 1, c. 4, which makes it felony to serve foreign princes without first taking the oath of obedience. So also in 1 Ja. 1, c. 31, which makes any one's going abroad with the plague upon him, felony. And this loss of dower being only part of the judgment by implication, may well be saved by an express proviso, without any repugnancy. 3 Inst. 47, 78, 80, 81, 90.

If a villein marry and then the lord enter, and then the villein die, his  
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## (B) Of what Estate a Woman may have Dower.

wife shall be endowed, for the lord's title began but by his entry, and the wife's title to dower began before.

Berk. 313; Co. Litt. 30. But otherwise, if he had been villein to the king. If a freeman marries a nief, she shall be endowed, but her lord may enter on the lands during her life. Co. Litt. 31 a.

If a woman being a lunatic kill her husband, or any other, yet she shall be endowed; because this cannot be felony in her who was deprived of her understanding by the act of God. So, though she be of sound mind, and refuse to bring an appeal of his death, when he is killed by another, yet she shall be endowed; for this is only a waiver of that privilege the law has given her to be avenged of her husband's murderer. So, it seems, if she refuse to visit and assist her husband in his sickness, yet she shall be endowed; for this is only undutifulness, which the law does not punish with the loss of her entire subsistence.

Perk. 364, 5. *β* When the woman was a lunatic at the time the ceremony of marriage was performed, and continued so to the end of the husband's life, she was held not entitled to dower, although the parties cohabited together. *Jenkins v. Jenkins'* heirs, 2 Dana, 102.*g*

If an idiot or lunatic marry and die, his wife shall be endowed; for this works no forfeiture at all, and the king has only the custody of the inheritance in one case, and a power of providing for him and his family in the other; but in both cases the freehold and inheritance is in the lunatic, and therefore the wife dowable.

Co. Litt. 31 a. And therefore if lands descend to an idiot or lunatic after marriage, and the king on office found takes those lands into his custody, or grants them over to another as committee in the usual manner; yet this seems no reason why the husband should not be tenant by the curtesy, or the wife endowed, since their title does not begin to any purpose till the death of the husband or wife, when the king's title is at end; but for this *quære*, and vide Plowd. 263 b; 4 Co. 124, 125.

The widow of a deceased partner is not entitled to dower in lands purchased with the partnership funds, and held in the names of all the partners.

*Executors of Richardson v. Executors of Wyatt*, 2 Desaus. 471.

*β* Dower can be recovered by the widow only; on her death the claim to it is extinct.

*White v. Parnther*, 1 Knapp, 226.

The widow of a tenant in fee, conditional at common law, is entitled to dower, although the tenant died without having had issue.

*Millege v. Lamar*, 4 Desaus. 637.

Testator devised his real estate charged with the payment of his debts and an annuity to his wife in lieu of dower; after the sale of the estate and payment of debts, the income of the fund was insufficient to pay the annuity in full; held that the widow was entitled to have it paid out of the capital as well as the interest of the fund, and the arrearages to be computed from the testator's death.

*Stamper v. Pickering*, 9 Sim. 176.

A widow is not entitled to dower in lands which her husband had conveyed before marriage, although the deed was not recorded at the time of the marriage.

*Blood v. Blood*, 23 Pick. 80.*g*

## (B) Of what Estate a Woman may have Dower.

1. Of *Quarantine*.

THIS is a privilege the law allows to women to continue in the capital

(B) Of what Estate a Woman may have Dower.

messuage or mansion-house, or some other house whereof they are dowable, forty days after their husband's death, whereof the day of his death is counted one; and during this time they are to be provided with all necessities at the expense of the heir, and before the end thereof to have their dower assigned to them. This privilege is confirmed by Magna Charta, c. 7, and seems to be only a compliance with that decency and ceremony which custom has introduced upon so melancholy an occasion, that widows, who are supposed to be under great affliction, may not be forced to appear abroad, and be put to their shifts for a maintenance; and for this reason, if they marry within the forty days, their quarantine ceases, for then they have provided for themselves, and their sorrowful condition is supposed to be at an end.

Co. Litt. 32b, 34b; 2 Inst. 16, 17; Brook, 107; Hob. 153, and F. N. B. 161. (E.) the writ *de quarentinâ habendâ*. By the old law before the Conquest, the widow was to continue in her husband's house a whole year after his death, within which time her dower was to be assigned; and if she married before the year was out she forfeited her dower, and whatever her husband had left her.  $\beta$  In Kentucky the widow is entitled to the mansion and plantation of her deceased husband, rent free, till her dower has been assigned to her. Chaplin v. Simmon's heirs, 7 Monro, 338; White v. Clarke, 7 Monro, 640; Graham's heirs v. Graham, 6 Monro, 562. $\gamma$

In a writ of dower the demand was of three manors, the tenant pleads in abatement entry in part *puis darrein continuance*, and shows it in certain; the demandant replies that her husband in his lifetime was seised in fee of one of the said manors, &c., *super quo quidem manerio ipse et eadem pet. cohabitabant ut vir et uxor usque diem obitus sui*, and that he died, and this descended to the defendant as heir, and he entered, and that he and the demandant continually after the husband's death *hucusque commorabant et cohabitaverunt super dicto manerio*, and that she claimed at the will of the heir, *et non aliter*; and this was held no plea for the quarantine, because she did not show the time of her husband's death in certain, and the forty days after.

Kettlesby and Kettlesby, Dy. 76 b.

2. Of the different Kinds of Inheritances.

Of a use a woman shall not be endowed; that is, of a use not executed.

$\beta$  See Stephens v. Smith, 4 J. J. Marsh. 64. $\gamma$

A was seised in fee of estates let at the time of the marriage, upon leases for lives which did not expire during the coverture: held, that his wife was not entitled to dower.

Darey v. Blake, 2 Scho. & Lef. 387.

[So, of a trust estate of inheritance, or of an equity of redemption of a mortgage in fee, a woman shall not be endowed.

Chaplin v. Chaplin, 3 P. Wms. 229; Attorney-General v. Scott, Ca. temp. Talb. 138; Sugden's Law of Vendors, &c., Append. 46, S. C. more fully reported; Goodwin v. Winsmore, 2 Atk. 525; Burgess v. Wheate, 1 Bl. Rep. 138, 161; Dixon v. Saville, 1 Br. Ch. Rep. 326; Curtis v. Curtis, 2 Br. Ch. Rep. 630; Forder v. Wade, 4 Br. Ch. Rep. 526; D'Arcy v. Blake, 2 Sch. and Lefr. 387.] {If the trustee be the ancestor of the *cestui que trust*, and dies, whereby the legal estate descends to the *cestui que trust*, who afterwards dies, his wife shall be endowed. For wherever the legal and equitable estates unite in the same person, and are coextensive and commensurate, the latter is absorbed in the former. 3 Ves. J. 126, Philips v. Brydges; Ibid. 341, Selly v. Alston. See 1 Hen. & Mun. 92, Rowton v. Rowton.}

Of an *annuity* to a man and his heirs, after a writ of annuity brought, a woman shall not be endowed: but, if a rent-charge be granted to a man

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and his heirs, and before any distress made the husband die, and the wife bring her writ of dower, the heir cannot, by claiming it to be an annuity, defeat her of her dower thereof: but, if he brings an annuity, and recovers judgment before the wife, then it is become an annuity *in perpetuum*, and the wife shall be barred.

Perk. 341; Co. Litt. 32a; Moore, 83; Poph. 87; Co. Litt. 144b.

Of *copyhold lands* a woman shall not be endowed, unless there be a special custom for it; but, if there be a custom to be endowed thereof, then she shall have the assistance of such laws as are made for the more speedy recovery of dower in general, being within the same mischief, and therefore shall recover damages within the statute of Merton.

4 Co. 22; Hob. 216; 5 Co. 116; Shaw v. Thompson, Cro. Eliz. 426; Moore, 410, S. C.; Co. Litt. 33a. If the wife of a copyholder brings dower in C. B., the lord of the manor may plead *ne unques seisin que*, &c., and give the special matter in evidence.

Of a *castle for defence of the realm*, or of the homage and services appertaining to war, a woman shall not be endowed, because of no service towards her support and maintenance, and she is supposed unable to assist in the defence of the realm. So, of the capital messuage, being *caput baronie*, or *comitatûs*, a woman shall not be endowed, because this division would lessen the grandeur of the family, and disable the heir to support the dignity of his character.

Ro. Abr. 676; Co. Litt. 30b, 165a; Perk. 406; 2 Inst. 17. Though this seems to be the doctrine of the books cited, yet it has been lately adjudged, that a woman shall have dower of the capital messuage, though it be *caput baronie*. The reasons given for the judgment are, 1st, That the *caput baronie* spoken of in the ancient books was held by military tenure, which is now extinct, and was a castle of defence. 2dly, That the husband being made a baron after the marriage, this could not deprive the wife of her dower in any thing she was before dowable of; and therefore, though she had accepted 400*l. per annum* in lieu of her dower, as was pleaded; yet it not appearing to be in lieu also of her dower in the capital messuage called Bromley Hall, she had judgment, and this judgment affirmed in a writ of error. Also, the books before cited agree, that of a private castle for habitation only a woman may be endowed. So of the capital messuage of her husband, if it be not *caput baronie*. Lady Gerrard v. Lord Gerrard, 3 Lev. 401; Salk. 54, 253, S. C.; 5 Mod. 64, S. C.; Comb. 352, S. C.; Ld. Raym. 72, S. C.; Skin. 592, S. C.

¶ A widow is not entitled to dower in land given for a market-house, or other public use.

Gwynne and wife v. City of Cincinnati, 3 Ohio R. 25.

Of *tithes* women were not dowable till 32 H. 8, c. 7, for before that statute tithes were not a lay fee, but now they are dowable of them.

Sty. Pr. Reg. 122; 11 Co. 25; Co. Litt. 32a, 159a; Ro. Abr. 682; Ro. Rep. 68. And the best way to assign dower of tithes is the third sheaf, or the third part of the tithes generally, because it is uncertain what part of the land will be sown; and therefore if the garbs of any third part of the land in certain should be assigned, the tenant may perhaps not sow that part at all, and so defeat the dower. [But the assignment is good, though tithes of the third yard-land be assigned. M. 9, Ja. C. B., Kettleby's case; Hale's MSS.; Co. Litt. 32a, n. 3, 13th edit.] ¶ Dower demanded of the third part of the tithes of wool and lamb in three several towns, and it was asked of the court, how the sheriff should deliver seisin; and the court held it the best way for the sheriff to deliver the third part of the tenth part, and the third tenth lamb, that is, the thirtieth lamb. 1 Brownl. and Goldesb. 128. The demandant recovered dower of tenths of wool and lamb, and how execution should be made was the question. And the justices intended, that the sheriff might deliver the tenth of every third yard-land, and assign the yard-lands in certain. But after it was conceived, that this would be uncertain and unequal; and for that the sheriff was directed to deliver the third part of all in general; and yet the first was agreed to be good, but only in respect of inequalities, as, in dower of a mill, the third toll-dish; and of a villein, the third day's work, as in 23 H. 8; 2 Brownl. 143.]



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Of *common of pasture in gross*, which is certain, a woman shall be endowed, but not of common without number; because it cannot be divided without surcharging the common by two, which before was only in the power of one by the grant; and when one has power by the grant to put in as many cattle as he pleases, he alone is made judge of the number, which to divide, or delegate to another, would be unjust.

Perk. 341, 342; F. N. B. 142; Co. Litt. 30; Ro. Abr. 675; 11 Co. 45; Sty. Pr. Reg. 122.

Dower of several lands, meadow and pasture, and common of pasture *cum pertinentiis* in D, and upon *ne unques seisie que* dower pleaded, and verdict for the demandant, it was moved in arrest, &c., that of common in gross without number a woman could not be endowed; which the court agreed; but here, it being after verdict, it should be intended common appendant, since otherwise the judge could not have directed the jury to find for the demandant; for though it be not said *eisdem spectans*, and though, if appendant, it was included in *cum pertinent.*, yet it is not *bis petitum*, but only an enumeration of the several things demanded.

Pruett v. Drake, Cro. Car. 300; 1 Ro. Abr. 675, S. C.; Sir W. Jon. 315, S. C., by the name of Brewood v. Drake.

In dower the demand was *de tertiâ parte liberæ faldæ*, and held not good for want of setting out in certain, for what cattle, as to their number and kind, and so like common without number.

Godb. 21.

A woman entitled to a dower of a manor, in which were copyholders, demanded her dower by the name of certain messuages, certain acres of land, and certain rents, and not by the name of the third part of the manor, and recovered and kept courts, and granted copyholds; which the whole court held to be void, because she had no manor, having made her demand, as of a thing in gross. But, if the demand had been of the third part of the manor, then she would have had a manor, and might have kept courts and granted copies.

Bragg's case, Godb. 135. [Owen, 4, S. C.] Vide Perk. 341, 343, 344; Cro. Ja. 621; Palm. 264; Brook, 102; Co. Litt. 32, 165.

Of an *advowson*, be it appendant or in gross, a woman shall be endowed, for this may be divided as to the fruit and profit of it, viz., to have the third presentation.

For which vide Perk. 343, 344; F. N. B. 148, B. 150 G.; Cro. Eliz. 360; Ro. Abr. 683, 685; Co. Litt. 379; 3 Leon. 155; Cro. Ja. 691.

Of a *villein in gross*, or *regardant*, a woman shall be endowed; as to have the third day's, or week's, or month's work of such villein, and the writ shall be *de libero tenemento*.

Perk. 342; F. N. B. 148; C. Ro. Abr. 675; Co. Litt. 32 a, 164 b, 307 a; Brook, 91; 2 Brownl. 143. ¶ A widow is not entitled to the slaves of her husband, emancipated by his last will. Lee v. Lee's Ex'r., 1 Dana, 48.¶

Of a *mill* a woman shall be endowed, though it cannot be divided, and therefore she shall have the third toll-dish, or *integrum molendinum per quemlibet tertium mensem*.

Co. Litt. 32 a; 11 Co. 25; Perk. 342, 415; 2 Brownl. 143; Bendl. 120; 4 Leon. 202; F. N. B. 149; Brook, 39. ¶ If the judgment be, that she recover seisin of the third part of a mill, *per metas et bundas*, it is error. Gilpin v. Cookson, 1 Lev. 182; 2 Keb. 8, 41, S. C. ¶ Where the property is incapable of division, dower may be given in the form of a rent distrainable of common right. H. K. Chase's case, 1 Bland. 227.¶

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Dower was brought *de tertiâ parte* of a mill, a kiln-house, &c., and judgment to recover the third part *in separatitate per metas et bundas*; and this judgment was reversed upon error brought, for it ought to have been of the third part generally, and if *per metas et bundas*, none of them can make any use of it.

Gilpin v. Cookson, 1 Lev. 182; 2 Keb. 8, S. C.

Of a *bailiwick* a woman shall be endowed, as to have the third part of the profits. So, if a fair or market, the third part of the stallage. So, of an office, as the office of the Marshalsea, to have the third part of the profits; and in such cases she shall be contributory to the third part of the charge. So, she may be endowed *de tertiâ parte exituum provenient. de custodiâ gaolæ Abbatie Westmon.*, or of the third part of the profits of courts, fines, heriots, &c.

Perk. 342; Sty. Pr. Reg. 122; Co. Litt. 32; Ro. Abr. 676; F. N. B. 149; Plow. 379.

A woman may be endowed of the third part of the *profits of a park-keeper*, or of the third part of the *profits of a dove-house*, or of the third part of the profits of a piscary, as the third fish, or *tertium jactum retis*.

Co. Litt. 32 a; Plow. 379 b.

[So, a woman is entitled to dower of tolls arising from a public navigable river.

Buckeridge v. Ingram, 2 Ves. jun. 652.]

|| So, a woman is entitled to dower of mines wrought during the coverture, whether by the husband, or by lessees for years; whether paying pecuniary rents, or rents in kind; whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others. And dower may be assigned of mines, either collectively with other lands, or separately of themselves. It is to be assigned by metes and bounds, if practicable; otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole by short proportionate periods. If land containing an open mine be assigned, the tenant in dower may work it for her own benefit.

Stoughton v. Leigh, 1 Taunt. 402; Hoby v. Hoby, 1 Vern. 218.

But a woman is not entitled to dower of mines or strata unopened, whether under the husband's soil, or under the soil of another.

Stoughton v. Leigh, 1 Taunt. 402; Hoby v. Hoby, 1 Vern. 218. The reporter makes a *qu.* of this, because there is no possible enjoyment or pernanacy of profit of mineral strata, granted in the land of another, but by working them. In a grove of oaks there is the herbage and pannage, and the timber is only an incident to the inheritance, though it may be the most valuable part of it; but the working of the strata is the only enjoyment of them.||

¶ A wife is not entitled to dower of lands mortgaged for the purchase-money.

Trustee of Frazier v. Centre, 1 M'Cord's Ch. R. 279.

Dower is not allowed to the wife of lands of which the husband was but a trustee.

Powell v. The Monson, &c., Man. Co., 3 Mason, 347; Cowman v. Hall, 3 Gill. & Johns. 398.

Where a mortgage was given by the husband before marriage, the widow was held to be entitled to dower only in the equity of redemption. And the same principle applies when after marriage the wife joins her husband in giving the mortgage.

Heth v. Cocke, 1 Rand. 344; 12 S. & R. 18; 7 Johns. 278; 15 Johns. 319; Van Dyne v. Thayer; 19 Wend. 162. But see Stille v. Carroll, 12 Pet. 201.

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A widow is not entitled to dower in lands held by improvement rights alone.

*Kelly v. Mahan*, 2 Yeates, 515.

An intended wife entered into an agreement with her intended husband that she would claim no dower in the lands of which he was then or would afterwards become seised : after marriage and husband's death held that such agreement did not operate upon any lands he acquired after marriage.

*Arrington v. Arrington*, 2 Car. Law Rep. 253.

The widow's estate in dower partakes of the nature of the estate of her husband ; if his estate was only equitable, hers must be so also.

*Porter v. Robinson*, 3 Marsh, 256.

A and B entered into a parol agreement to exchange farms, in pursuance of which A conveyed his farm to B by a deed in the common form, and B conveyed his farm to A in the same way. The widow of A claimed and was allowed dower in both the farms.

*Cass v. Thompson*, 1 Adams, 65.

Wild and uncultivated lands are not subject to the widow's dower.

*Conner v. Shepherd*, 15 Mass. 164 ; *Kuhn v. Kaler*, 2 Shepl. 409 ; *White v. Cutler*, 17 Pick. 248.

The widow of a deceased mortgagor is entitled to dower in the equity of redemption in Connecticut.

*Fish v. Fish*, 1 Conn. 559 ; see *Smith v. Eustis*, 7 Greenl. 41 ; *Carll v. Buttmann*, 7 Greenl. 102.

A widow is entitled, in New Jersey, to dower of lands mortgaged in fee by her husband before marriage.

*Montgomery v. Bruere*, 2 South. 865. See S. C. 1 South. 260.

In Virginia, the widow is not entitled to dower of real estate which had been mortgaged by her husband before marriage, but she is entitled to be endowed to the equity of redemption.

*Heth v. Cocke*, 1 Rand. 344. See *Van Dyne v. Thayer*, 19 Wend. 339.

A conveys land to his four sons in fee, who by deed of even date mortgage the same to the father to redeem the payment of a sum of money, and a maintenance for the father during life. After the death of one of the sons, the mortgage was foreclosed. The two deeds were considered as one instrument, and as parts of one contract, and the seisin of the deceased son was not such as to entitle his wife to dower.

*Holbrook v. Finney*, 4 Mass. 566.

A widow is entitled to dower in lands of which her husband died seised, and out of which the widow of her husband's father has dower assigned to her. Such a widow would be entitled to dower only in her husband's right. For example, if the widow of A, the father, had dower in a tract of nine acres, that is, three acres, the widow of B, the son, would have dower in six acres, that is, two acres ; on the death of A's widow, B's widow would have dower in the other three acres, that is, one acre more than she had before.

*Bear v. Snyder*, 11 Wend. 592.

A husband died seised of a tract of land, of four acres in extent, consisting of a slate quarry, mostly below the surface of the ground, but partially above ground. One-quarter of an acre of the quarry had been dug over, and the practice was to take a section of ten or twelve feet square on the surface, go down a certain depth, and then begin on the surface again. It

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was held, that not only that portion of the quarry which had been actually dug, but the whole extent owned by the husband must be considered as opened, and that the widow was entitled to dower in the same.

*Billings v. Taylor*, 10 Pick. 460.*g*

## 3. Of the Nature and Quality of such Estate, whether sole, joint, or in Common.

The husband must be seised of an estate in fee simple, fee tail general, or as heir of the special tail; which necessarily excludes descendible freeholds; therefore if a man make a lease for life, rendering rent to him and his heirs, and after marry, and die, his wife shall not be endowed of this rent, because it is but a descendible freehold; nor of the land, because not seised during the coverture.

Ro. Abr. 676, 3 P. Wms. 263. *β* In Ohio, the widow's dower extends to an equitable estate. *Smiley and wife v. Wright*, 2 Ohio, 507. The same rule obtains in Pennsylvania. *Shoemaker v. Walker*, 2 S. & R. 556.*g*

But, if tenant in tail bargains and sells his land to the husband and his heirs, the wife of the bargainee shall be endowed against his heir, but not against the issue in tail. So, if tenant in tail grant all his estate to one and his heirs, though it be of things which lie merely in grant, as rent, common, advowsons, &c., yet the wife of the grantee shall be endowed till the grant be avoided by the issue in tail. The reason of which difference between those descendible freeholds, and these estates made by tenant in tail, seems to be, that, in the first case, the estate in its creation seems to be no greater than a freehold; but in the other nothing appears to the contrary, but that it may be an absolute fee, and till the issue comes in to show it otherwise, and claims his right, it shall, to all intents, be regarded as such; and, by consequence, the wife of such grantee or bargainee is well dowable thereof till the contrary appears.

*Saund.* 261; *Plow.* 556; *Bulst.* 165; 3 Co. 84; 10 Co. 96, 98.

If tenant in tail be attainted of treason, and the king grant the land to one and his heirs, the wife of the grantee shall be endowed; for the king had a qualified fee, so long as the tenant in tail had issue; and this qualified fee passed to the grantee.

*Plow.* 557.

But, if tenant in tail covenant to stand seised to the use of himself for life, and after to the use of his eldest son in tail, and after marry, and die, yet his wife shall be endowed; because when he limits an estate for his own life, he hath executed all the power he had over the estate by such manner of conveyance, and the remainder is merely void; and he continues tenant in tail, as he was before. So, if he had covenanted that the land should descend, remain, or come to his son after his death; yet his wife should be endowed; for this is only a covenant to permit his son to have what he ought not to hinder him of, and makes no alteration of the father's estate.

*Blitheman v. Blitheman*, Cro. El. 279; 2 Co. 72, S. C., cited; *Freshwater v. Rois*, Yelv. 51; *Moore*, 683, S. C. But, if lessee for life leases to the lessor and his heirs, or the heir of his body, for the life of the lessee, and after the lessor dies, living the lessee, the wife of the lessor shall be endowed, because this amounts to a surrender. Ro. Abr. 677.

If there be tenant in special tail, remainder to him in general tail or fee, and his wife die without issue, and he marry again, and die, his wife shall be endowed; for by the death of his first wife without issue he was become tenant in tail after possibility, &c., which being but an estate for life, was

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merged by the accession of the remainder in tail or fee; and so his second wife dowable.

Ro. Abr. 677; Brook, 25; Perk. p. 338.

If A seised in fee covenant to stand seised to the use of himself and his heirs, till C his middle son take wife, and after to the use of C and his heirs; and after A die, and this descend to B his heir, who dies, and then C take wife; it seems the wife of B shall lose dower, because the estate of the husband ended by express limitation made before her title of dower began; and therefore her dower, which is derived out of it, cannot continue longe. than the original estate.

Between Flavil and Ventrice; but *qu.*, for the court was divided upon it. Ro. Abr. 676.

Of an estate to a man and his wife, and the heirs of their two bodies; if such wife die, and he marry a second wife, and die, such second wife shall not be endowed, because the issue by her cannot inherit *per formam doni*.

Vide Brook, 19, 36; Cro. Ja. 615; Litt. § 53; 8 Co. 36; Co. Litt. 19 a; 2 Inst. 336; Co. Litt. 31; Leon. 66; 3 Leon. 80; Noy, 66; Brook, 9; Dyer, 41 a; Perk. 302.

The husband must have the freehold and inheritance in him *simul et semel*, otherwise the wife shall not be endowed; therefore, if lands are given to the husband for life, remainder to be in tail, remainder to the husband in fee or in tail, and he dies living B or any of his issue, his wife shall not be endowed.

Ro. Abr. 677; Perk. 335; Brook, 6. Vide Cro. Eliz. 564. A tenant for life, remainder to trustees for ninety-nine years, remainder to A in tail; A dies; his wife shall be endowed, notwithstanding the intermediate estate for years. Salk. 254; Bates's case, Ld. Raym. 326. See the next case but one.

If a lease is made for life, rendering rent, and the lessor marries and dies; his wife shall not be endowed either of the rent or of the land: not of the land, because her husband was not seised of the freehold thereof during the coverture, and the rent was but a freehold for life. But, if a lease is made for years, rendering rent, and the lessor marries, and dies, his wife shall have dower of the third part of the reversion, and of the third part of the rent, as incident to it; because he had the freehold and inheritance in the land *simul et semel*; but she shall not be endowed of the rent *per se*, merely because her husband was not seised of any freehold or inheritance in it. But, if no rent be reserved on the lease for years, then *cesset executio* during the term; and therefore, if a lease be made for years, remainder to J S and his heirs, the wife of J S shall be endowed; but *cesset executio* during the time.

Perk. 348; Brook, 44, 60, 89; Co. Litt. 32 a; Perk. 335, 336; Ro. Abr. 678; Brook, 6. But, if a lease for life or years be made by the husband after the marriage, then his wife shall have her dower discharged of them, as she shall from other charges of her husband. Co. Litt. 32 a.

In dower upon *ne unques seisie que dower* pleaded, the case was thus: A tenant for life, remainder to B and his heirs for the life of A, remainder to the heirs male of the body of A, remainder over; A marries, and dies without issue; and if the remainder to B and his heirs, during the life of A, was such an interposing estate between the estate for life to A and the remainder to him in tail, that his wife should not be endowed, was the question? And for the demandant it was said, that all the estate was really in A, and the remainder to B for the life of A was but a possibility; that if A should commit a forfeiture, then B might take advantage of it to preserve the

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remainder; and though by reason of this possibility, the estate for the life of A is not merged, yet the tail is executed to such purpose that his wife shall be endowed. But the court, on the first argument, gave judgment against the defendant. The (a) reason seems to be, because the husband was not seised of the freehold and inheritance *simul et semel*.

Duncombe v. Duncombe, 3 Lev. 437. (a) The books give no other reason for this distinction but that it would be giving the wife a larger estate than the husband had, whereas she is in only in the *per*, and continuance of her husband's estate. [The true reason is, that the remainder to B was an intervening *vested* estate, and not a possibility. Fearn's C. R. 509, 510, 4th ed.]

[Lands were conveyed to the use of A and his wife for life, remainder to the use of B the son of A for life, remainder to the first and other sons of B in tail, remainder to A in fee; A and his wife die in the lifetime of B, who afterwards died without issue, leaving a wife: the question was, whether the wife of B was entitled to dower in the lands? And it was decreed she was; for that the estate for life in B was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.]

Hooker v. Hooker, Ca. temp. Hardw. 13; 2 Barnardist. B. R. 200, 232, 379, S. C.]

If the husband is seised of a joint estate, and dies, his wife shall not be endowed; as, if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed, but it shall go to the survivor, who is then in from the first feoffor or donor, and may plead it as an original feoffment or gift to himself; and so is paramount to her title of dower, which is not complete till her husband's death.

Co. Lit. 37 b; Bro. *Dower*, pl. 4, 84; Cro. Car. 191, which last book says it was the ancient course in mortgages, to make the estate to two, in order to prevent the mortgagee's wife of dower.

So, if lands are given to two men, and the heirs of the body of one of them, and he who hath the tail marries, and dies, leaving issue; yet his wife shall not be endowed, but the survivorship shall take place; nor, though the survivor die after, shall the wife be endowed, because the husband, during the coverture, was not seised of an estate whereof she was dowable.

Perk. 334.

Father and son jointenant, to them and the heirs of the son, were both hanged out of one cart for felony: the wife of the son brought dower, and upon *ne unque seisie que dower* pleaded, this matter was given in evidence; and further, that the son survived,\* as appeared by shaking his leg; and adjudged she would be dowable.

Broughton v. Randal, Cr. El. 503; Noy, 64, S. C. But the case as reported is upon another point.—\* I think there is a case in the civil law where father and son were lost at sea in the same ship, and adjudged the son survived, as being according to the course of nature, and it was reasonable to suppose (being of full age) he was able longer to resist the force of the waters than the father, who, being much older, might be presumed to be weaker.

Of a tenancy in common a woman shall be endowed, for there no survivorship takes place, but each moiety descends to the respective heirs of the respective tenant in common; and in such case a dower shall be assigned in common too, for she cannot have it otherwise than her husband himself had.

Co. Litt. 34 b, 47 a; Litt. § 44, 45. *℞* Brown v. Adams, 2 Wharton, 188. But she is not entitled to dower in lands which her late husband and his partners held in common, which lands had been purchased out of the partnership funds. 2 Desaus. 471; Greene v. Surviving Partners of Greene, 1 Ohio, 542. *℥*

|| A man seised of a copyhold in fee in a manor, by the custom of which the wife of every copyholder that died seised of any estate shall be endowed,

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becomes bankrupt; the commissioners bargain and sell the land; the bankrupt dies; the deed is enrolled. It was holden, that the wife should not be endowed: for now by relation he did not die tenant; and this confirms what Lord Coke says, that the estate shall pass by relation, even to strangers. So, if one bargains and sells land, and takes a wife, and dies, and then the deed is enrolled, the wife of the bargainor shall not have dower; for by the relation, the estate passed before she was his wife. And by the same reason, if the estate shall be said to pass as to strangers *ab initio* for their disadvantage, it shall pass for their advantage: and therefore if a bargain and sale be made to a man, and he die, and then the deed be enrolled, it seems his wife ought to be endowed.

Parker v. Bleeke, Cro. Car. 568; Gilb. Uses, 291, 292; Gilb. Uses, 96; and Sheph. Touchst. 226, *confr.*; but see Mr. Sugden's note (5) in page 208 of his edition of Gilbert's Uses.

Where an estate had been purchased with a partnership fund, but conveyed to one partner under a specific agreement that it should be his, and he should be debtor for the money, the right of the wife to dower out of this estate was established against the assignees under a joint commission of bankruptcy.

Smith v. Smith, 5 Ves. 189.]]

### 4. *Of its Continuance; wherein of Estates conditional, suspended, determined, or extinguished; and therein of Remitters to the Heir, and Recoveries by Title Paramount.*

As to its continuance; in some cases this is material, and in some not: and therefore if donee in tail of rent or land marries, and dies without issue, and the donor enters; yet the wife of the donee shall be endowed, though in this case the estate tail has no continuance; for dower is such an incident to an estate tail, that if one makes a gift in tail, upon condition that the wife of the donor shall not be endowed, this condition is repugnant and void.

See Co. Litt. 241 a, note 4, 13th edit.; Perk. 317; Brook, 18, 86; Bulst. 163; Vaugh. 40; F. N. B. 149; 8 Co. 34; Co. Litt. 31; 6 Co. 41; Co. Litt. 224 a.

But, if a rent be reserved to the donor and his heirs upon such gift in tail, the wife of the donor shall be endowed of such rent no longer than the estate tail continues.

Dyer, 343, pl. 58; Perk. 348; Brook, 44; Co. Litt. 32 a, 241 a; Plow. 155; F. N. B. 149.

If one grant a rent out of his land to J S and his heirs, upon condition, that if the grantee die, his heir within age, that then, during such nonage, the rent shall cease; if the grantee die, his heir being within age, yet the wife of the grantee shall be endowed; but *cessabit executio* during the nonage of the heir; for such condition is part of the original constitution and nature of the rent, and then the wife can have it in no other manner than her husband had it granted to him.

Plow. 156; Co. 87; Brook, 51; Perk. 327.

If the husband seised of a rent in fee, or fee tail, release it to the tenant, the rent is extinguished by it; and yet, as to the wife, has such continuance that she shall have dower thereof; which the husband, by his own act, cannot debar her of.

6 Co. 79; 7 Co. 65, S. P.  $\beta$  Conveyances of real estate by deeds of gift to children are not fraudulent against a wife's right of dower, because not founded upon a valuable consideration. M'Intosh v. Ladd, 1 Humph. 459.

If the husband be seised of a defeasible estate during the coverture, yet

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his wife shall be endowed thereof till it be actually defeated ; as, if the husband and wife, lessees for life, surrender to him in the reversion ; this is defeasible by the wife, after the husband's death ; yet in the mean time, if the reversioner dies, his wife shall be endowed.

Ro. Abr. 677, (14, 15.) So, if a disseisor die seised, and the disseisee abate, yet the wife of the disseisor shall be endowed. So, if tenant for life surrender, or grant his estate to the husband in reversion upon condition, the wife of the reversioner shall be endowed till it be broken. Ro. Abr. 677 ; Brook, 74.

β An adverse possession of the premises in which dower is claimed, for more than twenty years, during the life of the husband, will not bar the rights of the widow, nor will a release of dower be presumed in such case.

Durham v. Angier, 20 Maine, 242.γ

If a feoffment be made to the use of J S and his heirs, till J D hath done such a thing, and then to the use of J D and his heirs ; if J S die, his wife shall be endowed till the thing performed.

Leon. 168 ; and Anderson holds she shall be endowed after, which seems not reasonable, because his estate is then determined by express limitation, to which it was at first subject ; but for this vide Perk. 317 ; Litt. § 357 ; 2 Co. 59, 79 ; Ro. Abr. 678 ; Brook, 62.

If land be mortgaged to the husband in fee, and the condition be broken ; and after, upon agreement, the mortgagor have the land by payment of the money ; yet the wife of the mortgagee shall be endowed ; for by non-payment of the money at the day, the estate of the mortgagee was become absolute, and his wife entitled to dower thereof. So, if the money was paid at the day, yet if paid by a stranger, who was no ways privy to the condition, the wife of the mortgagee shall be endowed ; for conditions being in law taken strictly, if they are not complied with, according to the terms thereof, it is as if they were not performed at all ; and so the wife, who is a stranger, shall not be prejudiced thereby.

Ro. Abr. 679 ; Perk. 392 ; Brook, 11 ; Cro. Car. 191 ; though this be the express doctrine in the common law courts, yet in Chancery when the mortgagor comes to redeem, even the woman's dower is avoided ; for the husband's estate was *ab initio* encumbered with equity, and in that court the mortgagee is considered as a trustee for the mortgagor. Hard. 465 ; Abt. in Equity, 311.

If tenant in tail discontinue in fee, and after take a wife, and disseise the discontinuee, and die seised, his wife shall not have dower, because the issue is remitted to the ancient entail, which, being a restitution to an ancient right, must take place of the dower of the wife of a subsequent wrongful estate, inasmuch as the estate of which she is dowable is defeated.

F. N. B. 149 ; Co. Litt. 331 a, 332 b.

So, if a man hath title of action to recover any land, and he enters, and disseises the tenant of the land, and dies seised, upon which his heir enters ; now he is remitted to the ancient right which his ancestor had ; and, by consequence, the wife of the ancestor shall lose her dower of the wrongful estate her husband had, which is determined and gone by act of law.

F. N. B. 149. In dower, the tenant shows that land was entailed to his father, husband of the demandant, and his wife, mother of the tenant in special tail, and that after his father discontinued the tail by fine to a stranger, and took back an estate by grant and render in general tail, and had issue the tenant ; and the first wife died, and his father married the demandant, and died, and so he is remitted to the first entail ; to which the court clearly agreed, and gave judgment that the demandant should be barred. 44 E. 3, 26 ; Brook, 14, S. C. ; but *qu.* at this day, since the statutes of 4 H. 7, c. 24, and 32 H. 8, c. 28, if the issue shall be remitted upon such fine, for these statutes seem against it, and then the wife shall be endowed.

If there are father and son, and the father exchanges land with a stranger,



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and dies, and the son marries, and enters into the land taken in exchange; and the stranger, being impleaded for his lands, vouches the son as heir, who enters into the warranty, and loseth, and thereupon execution is had accordingly, and then the son dies; his wife shall not be endowed of the lands taken in exchange; because the recovery thereof against her husband hath relation to the time of the exchange made, which was before her title of dower began.

Perk. 309.

If a disseisor makes a feoffment in fee with warranty, and the feoffee marries, and the disseisee brings a writ of entry in the *per* against the feoffee, who vouches the feoffor, &c., and each recovers in value against the other, and they have execution accordingly, and the feoffee dies, his wife shall have dower of the land recovered in value, but not of the land lost, because by title paramount: but, if one recovers in value against the husband by warranty of his ancestor, and the husband dies, his wife shall be endowed of the land recovered from him, because this was by force of the warranty, and not by elder title.

Perk. 322; F. N. B. 150. If two coparceners in gavelkind make partition, and one marries, and the other is impleaded for his part, and prays in aid of the other coparcener, who joins in aid of him, and the demandant recovers, and the tenant has *pro rata* of that which remains in the possession of the other coparcener, who after dies; his wife shall not have dower of that which was recovered *pro rata*, because the recovery hath relation to the death of the ancestor, which was paramount to her title of dower.

5. Of the Value and Improvement of the Husband's Estate, either in his Lifetime, or after his Death.

If the husband makes a feoffment in fee of land, and the feoffee builds thereon, and improves the same greatly in value; yet the wife of the feoffor shall have dower only according to the value it was of in the husband's time; for if such feoffment were with warranty, the heir would be bound to render only the value as it was at the time of the feoffment.

Co. Litt. 32 a; Perk. 328. When the value of the land has been increased by improvements made by a purchaser from the husband, the widow is entitled to dower according to the value of the land without such improvements. *Dashiel v. Collier*, 4 J. J. Marsh. 603. See 2 Johns. 484; 3 Caines, 117; 3 Mass. 544; 3 Mason's R. 347; *Van Doren v. Van Doren*, 6 Penn. 697; *Dunseth v. The Bank of the United States*, 6 Ohio, 76; *Mosher v. Mosher*, 3 Shepl. 160; *Wall v. Hill*, 7 Dana, 175. If a disseisor or feoffee, upon condition, improve the lands of the husband by building, &c., and the husband enter on the disseisor, or for the condition broken, he shall have all the improvements, because the estate of the one was tortious, and the other uncertain; and it was their folly to make such improvements. But, if the husband had died before such entry, and his wife had recovered dower; *quæ* if she should have the third part of such improvements, for her husband was never seised.

If the heir improve the land by building or sowing it, the wife shall recover her dower with the improvement upon it, because by her husband's death her title to dower was consummate, and the improvements as to her part were *quasi* upon her lands; for which reason likewise, if the land be impaired in value in the time of the heir, she shall share in the loss, unless it were voluntary by the heir himself, and then she shall recompense herself in damages against him.

Co. Litt. 32 a; 2 Inst. 81.

If the husband himself, or his feoffee, pull down houses, &c., and then the husband die; it seems, the wife hath no remedy for those houses, because before her title was consummate, the thing itself was destroyed.

Perk. 329. If the husband sow part of the land, and die, and this part be assigned

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## (C) Of Things requisite to Consummation of Dower.

to the wife for dower, whether the wife or executor of the husband shall have the crop, *qu.*, and vide Dyer, 316; 2 Inst. 81. ¶ In the case of *Fisher v. Forbes*, Vin. Abr. tit. *Emblements*, pl. 82, it seems to have been taken as settled, that a dowress is entitled to the emblements, because dower is considered as an excrescence or continuance of the estate of the husband.¶

(C) Of the Things requisite to the consummation of Dower, viz., Marriage, Seisin, and the Death of the Husband.

1. *Of the Marriage, how long it must continue; and therein of the several Sorts of Divorces.*

If a man make a contract of matrimony with a woman, and die before the marriage be solemnized between them, she shall have no dower, because she never was his wife.

Perk. 306. It was formerly held that a woman married in a chamber should not have dower, 16 H. 3, and that the marriage should be celebrated *in facie ecclesie*; but the law is now altered, and marriages in private houses, if all circumstances are complied with, are held good; and that God is not less present in such houses than in the most sanctified places. Perk. 306; F. N. B. 150. But see 26 G. 2, c. 33.

If a woman make a contract of matrimony with J S, and then marry with J D, who is seised of lands, and die, she shall have dower of the lands of J D.

Perk. 305. But if a man marry a second wife, living the first, and die, such second wife shall have no dower. So, if a woman marry a second husband, living the first, and the second husband die, she shall not have dower of his land. Ibid. 304, 305.

Upon issue of *ne unques accouple en loyal matrimony*, the bishop ought to certify, that they were accoupled in lawful marriage, though the man be under fourteen, or the wife above nine, and under twelve years of age at his death, because it was a good marriage till avoided, which now cannot be after his death. But, if either disagree to the marriage at their age of consent, then it is avoided *ab initio*, and the wife shall have no dower.

Co. Litt. 33 a; Dyer, 305, 313, 369. ¶ In Pennsylvania, cohabitation and reputation, especially of a long date, are evidence of a marriage in an action by the widow to recover her dower. *Chambers v. Dickson*, 2 S. & R. 475.¶

In dower, upon *ne unques accouple en loyal matrimony*, and issue thereupon, a writ was awarded to the bishop, who certified that the demandant was accoupled *in vero matrimonio cum prædicto B sed clandestino, et quod B et E* (demandant) *thori et mensæ participatione mutuo cohabitaverunt usq. ad mortem prædict. B*, and judgment thereon given for the demandant, and error brought and assigned (*inter alia*) that there was neither day nor place of the marriage mentioned in the bishop's certificate: but the court held it not material nor issuable, because the certificate from the bishop is concluding. 2. That the certificate is not good, because it did not answer to the words of the issue, *ne unques accouple en loyal matrimony*; for that it was a true matrimony, and that they lived together at bed and board, is but argumentative that they were *legitimo matrimonio copulati*: but the court disallowed this exception; for *vero matrimonio*, though *clandestino, copulati fuerunt*, is as good as *legitimo matrimonio*, and hath all one intentment; and though it be *clandestino*, yet it doth not vitiate the marriage; and when it is added, that *thori et mensæ participatione cohabitaverunt, &c.*, this proves they continued as husband and wife during his life, and therefore it is not to be questioned now; and the judgment affirmed.

*Wickham v. Enfield*, Cro. Car. 351. But for this vide Brook, 54; Dyer, 313, 368, 305; Co. Litt. 33 b; 9 Co. 19.

[A marriage in Scotland (supposing the parties not to go thither to evade the laws of England) is undoubtedly such a marriage as will entitle the

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woman to dower in this country. And as the lawfulness of it may be tried by a jury, a replication to a plea of "*ne unques accouple*" in a writ of dower, alleging a marriage in Scotland, may conclude to the country.

Ilderton v. Ilderton, 2 H. Bl. 145.]

If there be a divorce *causâ adulteri*, yet the wife shall be endowed; for this does not dissolve the marriage, but only separates the parties *a mensâ et thoro*, and the marriage still so continues in force, that if either of them marry any other, such marriage is void.

Powell v. Weeks, Noy, 108, adjudged; Godb. 145. [S. C. by the name of Lady Stowell's case; 1 Ro. Abr. tit. *Baron and Feme*, (A. pl. 21.) S. C., by the name of Stowell v. Wikes; Cro. Car. 463, S. C. cited; Co. Litt. 32 a, 33 b. But in R. Abr. tit. *Dower*, (P. pl. 13,) (which seems to be a report of Lady Stowell's case,) "if the wife be divorced for adultery, (which does not dissolve the bond of marriage by the canon law, nor of our church in this realm, but is only *a mensâ et thoro*,) yet this shall bar her of her dower." The divorce for this cause is no bar of itself, because not a *vinculo matrimonii*; but adultery is a bar, and the divorce is evidence of it.]

So, a divorce *propter sævitiam* or *metum* is of the same nature, and does not dissolve the bond of matrimony, but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill usage: and therefore the wife in such case shall be endowed the rather.

Cro. Car. 492, 493, Porter's case. A wife shall be endowed notwithstanding a divorce *causâ professionis*, for which vide Ro. Abr. 681; 2 Leon. 169; Moor, 226; Cro. Car. 462; 2 Inst. 687; Co. Litt. 32; but vide 32 H. 8, c. 38, by which it seems that this and other scrupulous divorces are taken away.

But, if there be a divorce *causâ præcontractus*, *causâ consanguinitatis*, *causâ affinitatis*, or *causâ frigiditatis*, the wife shall not be endowed; for these dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again. But if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced after; and therefore if the husband die before such divorce, his wife *de facto* shall have dower, for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify that they were *legitimo matrimonio copulati*.

Ro. Abr. 681; Co. Litt. 32 a, 33 b; 7 Co. 70; 5 Co. 98; 2 Leon. 169.

In dower, the writ was *præcipe A quod reddat B rationabilem dotem suam* of the lands, &c., *dudum C quondam viri sui*; and for not saying, *præcipe quod reddat B quæ fuit uxor C*, &c.; that so she might appear to have title of dower as his wife, it was held ill; and that *quondam viri sui* would not sufficiently help it.

Fulliam v. Harris, Cro. Ja. 217.

2. Of the Seisin, either in Fact or in Law: and herein of the Seisin in Fact, as it is continuing, or not continuing, as instantaneous.

The husband must be seised either in fact or in law, to entitle his wife to dower. But a seisin in law is sufficient for that purpose, because otherwise it would be in the husband's power to defeat his wife of a subsistence after his death, by his own negligence or malice, and she cannot enter to gain a seisin in his right, as he may do into lands descended to her; which is the reason, that of a seisin in law a man shall not be tenant by the curtesy; and therefore if the ancestor die seised, and the husband\* die before he enter into the land, yet his wife shall be endowed, though he had but a possession or seisin in law.

Perk. 304; Co. Litt. 31, 358; Litt. § 681; 8 Co. 34, 36; F. N. B. 149; Stanf. Prer. 41; Brook, 66, 75. \*Though a stranger abates. Perk. 371. β Dunham v.

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Osborn, 1 Paige, 634. See as to what is sufficient evidence of his being seised, 1 Caines, 185; 2 Johns. 119. See also 2 S. & R. 556, Appx.g

So, if a lease be made for life, remainder to J S in fee, who marries, and the lessee die, and then a stranger enter and intrude upon the possession, and J S die before any entry made by him, yet his wife shall have dower.

Perk. 372. *β* Although the husband did not die in possession of the land, the widow is entitled to dower. Galbraith v. Green, 13 S. & R. 85. But a woman is not entitled to dower unless the husband was seised during the coverture of an estate of freehold. Shoemaker v. Walker, 2 S. & R. 556.g

If the husband purchase rent, and die before the day of payment, yet his wife shall be endowed, nay, though the day of payment be come, and the rent be tendered to the husband, who will not receive it, but utterly refuses it, and dies before any receipt thereof by him, or any other for him, and before any thing paid in the name of seisin thereof.

Brook, 35, 66, 71; Perk. 373.

But, if there be neither seisin in fact, nor seisin in law, in the husband during the coverture, but only a right of entry or action, then his wife shall not have dower; and therefore, if a man be disseised, and then marry, and die before any entry made by him, his wife shall not be endowed of that land.

Perk. 366. So, if the father die seised, and a stranger abate, and then after the heir marry, and die before entry, his wife shall not have dower; because by this abatement the seisin in law, which he had, was devested before his marriage: and so he was neither seised in fact, nor in law, during the coverture. Perk. 367.

So, if exchange be of lands between A and B, and A enter into the lands of B, and then B marry, and die before any entry into the lands of A, his wife shall not have dower of those lands.

Perk. 369. *β* See Cass v. Thompson, 1 Adams, 65.g

If one enfeof a stranger, upon condition to be performed on the part of the feoffee, and after marry, and then the condition be broken, and the feoffor die before any entry made, his wife shall not have dower; because there was no seisin at all in the husband, during the coverture.

Perk. 368.

So, if a man make a bargain and sale to one and his heirs by indenture enrolled, with a *proviso*, that if such act be done, the bargain and sale shall be void; and after the bargainer take a wife, and then the condition be broken; and before entry the bargainer die; his wife shall not have dower; for though the estate of the bargainee vested by 27 H. 8, c. 10, of uses; yet, because the husband did not re-enter, the estate of inheritance in the bargainee was not devested, nor had the husband any seisin during the coverture.

6 Co. 34, Fitzwilliam's case; but, if the words had been, that after the condition broken, the bargain and sale should be to the use of the bargainer in fee, *qu.*, because then the statute reverts the possession in him again according to the use.

In some cases, though the husband be seised in fact, yet his wife shall not have dower; as, of an instantaneous seisin; (a) and therefore, if two joint-tenants are, and one of them makes a feoffment of his part, and dies, his wife shall not be endowed, because he was sole seised but for an instant when he made the livery. So, if *cestui que use* (b) after the statute 1 R. 3, c. 5, and before 27 H. 8, c. 10, had made a feoffment in fee, and died, his wife should not be endowed, because her husband was seised but for an instant.

Co. Litt. 31; F. N. B. 150; Ro. Abr. 676; Moor, 56. (a) [The proposition, tha

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in the case of an instantaneous seisin, the wife shall not be endowed, though here laid down broadly, is by no means general. When, indeed, the same act which gives the husband the estate, conveys it out of him again; when he is the mere instrument of passing the estate; the transitory seisin gained by such an instrumentality does not in general seem sufficient to entitle the wife to dower. But when the land, in the language of Sir Wm. Blackstone, 2 Comm. 132, *abides* in the husband for a single moment, that is, as a later writer explains it, (Preston on Estates, tit. *Dower*,) when he has a seisin for an instant *beneficially for his own use*, the title to dower shall arise in favour of the wife. Thus, in the case put above, where lands descend on a man who is married, and a stranger enters by abatement immediately after the death of the ancestor—there the wife of the heir shall have her dower, and yet the husband has merely a seisin in law, and that for an instant only, for the abatement divested it from him. So, in the case above of the father and son jointenants, who were hanged out of one cart, where the question depended on the priority of their death. And, where a husband *tortiously* gains an instantaneous seisin, as against the person benefited by, and deriving an estate in virtue of, such tortious act, the wife is entitled to her dower. Thus, in Matthew Taylor's case in C. B., 34 El., cited in Sir W. Jon. 317, where tenant at will, or for years, makes a feoffment in fee, and dies, and his wife brings dower, the feoffee cannot plead that the husband was never seised; for as the court there say, in an instant he gained a seisin, or as it is better explained *supra*, tit. *Disseisin*, (A), since the feoffee received his estate from him, he is estopped to say that the husband was never seised: besides, in respect of the feoffee the feoffor had an estate, though in regard to the disseisee he is to be considered as a wrongdoer. (b) It may be questioned whether either of these instances will support the doctrine here advanced, viz., that there cannot be dower in the case of an instantaneous seisin. In the first, the husband is never *solely* seised during the overture: for when he makes the feoffment he is seised *jointly* with his companion: the tenancy is not severed *until* the husband has made the conveyance, and departed with all his right and estate; and, consequently, during all the time he hath seisin of the estate, he hath it *jointly* with some other, and not *solely* by himself. In the other instance, viz., of the *cestui que use*, the husband hath not seisin of the land *at any period*: he had merely the *use* with the *power* in virtue of the statute of 1 R. 3, of transferring that quantity of estate in the *land* which he had in the *use*. Preston on Estates, *ubi supra*.]  $\beta$  A man who received a conveyance in fee of certain land, and at the same time mortgaged the same to another person, was held not to have had such seisin as to entitle his wife to dower. *Clark v. Monroe*, 14 Mass. 351. See *Bird v. Gardner*, 10 Mass. 364.

If lessee for life makes a feoffment in fee, or a lease *pur autre vie*, and dies, his wife shall not have dower, because he gained the fee but for an instant, and parted with it again, and this was no disseisin.

Ro. Abr. 676; Brook, 30; Cro. Ja. 515. [*Seisin*, of such a feoffment or lease by a tenant at will, or for years, for thereby he gains a freehold. Sir W. Jon. 317; Br. tit. *Disseisor*, &c., pl. 67; 12 E. 4, 12.]

If tenant in special tail marries a second wife, who is not dowable of the tail, and after makes a feoffment in fee, and dies, his wife shall not have dower, because he gained the fee but for an instant

Cro. Ja. 615; *Amcotts v. Catherick*, Ro. Abr. 676, S. C.

So, if conusee of a fine grant and render the land by the same fine to the consor, and die, his wife shall not be endowed, because he had seisin but for an instant.

Co. Litt. 31; Vaughn. 41; Cro. Car. 191; 3 Leon. 11.

[So, if a husband become entitled to estates by virtue of surrenders from tenants by copy of court roll, and grant them out again by copy of court roll, this instantaneous seisin of the freehold will not entitle the wife to dower.

*Sneyd v. Sneyd*, 1 Atk. 442.]

$\beta$  The fact that two persons jointly and equally built two houses in a block, that they divided by parol, that each occupied, sold, and received the proceeds arising from the sale of the house to him belonging, is not such a

## (D) Of the Assignment of Dower.

sole seisin as to enable the widow to recover dower in the house assigned to her husband.

Hamblin v. Bank of Cumberland, 1 Applet. 66.

Where the demandant claimed dower in a tract of land, of which her late husband was in possession, and on which one of his creditors levied an execution as his property during the coverture, and where the tenant showed no title but under such a levy; it was held, that there was sufficient evidence of seisin in fee in the husband to maintain the action.

Cochrane v. Libby, 6 Shepl. 39.g

## 3. Of the Death of the Husband.

As to the death of the husband, this is either a natural or a civil death; but upon a civil death the wife shall not be endowed; as, if the husband enter into religion, and be professed, his wife shall not have dower till he be naturally dead; for though upon such profession his heir may enter, and a writ of *mortdancestor* lies; yet because he could not enter into religion without the assent of his wife, and if she had dissented, his profession would be void; therefore if she does assent, she in a manner vows chastity as well as her husband, and shall have no dower during his natural life.

F. N. B. 150; Ro. Abr. 678; Perk. 307; Co. Litt. 33 b.

In dower of the lands of A her late husband, the tenant pleads in bar that A the husband was in full life at such a place, *et hoc paratus est verificare qualitercunq. curia, &c.*, the demandant replies that her husband *obit* at such a place, &c., *et est in ecclesiâ ibidem sepultus, et hoc parata est verificare qualitercunq. curia, &c. Ideo considerat. est quod prædict. M* (demandant) *doceat de morte*, and *dictus R* (tenant) *de vita viri, et super hoc dies datus est, &c.*, at which day the demandant examined two witnesses who did not speak directly to his death, but only of their great intimacy with him, and his being gone beyond the sea for his religion, and that they had not heard of him in seven years, and concluded that in their consciences they rather think him dead, and the tenant examining no witnesses to prove him living, the demandant had judgment.

Thorne v. Rolfe, Benl. 81; Dy. 185, S. C.; Moore, 14, S. C. And in Dyer a case is cited, where the death of the demandant's husband was proved by four witnesses, who agreed in all points, and at the day of the essoign of the tenant he produced twelve witnesses *de vita viri*, who also agreed in all points; and this was held the stronger proof, and the demandant was barred; for in these cases the rule is *qui melius probat, melius habet*.

Reputation in the family of the death of the husband, is *prima facie* evidence of the fact in an action for dower.

Cochrane v. Libby, 6 Shepl. 39.g

## (D) Of the Assignment of Dower.

## 1. By what Persons.

If a disseisor, abator, or intruder assign dower, this is good, and shall not be avoided, unless they be in of such estates by fraud and covin of the woman, to the intent she may be endowed by them, or recover dower against them, and then this shall be avoided by the entry of him who hath right, though the assignment be indifferently made by the sheriff after judgment of an equal third part.

Perk. 394, 395, 398; Co. Litt. 35 a; 2 Co. 67; 3 Co. 78; 5 Co. 30; 6 Co. 58; Plow. 54 b; Brook, 15, 59. The reason why such assignment shall bind is, because

(D) Of the Assignment of Dower.

she had a right to be endowed thereof, and might have compelled them as *tertenants* to assign her dower thereof, and ought not to expect till the heir will re-enter or sue for recovery of his right; but, if there were *covin* in her, and yet notwithstanding this should bind the heir, it would encourage such violence and wrong to the heir as would put him to great trouble and expense to recover his right, without any default in him. But an assignment of a rent out of such lands by them shall not bind, because *de jure* not dowerable of such rent. *Vide postea*.

If there be two or more jointenants of land, whereof a woman is dowerable, and one of them assign her dower thereout, this is good, and shall bind the others, because they were compelled to assign it in such manner: but, if one of them had assigned her rent thereout in lieu of dower, this should not bind the rest, because they could not be compelled to it by suit.

Perk. 397; Co. Litt. 35; 2 Co. 67. [This case of assignment of dower by one of two or more jointenants must be understood to be where the husband has been solely seised during the coverture, and afterwards conveys or devises the lands to two or more jointly and dies; for the wife of a jointenant is not dowerable. *Vide sup.*]

If the husband make several feoffments of his land to several persons, and one of them endows the wife of the feoffor of his part in satisfaction of all that she ought to have of the other feoffees, and she accepts it, this is good: but the others cannot take benefit of it, because strangers thereto, and cannot plead it, nor have they any means to bring the other into court to plead it. But, if the heir assigns her dower in satisfaction of dower out of his own lands, and the lands of the feoffees, then, if a writ of dower be brought against the feoffees, they may vouch the heir, who may (a) plead this for his own safety, lest they recover in value against him.

Co. Litt. 35; 9 Co. 18; Perk. 400, 402. (a) *Per* Dyer, in Moore, 26, the alienee himself may plead this assignment by the heir. *Vide* Co. Ent. 172, and Cro. Eliz. 842.

If the husband seised of lands in right of his wife, or jointly with his wife, of lands whereof a woman is dowerable, assigns the third part of the same lands to the woman for her dower; this is good, and shall bind the wife, although she survives him, because they might be compelled to it by suit.

Perk. 399; Brook. 23; Ro. Abr. 681.

None can assign dower but those who have a freehold, or against whom a writ of dower lies; therefore a (b) guardian in socage, tenant by statute merchant, statute staple, or *elegit*, or lessee for years, cannot assign dower, for none of these have an estate large enough to answer the plaintiff's demand.

Perk. 403, 404; Co. Litt. 35; Brook. 63, 94; Ro. Abr. 681; 6 Co. 57; Co. Litt. 38 b, 39 a; 9 Co. 16, 17; F. N. B. 148. (b) But a guardian in chivalry, though he have but a chatel, may after his entry into the land assign dower; for which vide Plow. 141; Ro. Abr. 682; Co. Litt. 35, 38; Brook. 20; 9 Co. 17; 2 Inst. 262.

At common law the heir had the power of assigning dower, without resorting to any court whatever.

Moore v. Waller, 2 Rand. 418.

2. Of the Manner; and herein of assigning it by *Metes and Bounds*.

If a woman be dowerable of land, meadow, pasture, wood, &c., and any one of these be assigned in lieu of dower of all the rest, it is good, though it be against common right, which gives her but the third part of each; for the heir's enjoyment of the residue sufficiently accounts for her title to what she has.

Ro. Abr. 683; Moor, 12, 19. Which last book says that assignment by the sheriff in such manner is good, if it be equal in quantity.

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If a woman be dowable in three manors, and accept of the heir one of those manors in lieu of dower in all the rest, this is good, though against common right, which gives her but the third part of each manor.

Ro. Abr. 683. But to a writ of *habere facias seisinam* the sheriff cannot return that he delivered the demandant one of the manors in recompense of her dower.

If lands whereof a woman has no right to be endowed, or a rent out of such lands, be assigned in lieu of her dower, yet this is no bar to her to demand her dower; for she having no manner of title to those lands, cannot without livery and seisin be any more than a tenant at will, which is no sufficient recompense for an estate for life, which her dower was to be. (a)

Perk. 407; Co. Litt. 34; 4 Co. 1; Co. Litt. 169; Brook, 3. But, if the rent be granted by indenture, then it works by way of *estoppel*. So, if by deed poll, or by parol and she agrees to it, and accepts the rent, she is concluded; vide Perk. 410; Dyer, 91. In dower, the tenant pleads in bar assignment to her of a rent out of the same land for her life, *virtute cuius she was in dominico suo ut de libero tenemento, &c.* But for not alleging that he was seised of the land at the time of the assignment, so that he might grant such rent, it was ruled against him. *Beaumont v. Dean*, Dy. 361; 2 Leon. 10, S. C. (a) [But see 2 H. 5, 12, the heir assigns dower of lands of which the husband was seised, but the wife not dowable, she is tenant in dower. 30 E. 1; Briefs. 884. If wife be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband. *Per omnes justiciarios*. Hal. MSS.; Co. Litt. 34 b, n. 9, 13 edit.]

In dower the tenant pleads that he hath assigned to her, in recompense of her dower, 20 bushels of wheat yearly out of the same land for her life; and held a good bar, and in the nature of a rent; but sheep, horses, &c., assigned in recompense of dower are no bar, because they neither issue out of land, nor are of the nature of land.

Moor, 59; Dyer, 91, in margine.

A woman recovers dower, and hath a writ to the sheriff, who returns that he hath delivered 84 acres to the demandant of the land mentioned in the writ; and afterwards a *scire facias* is brought, suggesting that 60 acres of the 84 assigned to her by the sheriff are a stranger's, not mentioned in the record, and therefore she ought to have a new division; the tenant says that the other 24 acres were parcel of the land recovered, and that she had entered and accepted the 24 acres; and upon demurrer it was adjudged that she was barred by her acceptance and entry into the 24 acres.

Moor, 679.

A woman entitled to dower cannot enter till it be assigned to her, and set out either by the heir, tertenant, or sheriff, in certainty.

Ro. Abr. 681; Dyer, 343; Plow. 529; Brook, 16; Co. Litt. 34 b, 37 a, b; 2 Williams v. Cox, 2 Hayw. 4g. And the reason seems to be from the partiality every one is presumed to have for himself and his own interest; and therefore the law will not allow her in such case to be her own carver. Another reason may be for the better direction of strangers, that they may more certainly know against whom to bring their *precipe*, which they cannot be so well apprised of, if she might enter privately, and take what part she pleased. But she need not stay for the return of the writ of *habere facias seisinam*, nor for the second judgment. Palm. 265, *Howard v. Cavendish*. And though she once refuses to accept the part assigned to her by the sheriff, yet may she afterwards enter into it. Dyer, 278.

The assignment of dower must be absolute, and not subject to be defeated by any condition, nor lessened by any exception or reservation; for the wife comes to her dower in the *per* by her husband, and is in, in continuance of his estate, which the heir or tertenant are but ministers or officers of the law to carve out to her; and therefore such conditions or re-



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servations are either totally void, and her estate absolutely discharged from them, or else the estate assigned with such condition or reservation is no bar to her recovery of dower, in an action brought for that purpose; as, if the trees are excepted in an assignment of lands whereof she is dowable, the exception is void.

Ro. Abr. 682; 7 Co. 37; Plow. 25 b; 2 Inst. 153; Hob. 153; Co. Litt. 34 b, 241 a. [The dowress holds of the heir; but by the institution of law she is in of the estate of her husband; so that after the heir's assignment she holds by an infeudation from the immediate death of her husband. Hence it is, that dower defeats descent, because the lands cannot be said to descend as demesne which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descend as demesne. Gilb. on Dower, 395.]

In dower the tenant pleads that he by indenture granted a rent out of the said land to the demandant in recompense of her dower, which she accepted; the demandant confesses the grant of the rent, and her acceptance, but says that in the same indenture was a condition, that if the rent was not paid within such a time after it became due, the rent should cease, and the indenture be void, and shows a breach; and upon demurrer it was adjudged for the demandant, because it was pleaded as a grant; also because it was upon condition; for rent assigned in recompense of dower, and which comes in lieu of the land, ought to be as absolute as the assignment of the land itself; and therefore the condition annexed is void; or if it should be good, yet it is only annexed to it as a grant, and upon breach thereof she is restored to her writ of dower.

Cro. Eliz. 451, Wentworth's case; Ro. Abr. 684; Co. Litt. 34 b.

It is a rule, that when the wife brings a writ of dower, and recovers, the sheriff ought to assign it by metes and bounds, if the thing recovered may be severed; and if the sheriff does not return seisin by metes and bounds, it is ill, (a) unless closes certain are assigned by name, or a manor which is known, and certain, in lieu of dower of other manors.

Perk. 414; Ro. Abr. 682; Co. Litt. 34; Benl. 87. But an assignment, in a different manner, by the consent of the demandant may be good. *Coots v. Lambert*, Ro. Abr. *Dower*, (X), pl. 3. [Sty. 276, S. C.; Rowe v. Power, 1 N. R. 1 S. P. According to the report of *Coots v. Lambert*, in Style, a special verdict found, that the tenant said to the widow thus, viz., *I do endow you of a third part of all the lands my cousin J S your husband died seised of.* Roll, C. J., to which Nicolas and Ask, justices, agreed, held, that it may be assigned generally of the third part in some cases, and the parties may agree against common right, and that here both parties agreed to take dower in this manner; but *Jermain e contra.* But per Roll, C. J., if the sheriff assigns dower, and does it not *per metes et bundas*, it is error, if it might have been so assigned; and where a feme cannot be endowed *per metes et bundas*, she may enter without assignment.] [It has been settled by the case of *Rowe v. Power*, decided in the House of Lords, that an assignment of an undivided third part, by agreement between the heir and widow, is good. 5 Bos. & Pul. 1, 33.] (a) For this vide Ro. Abr. 683; Perk. 339; Brook, 72; Co. Ent. 171.

Upon recovery of dower, and seisin awarded, the sheriff returns that he had assigned to the demandant for her dower of a house the third part of each chamber, and had chalked it out to her; and this was held an idle and malicious assignment; and he was committed for it, for he ought to have assigned her certain chambers or rooms thereof, &c.

Palmer, 265. In Longvill's case, Keb. 743, the sheriff was committed for refusing to make an equal allotment of dower, and taking 60*l.* to execute his writ of execution, and an information ordered against him; and equity will relieve against a partial and fraudulent assignment of dower by the sheriff. 1 Vern. 218; 2 Ch. Ca. 160, S. C.

The wife of a tenant in common shall not be endowed by metes and

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bounds, for she being in *pro tanto* of her husband's estate, cannot have it in other manner than he himself had.

Perk. 411; F. N. B. 149; Co. Litt. 32, 34, 37; Brownl. 127. A writ of dower will lie against the heir of a tenant in common, before partition made; for otherwise they might perhaps make no partition at all, and so defeat the wife of dower. Sutton v. Rolfe, 3 Lev. 84.

|| There needeth neither livery of seisin nor writing to any assignment of dower, because it is due of common right.

Co. Litt. 34; Rowe v. Power, 1 N. R. 1. ||

¶ When the husband aliens to two in severalty, or he aliens to one, and he aliens one part to another, or to two in severalty, the widow's dower is to be assigned out of each parcel of land.

Fosdick v. Gooding, 1 Greenl. 30.

Dower assigned to a widow who dissents from her husband's will is subject neither to debts nor legacies.

Bray v. Lamb, 2 Dev. Eq. 372.g

## 3. By what Court.

An assignment of dower by commission *de dote assignandâ* out of the Court of Wards was held no bar of dower at common law, but it ought to have been by writ *de dote assignandâ* out of Chancery, the jurisdiction of which court is not given to the Court of Wards in such case by 32 H. 8, c. 46.

Stainfield v. Viscount Bindon, Cro. Eliz. 364. ¶ If, in laying off dower, a jury give the widow too much, the heirs may show this to the court by affidavit, and, upon a rule for that purpose, the court will inquire into and set aside the verdict, if justice require it. When too little has been allotted, the widow may show it by affidavit, and the same course will be pursued. In either case counter affidavits may be filed by either party. Eagles v. Eagles, 2 Hayw. 181.g

Sir Thomas Arundell being attainted of felony, and his wife's dower saved by act of parliament, she brought her writ of dower against the Earl of Pembroke, and he making default after appearance, a termor prayed to be received, and showed his lease after the coverture, &c., and the attainer, &c., and that E. 6 granted a commission under the seal of the court of augmentations, to assign the third part of the land of the said Sir Thomas Arundell to his wife in dower; and showed further that by virtue of the commission, the third part of the rent reserved on the said lease was assigned to her, and this assignment confirmed by letters patent under the great seal, and showed agreement and acceptance thereof, and said that this suit was by collusion to defraud him of his term. In this case it was held, 1st, That the court of augmentations had no power to assign dower to the demandant or any other woman, but it must be in Chancery. 2dly, That the assignment of the rent was not warranted by the commission, and then the confirmation could not make that good which was merely void; and it was adjudged for the demandant.

Dyer, 363; Lady Arundell's case, vide Co. Ent. 173; 'le Record de cet case, and 2 Mod. 18, S. C. cited.

As to endowments in Chancery, it appears by our books, that in former times the widow of a tenant who held of the king *in capite*, whose heir was in ward to the king, was to sue in Chancery by petition for her dower; and after office found that she was the tenant's widow, then she was to make oath in Chancery that she would not marry again without the king's license; and upon that there went a writ out of the Chancery *de dote assignandâ* to

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the escheator, to assign to her dower of the third part of all the lands whereof her husband was seised, &c. But, if the heir were of full age at the time of the tenant's death, and the king had the lands only for his premier seisin, then could she not sue in Chancery, because the king was not then guardian, but had the lands only to such special purpose; and therefore to remedy this, was the statute *de prerogativa regis*, c. 4, made, which gives power to the king to assign dower to the widow, though the heir were of full age at the time of the tenant's death. But this power was not so absolutely lodged in the king as to exclude the widow from suing at common law for her dower, by reason of the words *si viduæ illæ voluerint*, which left her at liberty in such case, either to sue to the king in Chancery, or, if she thought fit, to sue the heir in the Common Pleas. But, if the king had committed the wardship to another *durante minore ætate* of the ward, then also at common law the widow had election to sue either to the king in Chancery, because notwithstanding such commitment he still continued guardian; or she might sue the committee at common law, and recover against him, without making the king a party by *ayde prier*, or otherwise, which was ordained by the statute of *bigamis*, c. 3, for avoiding delays in such cases: and when she recovered against the committee, she took no such oath as when she sued to the king in Chancery: yet nevertheless she could not marry without the king's license, it being against the policy of those times to permit such a widow to marry whom she pleased, since then she might have brought in enemies or foreigners into the king's feud: and in the king's case the fines for alienation still continued.

Stanf. Prer. 16; F. N. B. 164; Brook, 66, 76; 2 Inst. 18; Keilw. 133; Brownl. 196; Co. Litt. 38 b; 9 Co. 16, 17; 7 Mod. 43.

Another prerogative the king had in those times, that if the heir of his tenant *in capite* entered before livery sued, this was looked upon as an intrusion, and his wife lost her dower by it, by the express provision of *prerog. regis*, c. 13. But this was meant only of intrusion after office found, which gave the king a title; for if he entered before office found, and died, his wife should be endowed.

Stanf. Prer. 41; Brook, 66; Co. Litt. 30 b; F. N. B. 149.

Bill to have dower assigned, and praying account of rent and profits, and for a decree for one-third thereof; demurrer on the ground that the bill stated no impediment to recovery at law was overruled; for as the plaintiff's title is admitted, there is nothing to try at law, and equitable bars to dower are now recognised by the Court of Chancery.

Mundy v. Mundy, 4 Bro. C. Ca. 294.

On a bill for assignment of dower and account of arrears after twelve years, the Master of the Rolls said the widow is *prima facie* entitled from the time her title accrued, and it is upon defendant to show why she should not have it, and he decreed an account from the death of the husband.

Oliver v. Richardson, 9 Ves. R. 222.

(E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

If the husband seised of lands in fee exchange the same lands with a stranger for other lands, and die, the wife hath election to be endowed either of the lands given or taken in exchange, because her husband was seised of both during the coverture. But she shall not have dower of both; for that would be unreasonable.

Park. 318, 319; F. N. B. 149; Co. Litt. 31 b.

(E) Where the Wife shall have her Election, &amp;c.

Husband seised of lands in right of his wife, they both join in exchange of those lands with a stranger for other lands, which exchange is executed; then the husband and wife alien the lands taken in exchange by fine: two judges held, the wife after the husband's death might well enter into her own lands, notwithstanding the fine which was of the other lands; and resembled it to the case of Dyer, 385, where the husband after marriage made a jointure to his wife, and then they both levied a fine thereof *sur conusans de droit come ceo que il ad* of the gift of the husband; and this was adjudged no bar of her dower, because the election to claim jointure, or dower, is not till after the husband's death: and in the principal case judgment was given for the wife.

Leon. 285. *Widow is not to be endowed of land given, and land received in exchange.* Stephens v. Smith, 4 J. J. Marsh. 64.g

If lord and tenant are by fealty, and 12*d.* rent, and the lord takes a wife, and after purchases the tenancy in fee, and dies; his wife hath election to be endowed either of the seignory or the tenancy, because her husband was seised of both during the coverture. So, for the same reason, if the husband seised of a rent-charge in fee purchase the land whereout the rent is issuing, and die; his wife at her election may be endowed either of the land or of the rent, and the husband being seised of both, during the coverture, cannot by his own (a) act alter the wife's dower.

Perk. 320. (a) But, if the tenancy escheat by the act of God, as by the death of a tenant, she shall have dower of the tenancy only. Perk. 321. The reason is, because the seignory is determined during the coverture by act of law, and it is not any disadvantage to the wife to be endowed of the tenancy, for if she be put out of possession of part or all, by more ancient title, the seignory shall be revived in part or in all, &c. Ibid.

If the husband seised of lands in fee makes a feoffment thereof to a stranger in fee, rendering to him and his heirs 3*s.* rent, with clause of distress, and dies, and the feoffee endows the wife of the feoffor of the third part of the land for her dower, she shall hold it discharged of any rent, and the whole rent shall issue out of the residue of the land, because the wife shall be endowed of the best possession of her husband during the coverture; and the husband had the land discharged of the rent after the coverture; and yet because he had also an estate in the rent during the coverture, it seems she may be endowed of that, if she think fit, and waive her dower of the land; but the rent reserved on the feoffment is no more a bar to her to demand dower of the land, than if none at all had been reserved, if she chooses the land.

Perk. 324.

In some cases, a woman shall be endowed anew; as, where the lands, &c., assigned to her for dower, are lawfully evicted by elder title; and therefore, if one be seised of two acres by good title, and another by disseisin, and marry, and die, and his wife be endowed of the acre had by disseisin, and after the disseisee enter into the said acre, now she shall be endowed of the third part of the two remaining acres. So, if the disseisee in such case had recovered the acre against the wife, she should have been endowed of what remained, and the entry or recovery being by title paramount to her title of dower, it is as if her husband had never been seised thereof; and therefore she shall only recover the third part of what is left, and not a full recompense for the acre lost.

Perk. 419; F. N. B. 149; Ro. Abr. 684; 4 Co. 129.

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If one seised of two acres in one county marries, and enfeoffs a stranger of one acre with warranty, and hath issue, and dies, and the issue enters into the other acre, and the wife brings dower against the feoffee, who vouches the issue as heir, and he loses by default; and thereupon the wife hath a conditional judgment, viz., against the vouchee if, &c., and the demandant sues execution against the heir, and after is evicted by elder title; she shall have a *scire facias* upon the first recovery against the tenant, to be endowed of the two parts left. Also, upon such eviction she may be endowed *de novo* against the heir. And the same law, if the endowment was in Chancery.

Perk. 321; Ro. Abr. 684; Brook, 65; 9 Co. 17.

As to the *dos de dote*, if there be grandfather, father, and son, and the father, or, after his death, the son endow the grandmother, the mother shall not be endowed of the grandmother's thirds after her decease, because the grandmother's dower defeats the descent to the father, and by consequence, the father was seised of no more than two-thirds of that land; and therefore the wife of the father was entitled to a third of these two-thirds only, and no more. But, if the grandfather had enfeoffed the father of the whole land, and died, and the grandmother had been endowed, either by recovery or assignment, there the mother should be endowed of the grandmother's third after her decease, because by the feoffment the father was seised of the whole estate, which gave a title to his wife to be endowed of that whole estate: and though the grandmother recovered one-third out of that estate during her life, yet such recovery doth not defeat the operation of the livery, since by that conveyance the reversion of that third is claimed; and, by consequence, the mother shall be endowed of that third when it falls in possession, since the father was actually seised of it during the coverture, by virtue of such livery. If there be grandfather, father, and son, and the first two die, and the mother be endowed by the son of a third part of the whole, either by assignment *en pais*, or upon a recovery in a writ of dower, and the grandmother bring a writ of dower against the mother, and recover, she leaves the reversion in her; for the dower was vested in the mother by the assignment or recovery, and is only defeated during the life of the grandmother, whose estate as to the mother is less than her own estate; and, therefore, the reversion is in the mother, and she, after the grandmother's death, may enter into that third recovered from her; and by consequence, the heir may re-enter into the second dower assigned to the mother, upon such recovery against her by the grandmother; for she cannot have both.

Perk. 315, 316; 4 Co. 122; Bustard's case, F. N. B. 149; Ro. Abr. 677; Co. Litt. 31, 42 a.

A seised of land marries B, and aliens to C, who marries D, and then aliens to E and dies, and after D is endowed, and then B hath dower assigned to her of the third part of all the lands, and brings a *præcipe* thereof against D, who vouches to warranty E, who counterpleads upon the matter, and says that D ought not to be endowed, *quia non potest habere dotem de dote*; and adjudged accordingly.

Ro. Abr. 677.

[Lands, subject to a title of dower, were devised to a person in fee who died leaving a widow; this widow sued for her dower, and recovered a third part of the whole without any regard to the title of dower in the widow of the testator, who did not put her claim in suit. It was holden by the court, that the testator's widow not having recovered her dower, it was to

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be laid out of the case, and the dower of the devisee's widow was not *therefore* to be looked upon as *dos de dote*.

Hitchens v. Hitchens, 2 Vern. 403.]

(F) What shall be a Bar of Dower, and what not: And herein of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after: And herein of Elopement, and Defiance of Charters, or Heir.

§ DOWER is barred in various ways: 1. By the adultery of the wife, unless it has been condoned. 2. By a jointure settled upon the wife.(a) 3. By the wife joining in a conveyance of the estate of her husband. 4. By the husband and wife levying a fine and common recovery.(b) 5. By a divorce *a vinculo matrimonii*. 6. By an acceptance by the wife of a collateral satisfaction, consisting of land, money, or other thing given instead of it by the husband, and accepted by the wife after the husband's death.(c)

(a) 2 Paige, 511. (b) 10 Co. 49 b; Plowd. 504. (c) 4 Monr. 465; 5 Monr. 58; 4 Desaus. 146; 2 McCord's Ch. 280; 7 Cranch, 370; 5 Call, 481; 1 Edw. 435; 3 Russel, 192; Bouv. L. D. *Dowress.g*

If a recovery be had against the husband by collusion, this shall not bar the wife of dower; as, if the recovery be by confession or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining them. But it seems to have been a very great doubt whether a recovery by default should not be a bar; and the better opinion being that such recovery was a bar at common law, therefore the statute of W. 2, c. 4, was made, which ordains, that notwithstanding such recovery by default, &c., pleaded, the tenant shall moreover in bar of the dower show his right to the tenements recovered; and if it be found that he had no right, then shall the demandant recover her dower, notwithstanding such recovery by default against her husband.

2 Inst. 349; Perk. 376.

By the statute W. 2, c. 4, it appears, that if the recoveror had right, then the wife is barred; therefore, if the heir of the disseisor be in by descent, and the disseisee enter upon him, and marry, and the heir of the disseisor recover by default or reddition in a writ of entry, in nature of an assize, and the husband die, his wife shall not have dower, because he who recovered had right to the possession by the descent: *aliter*, if this disseisin, descent, &c., were after marriage, because the husband was seised before of a right-ful estate during the coverture, whereof his wife had title of dower, which cannot be defeated by the disseisin, descent, and recovery, which all happened during the coverture.

Perk. 379, 380; Ro. Abr. 681. So, if the husband make a feoffment in fee, and disseise the feoffee, who recovers in assize against him, the wife shall not falsify this recovery directly, but she may say, that long time before her husband was seised, *que lui dower poit*, &c. Brook, 22, 38.

If a recovery be against the husband by verdict, the wife shall not falsify in the point tried; but she may say, that he might have pleaded a better plea, viz., a release of all actions, or of all the right of the demandant; or she may confess and avoid the recovery, but cannot falsify in the point tried against her husband.

2 Inst. 349; Perk. 382; Brook, 24; vide Perk. 383, which seems *cond.*

If in a *præcipe*, brought against the husband, he loses upon a dilatory plea, as upon non-tenure, jointenancy, misnomer of the town, &c., the wife may falsify upon a writ of dower brought, by showing that the demandant

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had no right. But, if he had right, she cannot falsify the recovery, by showing that her husband might have pleaded jointenancy, misnomer, &c., for these would have been only in abatement of the writ, and make nothing to the right. But, if she shows that her husband was tenant of the land recovered, and that the demandant had no right or cause of action, but jointly with a stranger, which stranger by deed *in cur. prolat.* released all his right to the husband before the action brought; this is a good falsification of the recovery for one moiety of the land recovered.

Brook, 26; Perk. 381, 385, 386. A recovery in a *cessavit* shall bar the wife. Perk. 389. If the husband aliens in mortmain, and the lord enters, *qu.* whether this be a good bar? Perk. 390.

If the husband levy a fine with proclamations of his lands, and die, his wife is bound to make her claim within five years after his death; otherwise she shall be debarred of her dower; for though her title of dower was not consummate at the time of the fine levied, yet, it being initiate by the marriage and seisin of the husband, the fine begins to work upon it presently after the husband's death; and if she does not claim it within five years after, she shall be barred.

2 Co. 93; 10 Co. 49, 99; 3 Inst. 216; Hob. 265; Moore, 53, 639; Dyer, 224; 13 Co. 20; 2 Ro. Rep. 69, 409, all against Plow. 373. Vide 3 Leon. 50, by which it appears, that though she brought her writ of dower within five years, yet because she did not pursue it till after six years were past, it was adjudged that she could not by a new writ revive her ancient claim, which was barred by the five years lapsed after the husband's death; and it was held, that assignment of dower in the court of wards was no sufficient claim of dower, because she could not have a writ of dower there.

If the husband and wife join in levying a fine, or suffering a common recovery, this shall bar her of her dower totally, because in both cases she is examined upon record by the judges as to her consent; and she having nothing in the lands in her own right, her joining in such acts can be to no other purpose but to bar her dower. But, if the husband be seised in fee, and a stranger levy a fine to him and his wife *sur consauance de droit come ceo*, &c., of these lands, and the husband and wife grant and render the same lands to the stranger and his heirs; it seems the wife shall not be barred of her dower, because she is not examined in this case, as she is in the other; and therefore, if this fine *sur grant et render* be pleaded in bar, she may say that she had nothing in the lands at the time of the fine levied.

Eare v. Snow, Plow. 515; 10 Co. 49 b; Cro. Eliz.; Brook, 77.

If a jointure be made to the wife during the coverture, and after the husband and wife levy a fine thereof; yet this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before; and then the fine, levied of the jointure before her time for election of dower was come, can be no bar to her electing of dower when it is come.

Bulst. 173; Leon 285; Dyer, 358.

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time.

Perk. 350; F. N. B. 149; Moore, 31. If lessor marries the lessee for years, and dies, it is said she shall have dower during the term; but it should seem she can have no

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fruit thereof till the term ended, she having the whole already for years, unless upon recovery of dower the term be merged for the third part so recovered in dower.

If lands are given to the husband and wife, and to the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband and his heirs *ab initio*, and so she shall have her dower thereof. But, if the estate be made to the husband and the wife for the life of the husband, remainder to the right heirs of the husband, it should seem she cannot in this case disagree, because the estate upon the husband's death is determined and gone.

Perk. 352, 353; 3 Co. 97. Though by this contrivance all women may be defeated of their dower as to estates purchased after the marriage.

By the common law, a woman could not be barred of her dower by any assignment or assurance to her of other lands, or of a rent issuing out of other lands, whereof she was not dowable, (except in the case of dower *ad ostium ecclesie*, or *ex assensu patris*;) for though such assignment or assurance were made by the husband before marriage or after, or by the heir after his death; and they were expressly said to be in full bar and recompense of her dower; yet might she recover her dower notwithstanding; for she having a right to be endowed of the third part of all her husband's lands vested and fixed in her immediately upon the marriage, and the husband's seisin thereof, this right, like all others, could not be transferred or extinguished, but by a release thereof; and if no such release were made, it continued still in being, for want of the proper means to destroy it; and if it still existed, her remedy was open to recover and reduce it into possession.

4 Co. 1; Vernon's case, Dyer, 91; Co. Litt. 34, 36; Brook, 97; 2 Brownl. 132.

One devises lands to his wife during her widowhood, and dies, the wife enters under the will, and afterwards marries again, and brings dower; and this devise was pleaded in bar; and it was held no bar. 1st, Because a will imports a consideration in itself, and cannot be averred to be in bar of dower, without it be so expressed. (a) 2dly, Dower cannot be of less estate than for life. And a third reason may be, because her right cannot be barred by collateral recompense.

Moore, 31; Co. Litt. 36 b; 4 Co. 4 a. (a) [A better reason than this is, that the whole of a will concerning lands must be in writing, and no averment ought to be taken out of the words of the will. 4 Co. 4 a.—According to the report of this case by Moore, it was holden by Weston and Benlows, J., against Dyer, J., that the devise was a bar of dower.]

¶ Where a provision in bar of dower was made for the wife after marriage, and, consequently, she was not bound to accept it; it was holden, that if she agreed to such a provision by entry after the death of her husband, she might be barred in a writ of dower by plea "*quod intrando agreeavit*." By the entry she made her election, and the election bound her, though the agreement did not.

3 Leon. 272.¶

As to circumstances where the wife is put to her election to take her dower or the benefit of a devise to her, see the following cases.

Miall v. Brain, 4 Madd. R. 119; Butcher v. Kemp, 5 Madd. 61; Dickson v. Robinson, 1 Jac. 503; Robert v. Smith, 1 Sim. & Stu. 573; Roadley v. Dickson, 8 Russ. 192; and tit. *Election*, (E).

Plea of purchase for valuable consideration without notice of the marriage is not good to a bill for dower, it being a legal title; a plea of purchase without notice is only a bar to an equitable claim.

Williams v. Lambe, 3 Bro. C. Ca. 264.



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In order to give to a purchaser the protection of an outstanding term against dower, he must have procured an assignment, or at least a declaration of trust, or must have got possession of the deed creating the term.

*Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246.

If lands are conveyed to such uses as A shall appoint, and in default of and subject to appointment to the use of A in fee, and A makes an appointment in favour of another, being at the time of the appointment married, A's wife is not entitled to dower out of these lands, for by the appointment her dower is defeated.

*Ray v. Sung*, 5 Barn. & A. 561.

If an estate is devised to A and his heirs forever, and if A should have no issue, then after his decease to the heir at law, subject to such legacies as A may leave to the younger branches of the family, and A becomes seised under the will and marries and dies without issue, his wife is entitled to dower out of the estate.

*Moody v. King*, 2 Bing. 447; and see *Buckworth v. Thirkell*, 3 Bos. & Pull. 659.

In ejectment the case was, that a man devised his land to his wife till his daughter M should arrive at the age of 19 years, and after to M in tail, remainder over in fee, and devise farther that M should pay after her age of 19 years, to his wife 12*l.* *per annum* in recompense of her dower; and if she failed in payment, that then his wife should have the land for her life; the wife, before the daughter came to the age of 19, brought a writ of dower, and recovered a third part, and after the daughter came to 19, and for non-payment of the 12*l.*, the mother entered; and the question was, whether her entry was lawful? It was argued that it was, and that by bringing her writ of dower she had not waived the benefit to have the lands by the devise, because then she had no title to it, but her title accrued after for non-payment of the 12*l.* But, it was adjudged, that she having recovered a third part in dower, she should not have the rent by the will; for it is against the intention of the will that she should have both, and the acceptance of one is a waiver of the other.

*Gosling v. Warburton*, Cro. Eliz. 138.

One seised of lands in fee held in socage, and of other lands in tail held *in capite*, devises by will in writing the third part of all his lands to his wife in recompense of her dower, and dies; she enters into the third part of the fee simple lands without bringing her writ of dower; and held, that she was barred from claiming any more.

*Dyer*, 220; 4 Co. 4.

A man marries an orphan of London, who had a great portion in the orphan's court there; the husband dies before taking it out, but makes his will, and devises this money to his wife, provided that she should not claim her dower; and yet after his death she brought her writ of dower; and thereupon a bill was brought in Chancery to compel her to release her dower, or renounce the devise, and for an injunction in the mean time; but to no effect, the money belonging to her in her own right, by the custom, for want of the husband's altering the property thereof: and though he had, yet it was admitted it would have been no bar of dower, being totally collateral thereto, though it should seem she would in such case have (a) forfeited the money by suing for dower.

*Phœasant's case*, 2 Ventr. 340; Chan. Ca. 181, S. C. (a) If lands, money, goods, &c., are devised to a woman, without saying in lieu or satisfaction of dower, &c., the

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wife shall have both, because a devise implies a consideration; *β* *Morgan v. Edwards*, 1 *Dow. & Clark*, 104; *Smith v. Kniskern*, 4 *Johns. Ch.* 9; *Adsit v. Adsit*, 2 *Johns. Ch.* 448; *Wood v. Lee*, 5 *Monro*, 58; *Bailey v. Duncan's Rep's*, 4 *Monro*, 265; *β* but, if it be said in lieu or recompense of dower, then the wife cannot have both, but may waive which she pleases; and this has been often adjudged in Chancery. *Axtel v. Axtel*, 2 *Chan. Ca.* 24; *Lawrence v. Lawrence*, 2 *Vern.* 365; 1 *Eq. Ca. Abr.* 218, *S. C.*; 2 *Freem. Rep.* 234, *S. C.*; 1 *Br. P. C.* 591, *S. C.*; *Lemon v. Lemon*, *Vin. Abr.* tit. *Devise*, (*T. c.*) pl. 45; *Hitchin v. Hitchin*, *Pr. Ch.* 133; *Galton v. Hancock*, 2 *Atk.* 427; *Tinney v. Tinney*, 3 *Atk.* 8; *Inledon v. Northcote*, *Ibid.* 436; *Ayres v. Willis*, 1 *Ves.* 230; *Charles v. Andrews*, 9 *Mod.* 152; *Broughton v. Errington*, 7 *Br. P. C.* 12; *β* *Bailey v. Duncan's Rep's*, 4 *Monro*, 265; *Herbert v. Wren*, 7 *Cranch*, 370; *Blunt v. Gee*, 5 *Call*, 481; *Roberts v. Smith*, 1 *Sim. & Stu.* 513; *Dickson v. Robinson*, *Jacob*, 503; *Roadley v. Dixon*, 3 *Russ.* 192. *β* [However, notwithstanding these cases, devises have been frequently deemed a satisfaction of dower, where the will has been silent, on account of strong and special circumstances; as, where allowing the wife to take a double provision would be inconsistent with the disposition of the will. *Arnold v. Kempstead*, *Amb.* 466, and 1 *Br. Ch. Rep.* 292; *Villareal v. Lord Galway*, *Amb.* 682, and 1 *Br. Ch. Rep. ubi sup.*; *Jones v. Collier*, *Amb.* 730; *Wake v. Wake*, 3 *Br. Ch. Rep.* 255; *Boynton v. Boynton*, 1 *Br. Ch. Rep.* 445. In such case the widow must make her election. But she shall not be put to this election, unless there be a declaration plain, or a clear introvertible result from the will that the testator meant that she should not take both. *Foster v. Cooke*, 3 *Br. Ch. Rep.* 347; *French v. Davies*, 2 *Ves. jun.* 572. Nor shall she in any case be obliged to make her election till the account be taken, and it appear out of what estates she is dowable. *β* *Hall v. Hall*, 2 *McCord's Ch.* 280; *β* *Boynton v. Boynton, ubi sup.*; nor shall she be precluded from making it by having accepted an annuity for three years under the will, she during that time having claimed both her dower and the annuity. *Wake v. Wake, ubi sup.*] || The law upon this point is so clearly stated by Lord Redesdale in giving judgment in *Birmingham v. Kirwan*, that I shall extract the passage from the report of that case:—The principle, that the wife cannot have both dower and what is given in lieu of dower, is acknowledged, both in law and in equity, and the only question in these cases is whether the provision alleged to have been given in satisfaction of dower, was so given, or not. If the provision results from contract, the question will be simply, whether that was part of the contract. But, if the provision be voluntary, a pure gift, the intention must either be expressed in the form of the gift, or must be inferred from the terms of it. It is, however, to be collected from all the cases, that as the right to dower is in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated, either by express words, or by clear and manifest implication. If there be any thing ambiguous or doubtful, if the court cannot say, that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported; and to make a case of election, that is necessary, for a gift is to be taken as pure, until a condition appear. This would seem to be the ground of all the decisions. *Hitchin v. Hitchin, (ubi sup.)* proceeds clearly on this ground, and all the cases seem to have followed it; and the only question made in all is, whether an intention not expressed by apt words could be collected from the terms of the instrument. Cases of this description can be used only to assist the judgment of the court in deciding what may be deemed sufficient manifestation of intention; and the result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds, &c. That is the ground on which Lord Camden decided the case of *Villareal v. Lord Galway, Amb.* 682; 1 *Br. Ch. Rep.* 292, notes, *S. C.*; the claim of the annuity was considered as utterly inconsistent with the claim of dower; the directions in the will with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child, were inconsistent with the setting out a third part of the estate by metes and bounds; and therefore his lordship thought the implication manifest, that the testator did intend the annuity as a provision in lieu of dower. *Per* Lord Redesdale, in *Birmingham v. Kirwan*, 2 *Sch. and Lefr.* 452. See also *Pitt v. Snowden*, before Lord Hardwicke, 1 *Br. Ch. Rep.* 292; *Pearson v. Pearson, Id. Ibid.*; *Arnold v. Kempstead, Amb.* 466, and 1 *Br. Ch. Rep.* 292; *Jones v. Collier, Amb.* 730; *Boynton v. Boynton*, 1 *Br. Ch. Rep.* 445; *Wake v. Wake*, 3 *Br. Ch. Rep.* 255; *Foster v. Cooke, Ibid.* 347; *Middleton v. Cater*, 4 *Br. Ch. Rep.* 409; *Estcourt v. Estcourt*, 1 *Cox's Rep.* 20; *Thompson v. Nelson, Ibid.* 447; *Strahan v. Sutton*, 3 *Ves.* 249; *Couch v. Stratton*, 4 *Ves.* 391; *Greatorex v. Cary*, 6 *Ves.* 615; *Chalmers v. Storil*, 2 *Ves. and Beam.* 222;

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Walker v. Walker, 1 Ves. 54; Warde v. Warde, Ambl. 299; Garthshore v. Chalie, 10 Ves. 20; Birmingham v. Kirwan, 2 Sch. and Lefr. 444; Lord Dorchester v. Earl of Effingham, Coop. 319. It seems to be now settled, after a very considerable difference of opinion, that a gift of a rent-charge to a wife out of the very estate in which she claims dower, will not let in the presumption that the husband meant to exclude her from taking her dower; Pearson v. Pearson, *ubi supra*; Foster v. Cooke, *ubi supra*; Strahan v. Sutton, *ubi supra*; Greateux v. Cary, *ubi supra*; nor will the gift of an annuity out of a fund composed of the produce to arise by sale of the real and personal estates mixed together, have that effect. French v. Davies, 2 Ves. jun. 572.]]

A woman had title to dower of lands, whereof one is tenant for life, remainder to another in fee; the woman releases to the remainderman all her right of dower: this is a good bar in dower brought against the tenant for life, though she had no present cause of action against him in the remainder, till after the death of the tenant for life. So, of a release to tenant for life, he in the reversion or remainder shall take advantage thereof, because her dower accrues not only out of the estate for life, but also out of the reversion or remainder, and both as to her make but one estate; so that if she discharge either, she discharges the whole.

1 Co. 112 b; Co. Litt. 265; 8 Co. 151, Edward Altham's case.

In dower the tenant pleads a release from the demandant to such a one tenant in *possessione tenementor. predict. existen.*, and because not said that he was *tenens liberi tenementi*, it was held no plea; and adjudged for the demandant; for a release of dower to tenant for years, or at will, can be no bar of dower, because she cannot demand it against them.

Cro. Ja. 151.

If a woman pretends herself *ensient* by her husband, when in truth she is not, by which the heir is disturbed of his inheritance; she shall lose her dower if she acknowledge it before the justices.

2 Inst. 436. But this case may admit of so many distinctions, that it is hard to make law of it, as it is put, and harder yet, that it should be a bar of her just right. And see the writ *de ventre inspiciendo*.

By the custom of some places the wife shall be barred of her dower, if she receives part of the money for which her husband sold the land, whereof she was otherwise dowable. So, by the custom of some places, if a widow marries, she shall have no dower of her second husband's lands.

Davies, 30 b; Brook, 53, tit. *Customs*.

As to elopement, this was no bar of dower at the common law, (a) though a divorce were sued and obtained for the adultery; but now by the (b) statute of W. 2, c. 34, it is expressly provided that in such case the wife shall lose her dower; and though she does not go away *sponste*, but is taken against her will, yet, if after she consents and remains with the adulterer, she shall lose her dower; for the remaining with him without reconciliation is the bar of dower, not the manner of going away.

2 Inst. 435; Co. Litt. 32; F. N. B. 150; Ro. Abr. 680. (a) [Nor is a jointure now forfeitable by elopement or adultery. Sidney v. Sidney, 3 P. Wms. 268. Neither will the circumstance of a wife's living separate from her husband in adultery prevent a court of equity from decreeing a specific execution of articles in her favour. Blount v. Winter, in Canc. July 19, 1781,] || cited in Mr. Cox's note, 3 P. Wms. 277. Where a bill was filed by a married woman, claiming under a bond given by her husband to a trustee for her separate maintenance, and admitted to have been destroyed by the husband and trustee, by reason of subsequent acts of adultery, the bill was retained, with liberty to the widow to bring an action on the bond. Seagrave v. Seagrave, 13 Ves. 439.]] (b) The words of the statute are, *si uxor sponste relinqueret virum suum, et abierit et moretur cum adultero suo, amittit in perpetuum actionem petendi dorem suam, quæ ei competere posset de tenementis viri sui, si super hoc convincatur, nisi vir suus sponste et absq. coercionem ecclesiæ*

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*eam reconciliat, et secum cohabitare permittat, in quo casu restitatur ei actio.* Vide Dyer, 107, a precedent of such elopement pleaded, and issue taken upon the reconciliation of the husband, and there held, that the defendant cannot give in evidence any other elopement but that pleaded. ¶ See Stegall et al. v. Stegall's Administrators et al., 2 Brock. 256; Cochrane v. Libby, 6 Shepl. 39.g

If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but, if after such ravishment she consent to remain with him, she shall lose it. So, if she voluntarily go away from her husband, though she remain all her lifetime with the adulterer against her will, or if she remain not with him, but he turn her away, yet shall she lose her dower; but, if she be reconciled as the statute ordains, then she shall be endowed, though the husband aliened\* the land in the mean time.

Perk. 354; Brook, 12, *cont.*; Ro. Abr. 680; 2 Inst. 136; Co. Litt. 32; 13 Co. 23. If she elope, and live in adultery on any other the manors or lands of her husband, she shall lose her dower. 2 Inst. 436. But vide Perk. 355; F. N. B. 150; Ro. Abr. 680, *cont.* For the husband is to take care that none such live there. If the husband be reconciled by church censures, yet she shall lose her dower. Ro. Abr. 680.—\*Co. Litt. does not warrant this part of the position.

If a man grants his wife with her goods to another, and she lives with the grantee all the lifetime of the husband, yet she shall lose her dower, by reason of living with him in adultery. And where such a grant was pleaded, it was holden, 1st, That the grant was void. 2dly, That it did not amount to a license; or if it did, that it was void. 3dly, That after the elopement there shall be no averment admitted *quod non fuit adulterium*, though the grantee and the woman married after the husband's death. And though in this case they brought sentence of purgation of the adultery from the spiritual court, yet it was not allowed against such presumption.

Dyer, 106, in margine; 2 Inst. 435; Ro. Abr. 680.

If the husband's relations keep him from his wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all marriages and interest which she can have in him as her husband, and also persuade her to marry again, which she does with one who has notice that her first husband is alive, but she herself has no notice of it; though she lives in adultery with this man, and though her husband be not out the realm, nor beyond the seas, so that she ought to have taken notice of his being alive, yet because *non reliquit virum sponte*, as the statute says, but by persuasion of his friends, not knowing herself but that he was dead, this is no such elopement as will bar her of her dower.

Green v. Harvey, Ro. Abr. 680.

It is a good plea in bar of dower, that the demandant detains from the heirs such charters, showing them in certainty, unless they are in a bag sealed, or box locked; and then it is sufficient to say that she detains from him such bag or box of charters. But if the bag or box be open, then the defendant must show the charter in certain, and after such plea he must add, that if she will deliver them to him, he is, and always hath been, ready to render her dower. Upon this, if she delivers them to him, she shall have judgment for her dower presently; but, if she deny such detainer, and it be found against her, she shall be barred forever. And it is to be observed, 1st, That these charters ought to concern the land, or the reversion of the land whereof dower is demanded. 2dly, That such detainer is no bar of dower for more lands than the charters concern. 3dly, That none can plead this plea but the heir, and not a stranger who is tenant of the land, though he hath the charters conveyed to him.

9 Co. 17, 18; Plow. 85; Perk. 356, 360; 5 Co. 75; Ro. Abr. 679; Brook, 1, 4, 39,

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41, 47, 48, 53, 57, 67; Hob. 39, 113, 199; Bendl. pl. 215; Dyer, 37, pl. 42, 230, pl. 52. The reason why such detinue of charters is a good plea for the heir, seems to be, because the inheritance by law is cast upon him immediately after his ancestor's death, without any act of his concurring; and therefore he cannot provide against the injury done him by any precaution or covenant whatsoever: but a stranger, who comes to the land by conveyance, and his own act, ought to take care to have all the deeds and writings necessary for the defence of his title delivered to him at the same time, or to secure himself by proper covenants; and if he has not so done, it is his own folly; and he shall take no advantage thereof by pleading it in bar of the demandant's right, but must pursue his remedy by an action of detinue, &c. In what cases the heir himself shall be considered as a stranger, and cannot plead detinue of charters, vide 9 Co. 18; Perk. 258; Dyer, 230.

If two coparceners are of land, and after partition made between them the mother brings dower against one of them, she [the daughter] may well plead detinue of charters, because the charters concern her inheritance, though they do also concern her sister, who both make but one heir

Perk. 359.

If the daughter enter into the land after her father's death, who left his wife *ensient*, and the wife bring dower against the daughter as heir, she cannot plead detinue of charters, because it may be that the wife is *ensient* with a son, who will be heir, and therefore may justly detain the charters for him.

Perk. 360; Ro. Abr. 679; Brook, 8.

Detinue of a transcript of a fine is not a sufficient cause to detain dower, because another transcript may be had in the treasury.

Perk. 360; Ro. Abr. 679, *cont.*  $\beta$  A widow who claims dower is not obliged to show the deeds by which the seisin of the husband is established, as she is not entitled to the possession of the title deeds. *Smith v. Paysenger*, 2 Rep. Con. Ct. 62. $\gamma$

Detinue of charters is no good plea after imparlance: resolved upon a demurrer to such plea in the court of Durham, and confirmed on a writ of error in B. R.

*Burdon v. Burdon*, Salk. 252; Comb. 183, S. C.

The guardian in chivalry may plead detinue of the heir, because the wardship of the heir belongs to him: but he cannot plead detinue of charters, because they belong to the heir for defence of his inheritance. And the reason why he is allowed to plead detinue of the heir in bar of dower seems, because the writ of dower lies only against him during the minority of the heir; and since the demandant does wrong in detaining from him the wardship, it is but reasonable she should be delayed of her right against him, till she restores it; and therefore he concludes his plea, that if she will deliver to him the ward, he hath been and still is ready to render her dower. So, if the wife takes away the ward, and delivers him to another, so that the guardian cannot have him, this is a good cause to bar her of her dower. So, if the guardian comes in by voucher, he may plead the same plea. And this is a good plea in bar of dower *ad ostium ecclesiae*, or *ex assensu patris*; if the wife does not enter, but brings her writ, claiming it as dower, whereof she was *nominatim dotata* by her husband. And in these cases if she cannot render the ward unmarried, she shall lose her dower, because she hath thereby deprived the guardian of what was most valuable, viz., the marriage of his ward.

Dyer, 230, pl. 52; Perk. 360, 363; Ro. Abr. 679; Brook, 47, 67; 9 Co. 18, 19; 10 Co. 94; Co. Litt. 39 a.

If a woman, as mother to the heir, brings him up, and one claims the wardship of him as guardian in chivalry, and takes him from her; this is no

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cause for the rightful guardian to detain her dower, because she was not in fault.

Perk. 362.

If the mother takes the heir out of the possession of those who had the education of him, and they retake him, so that she cannot deliver him to the guardian, this is a good cause to detain her dower for the wrong done in the eloinment at first, when the wardship did not belong to her.

Perk. 363.

β The widow's right of dower cannot be barred by any equity against the husband.(a) Nor by any act of the husband, without the wife's consent or misconduct.(b)

(a) Winn v. Elliott's widow, Hard. 482. (b) Matthews v. Matthews, 1 Edw. 565; Rowe v. Hamilton, 3 Greenl. 63.

Where an infant joins with her husband in a deed of conveyance of real estate to trustees in payment of his debts, in ignorance of her legal rights, being informed at the time of acknowledging the deed that the same would not prejudice her rights, it is no bar to her dower in the lands so conveyed.

Sanford v. McLean, 3 Paige, 117.

At a sale made by order of court, widow asserted that the sale was made free from her dower, in consequence of which the price was increased; held, she was barred.

Smiley v. Wright, 2 Ham. 509. See 5 Monro, 518; 4 Paige, 94.

Adverse possession of the lands in which dower is claimed, for more than twenty years during the life of the husband, does not bar the widow's dower.

Durham v. Angier, 20 Maine, 242.

When the husband and wife convey the husband's lands, and the deed is acknowledged according to law, the wife's right of dower will be barred;(c) but when the acknowledgment is defective, her right remains.(d)

(c) Kirk v. Dean, 2 Binn. 341; McIntire v. Ward, 5 Binn. 301; Shaller v. Brand, 6 Binn. 435; Barnett v. Barnett, 15 S. & R. 71. (d) Watson v. Bailey, 1 Binn. 470; James v. Lyon, 3 Yeates, 471; Evans v. The Commonwealth, 4 S. & R. 273; Thompson v. Morrow, 5 S. & R. 289; Watson v. Mercer, 6 S. & R. 49; Fowler v. McClurg, 6 S. & R. 143; Jourdan v. Jourdan, 9 S. & R. 273.

But if the widow, whose acknowledgment was defective after the husband's death, join as one of the executors in a suit to recover the purchase-money of lands conveyed by such deed, she will be considered as having affirmed the deed.

Shaw v. Anderson, 7 S. & R. 43.

In Pennsylvania, dower is barred by a sale of the land under a *levari facias*, on a mortgage executed by the husband alone, after marriage.(e) But a fraudulent mortgage given to defeat the wife's dower, will not have that effect.(g)

(e) Scott v. Croisdale, 2 Dall. 127; S. C. 1 Yeates, 75. (g) Killenger v. Reidenhauer, 6 S. & R. 531.

When the deed contains no words of grant by the wife, it does not convey her estate in the land, nor her right of dower.

Powell v. The Monson, &c., Man. Co., 3 Mason, 347.

When the wife joins her husband in a lease for years, she is entitled to dower in the rent.

Herbert v. Wren, 7 Cranch, 370.

## (G) Of Jointures.

When a widow is beyond seas, and consequently within the saving clause of the act of limitations, the staleness of her claim cannot be set up as a bar to her dower.

*Larrowe v. Beam*, 1 Wilc. 498.*g*

(G) Of Jointures: And therein of their Origin; the Statute of 27 H. 8; and the Rules to be observed so as to make them an effectual Bar of Dower.

THE most usual method of barring dower at present is by jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife; but, in common acceptation, extends also to a sole estate limited to the wife only, and is, according to Lord Coke's description, "a competent livelihood of freehold for the wife of lands or tenements, to take effect presently in possession or profit after the death of the husband, for the life of the wife at least, if she herself be not the cause of the determination or forfeiture of it."

2 Bl. Comm. 137; *More v. Grice*, 1 Ch. Ca. 125; Co. Litt. 36 b; 4 Co. 2 b. *β* A legal jointure settled upon an infant before marriage, is a legal bar of her dower. *McCartee v. Teller*, 2 Paige, 511.*g*

A woman, as we have seen above, was not dowable of a use at common law; for the privilege of dower was only to freeholders' wives, and a use being no freehold, was not within that law, and the Chancery does not allow the feoffees to be seised to the use of any but of those that are particularly named in the trust. It became therefore a practice for the wife's friends, upon her marriage, to procure the husband to take a conveyance to himself and his wife of some specific property, as a provision for her after his death. And this was the origin of jointures.

*Gilb. Uses*, Sugden's edit. 48, 321.

But, though this method was an effectual security to the wife, yet was it highly injurious to the husband and his heirs; for the maxims of the common law, that no right could be barred before it accrued, and that a right or title to a freehold could not be barred by the acceptance of a collateral satisfaction, allowed her to claim both her dower and the benefit of any settlement that was made upon her. It was foreseen too, that the mischief would be increased by the operation of the statute of uses; for as every man who had the use of the land would by that statute become seised, a title of dower would accrue to his wife, and if she had already an estate in jointure, she would take a double provision. Clauses therefore were introduced into the statute itself to obviate this injustice, and thus jointures were made a legal satisfaction of dower.

By the 27 H. 8, c. 10, § 6, it is enacted, "That where divers persons have purchased, or have estates made and conveyed of and in divers lands, tenements, and hereditaments, unto them and their wives, and to the heirs of the husband, or to the husband and the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and the wife for term of their lives, or for term of the life of the said wife; or where any such estate or purchase of any lands, tenements, or hereditaments, hath been or hereafter shall be made to any husband and to his wife in manner and form above expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; that then in every such case every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue of the (a) lands, tenements, or

## (G) Of Jointures.

hereditaments, that at any time were her said husband's, by whom she had any such jointure, nor shall demand or claim her dower of and against them that have the lands and inheritances of her said husband; but if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower by writ of dower, after the due course and order of the common law of this realm; this act or any law or provision made to the contrary thereof notwithstanding."

(a) A jointure made of copyhold lands is no bar of dower within this statute. Cro. Car. 44; 4 Mod. 85.

§ 7. Provided, "That if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto."

§ 9. Provided also, "That if any wife have, or hereafter shall have, any manors, lands, tenements, or hereditaments unto her given or assured after marriage for term of her life or otherwise, in jointure, except the same assurance be to her made by act of parliament, and the said wife after that fortune to overlive the same her husband in whose time the said jointure was made or assured unto her; that then the same wife so overliving shall and may be at liberty after the death of her said husband to refuse to have and take the lands and tenements so to her given, appointed, or assured during the coverture, for term of her life or otherwise, in jointure, except the same assurance be to her made by act of parliament, as is aforesaid, and thereupon to have, ask, demand, and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments, as her husband was and stood seised of any estate of inheritance any time during the coverture; any thing," &c.

To make a good jointure within this statute, the six following things are to be regarded:

1. *The Estate must [and even be so limited that it must] take Effect immediately from the Death of the Husband.*

Therefore if an estate be made to [J S for life, remainder to] the husband for life, remainder to the wife for her jointure, this is no good jointure, for it is not within the words or intent of the statute; for the statute designed nothing as a satisfaction of dower, but that which came in the same place, and is of the same use to the wife; and though J S dies during the life of the husband, yet this is not good; for every interest not equivalent to dower, being not within the statute, is a void limitation to deprive the wife of her dower.

Sherwell's case, Hutton, 51; 4 Co. 3.

So, if an estate be made to the use of A for life, the remainder to the wife for life, this is not good, though A dies, living the husband.

4 Co. 2; Hob. 151.

So, if an estate be made to the husband for life, the remainder to J S for years, the remainder to the wife for her jointure, this is not good, though the years are expired in the lifetime of the husband; [and yet here the wife had the immediate freehold.]

Hut. 51; Winch. 33.



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But, if an estate be made to the husband for life, the remainder to J S for the life of the husband, to support contingent remainders, remainder to the wife for life, this is a good jointure, though not within the express words of the statute, for it is within the equity and design of it.

4 Co. 3.

If a man makes a feoffment to the use of himself for life, remainder to the son and his wife, and the heirs of the body of the son, this is no good jointure, though the wife hath an immediate freehold ; for to be within the cases of the statute whereby dower is barred, the wife must have (a) a sole property after the death of her husband.

Winch. 33. (a) That a jointure within this act by the first limitation must take effect for life in possession or profit presently after the death of the husband, laid down in Co. Litt. 36 b ; 4 Co. 2 a ; Cro. Ja. 489 ; Hut. 51 ; Winch. 33.

A feoffment in fee to the use of the feoffee for life, the remainder to the use of his second son for life, remainder to the use of such wife as the son shall take, remainder to the heirs of the son ; the father dies, the son marries, and dies : the wife is not by this settlement barred of her dower ; for this at the time of the creation was no certain provision for the wife's life, for the son might have married and died in the life of the father.

Sid. 3, 4, *per* Bridgman, Ch. J.

A jointure limited to take effect immediately on the death of the husband shall take effect as well on a civil as a natural death ; therefore, if the husband enters into religion, is banished, or abjures the realm, the wife shall have her jointure.

Co. Litt. 133 ; Moore, 851 ; 3 Bulst. 188 ; Ro. Rep. 400.

2. *It must be for Term of the Wife's Life or greater Estate.*

Therefore, if an estate be made to the wife for the life or lives of many others, this is no good jointure ; for if she survives such lives, as she may, then it would be no competent provision during her life, as every jointure within the statute ought to be.

Co. Litt. 36 b ; 4 Co. 2 b.

So, if a term for 100 years be limited to the wife, if she so long live, or absolutely, this is no good jointure ; for the statute provides, that when the wife hath an estate for life by settlement, she shall be barred of her dower at common law ; if she hath any greater estate, she hath an estate for her own life included in it ; but, if she hath any less estate, it is out of the statute.

Co. Litt. 36.

If an estate be limited to the wife upon condition, [she may waive it, but] her acceptance of such a conditional jointure makes it good ; for this estate supports the wife well enough, and it is in her power to continue it during her life ; therefore, an estate limited to the wife (b) *durante viduitate* is a good jointure ; for it cannot determine but by her act.

4 Co. 3 a ; Dyer, 228. (b) So, says my Lord Coke, if limited to her upon condition that she shall perform the will of her husband, &c., this is a good jointure within the words and intention of the act, for that her estate cannot determine without her default. 4 Co. 2 b, 3 a. But for this vide Moore, 31 ; Leon. 311 ; N. Bendl. pl. 247.

3. *That it must be made to herself, and not to others in Trust for her.*

This rule, my Lord Coke says, is so necessary to be observed, that though the wife should assent to a jointure made in trust for her, yet it would not

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be good; for the statute only bars the dower when by it the possession (which was formerly a use) is executed in her.

Co. Litt. 36 b; 1 Atk. 563. *β* A grant of a rent-charge out of particular lands to an infant for her jointure, in consideration of marriage, though the grantor be afterwards evicted, being, in equity, a general agreement to grant a rent-charge of that amount out of some lands, will bind the infant, if her parent or guardian assented to it. *Corbet v. Corbet*, 1 Sim. & Stu. 612, 621; S. C. 5 Russ. 254.*g*

But, as the intention of the statute was to secure the wife a competent provision, and also to exclude her from claiming dower, and likewise her settlement, it seems that a provision or settlement on the wife, though by way of trust, if in other respects it answers the intention of the statute, will be enforced in a court of equity.

|| Any provision, however precarious, whether secured out of realty or personalty, which an adult, previously to her marriage, accepts in lieu of dower, will be a good jointure in equity. *Jordan v. Savage*, *infra*. *Charles v. Andrews*, 9 Mod. 159; *Williams v. Chitty*, 3 Ves. 545; 4 Br. Ch. Rep. 513, S. C. And infants are within this statute, and may be barred of dower by a legal jointure; *Drury v. Drury*, 3 Br. P. C. 570; 4 Br. Ch. Rep. 506, S. C.; *Wilmot*, 177, S. C.; *β Shaw v. Boyd*, 5 S. & R. 311;*g* and by an equitable jointure also, provided it be not precarious, but be as certain a provision as is required to operate as a legal bar. *Caruthers v. Caruthers*, 4 Br. Ch. Rep. 500; *Smith v. Smith*, 5 Ves. 189. || *β Simpson v. Gutteridge*, 1 Madd. 609; *Corbet v. Corbet*, 1 S. & S. 612.*g*

4. *It must be in Satisfaction of her whole Dower.*

The reason hereof is, that if it be in satisfaction of part only of her dower, it is uncertain for what part it is in satisfaction, and therefore void in the whole: but, if it be expressed of what part, *quære* if good.

Co. Litt. 36 b.

If an estate be made to the wife in satisfaction of part of her dower before marriage, and after marriage other lands are conveyed, wherein it is said to be in full satisfaction of all her dower; if she waives the lands conveyed to her after marriage, she shall have dower of all the lands of her husband, notwithstanding the settlement is in satisfaction of part.

4 Co. 5.

5. *That it must be expressed to be in Satisfaction of her Dower; therein how far a collateral Recompense shall be a Bar of Dower or Jointure.*

My Lord Coke says, that it must be expressed or averred to be in satisfaction of her dower. But *quære*; for this does not seem requisite, either within the words or intention of the statute.

Co. Litt. 36 b.

Therefore when an assurance was made to a woman to the intent it should be for her jointure, but it was not so expressed in the deed, the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was not traversable.

Owen, 33, and there said, that it had been so likewise ruled between the Queen and Dame Beaumont. So, *Charles v. Andrews*, 9 Mod. 152.

J S, seised of copyhold lands belonging to the manor of Whitechurch, in which manor there is the following custom, viz., that the first wife of every tenant shall have her freebench in all the lands whereof her husband was ever seised during the coverture; the second wife a moiety, and the third a third part, so long as she keep her husband above ground; J S, in consideration of a marriage and marriage-portion, covenants with trustees, that within two months after the marriage he would settle all his lands to

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the following uses, viz., as to part of the lands to the use of himself and his wife for their lives, remainder to the first son, &c., in tail male; and as to the other moiety, to the use of himself for life, remainder to his first son, &c., with a proviso that the lands so settled on the wife should be in lieu of her customary estate; and one of the points in this case was, whether, this jointure not being made expressly in lieu of her dower, but only said so in the proviso, and she being an infant at the time of making the articles, and not a party to them, she should be excluded from claiming her freebench; and it was holden, that she should be obliged to abide by her jointure. And the case of *Vizet and Longdon* was cited, where a sum of money was settled upon a woman before marriage for her provision and maintenance; and the master of the rolls was of opinion she should have both that and her dower; but the chancellor reversed the decree, and confined her to her settlement.

• Mich. 6 G. 2, *Jordan v. Savage*.

|| But it hath been holden, that a jointure of land made by a freeman of London on his wife, said only to be in bar of her dower, but not expressed to be in bar of her customary part, will be no bar of the customary part.

*Babington v. Greenwood*, 1 P. Wms. 5301.||

[A, in consideration of a portion, articulated to settle a jointure, but died before the portion was paid, or the settlement was made. The widow took out administration, and so entitled herself to the portion; she then filed a bill against the heir of the husband to have her jointure settled. But the court said, the plaintiff shall not have the money as administratrix, and the jointure too, which was agreed to be made in consideration of the money, and in expectation that the husband should have received it; and therefore dismissed the bill with costs. But the reporter adds a *quære de hoc*; for she is entitled to these two demands in distinct capacities; and the debts may appear hereafter to exhaust the assets; and in case the husband had actually received the portion, and it had been in his possession, she would have had it as his administratrix.

*Meredith v. Jones*, 1 Vern. 463.]

|| And upon this maxim, *quando duo jura in uno conveniunt, æquum est ac si essent in diversis*, where A had covenanted that in consideration of 1200*l.* he and all claiming under him would convey to B or pay back the money; and a conveyance being accordingly made, B was evicted by a jointress, who claimed under a settlement made by her late husband, the former owner of the estate; and afterwards B made the jointress his executrix and died; it was adjudged, that she should have both the money and the land; the last as executrix of B, the first under her marriage-settlement.

*Jason v. Jarvis*, 1 Vern. 284.

Where by articles made on marriage of an infant in consideration of a sum of money then paid to the husband, a suitable jointure was to be settled on her when of age in bar of dower, and she was to convey her lands to be limited to the husband in fee, and the jointure was accordingly settled, and the wife when of age was party to the deed, but she never conveyed her own estate, nor was she ever required by the husband so to do, though her dower exceeded her jointure; and upon the death of her husband she entered on the settled land; it was decreed that she was entitled

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to keep her own estate and the jointure, not being bound either by the articles, or by her acceptance of the jointure.

Lucy v. Moore, Mosel. 59; 3 Br. P. C. 514.

Where A charged lands in D with a portion for a daughter by a first venter, and then married again, and settled part of those lands for the jointure of a second wife, who had no notice of the charge; and then believing, that the portion would take place of the jointure, devised other lands to the wife in lieu thereof; and the wife by combination with the heir refused to accept the devise; it was decreed that the daughter should hold such part of the lands devised as should be equal in value to the lands comprised in the settlement of the jointure, until her portion was raised.

Reeve v. Reeve, 1 Vern. 219; 2 Vent. 363, S. C. rather differently reported. Recognised by Lord Hardwicke in Lanoy v. Duke and Duchess of Athol, 2 Atk. 447.]]

6. *That it must not be made during the Coverture.*

|| Although it be said that the very words of the act require this, yet Lord Coke, whose authority is referred to, says, it may be made either before or after marriage. If it be before marriage, she is sole, and as such, under no man's power; if after marriage, she takes a jointure in satisfaction of dower, || she may waive it after her husband's death; but, if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she (a) agrees to it after she is at liberty, it is her own act, and she cannot avoid it.

Sugd. Gilb. Uses, 333; Co. Litt. 36; 4 Co. 3. (a) What shall be said an agreement or refusal, 3 Co. 26 a; 3 Leon. 272; And. 352; Poph. 88; Gouls. 4, 84, 85.

If a jointure be made to the wife before coverture, and the husband and wife alien by fine, the wife shall not afterwards be endowed of any lands of her husband's; for since she quitted her dower when she was at her own disposal, she can claim nothing but the jointure, and that she has passed away by the fine levied. But, if the jointure was made during the coverture, [otherwise than by act of parliament,] and then she relinquished it by fine, yet she shall have her dower of the other lands; for the acceptance of a jointure during the coverture is no bar of her dower, and her passing it by fine cannot be construed an acceptance of property in them, since that is capable of another construction, viz., to bar her of her dower in those lands.

Co. Litt. 36 b; Bulstr. 163.

The husband after marriage settled lands to the use of himself and wife in (b) tail, for her jointure, and during the coverture part of the lands were evicted, and the husband died, and the wife entered into the residue; and upon a reference out of the court of wards to the two chief justices, it was resolved, that she should have a recompense for the part evicted.

Moore, 717; 4 Br. Ch. Rep. 506, note. (b) But whether the part settled in recompense should be in tail, or for life only, *qu.*; and vide 4 Co. 3 b.

A seignory was granted to the husband and wife, and their heirs, the tenant attorns, the husband dies, and the seignory survives to the wife, and she brought her writ of dower, in bar of which the heir pleads acceptance of homage from the tenant; and this was holden a good bar; for though she might have disagreed to such estate made during the coverture, yet by the acceptance of homage she hath concluded herself; and this case differs from the assignment by the heir *in pais* and her acceptance; because if he gives her a wrong estate, and she accepts thereof, this is no bar of her

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rightful estate; but here she having two titles, either as a purchaser to have the whole, or as a wife to have the third part, her acceptance of the one is a waiver of the other, because she cannot have both out of the same land.

3 Leon. 272; 3 Co. 27.

If lands are given to the husband and wife, and the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband and his heirs *ab initio*, and so she shall have her dower thereof. But, if an estate be made to the husband and wife for the life of the husband, remainder to the right heirs of the husband, it hath been said that she cannot in this case disagree, because the estate upon the husband's death is determined and gone. [Yet it seemeth, saith Perkins, that she may disagree by bringing a writ of dower, notwithstanding that the estate were determined; for otherwise, by such means, the wife may be ousted of her dower in every purchase made by her husband; and yet during the marriage she is always by law under the government of the husband, in such manner and form as that she cannot give away any manner of profit arising out of the lands without the leave of her husband; and she cannot disagree to the same estate during the marriage.]

Perk. 352, 353; 3 Co. 27.

If an estate be made to the wife for her jointure during the coverture, the remainder to J S in fee, and the wife waive this jointure, J S shall have the remainder; for here was a particular estate at the time of creating the remainder, so that it had the circumstances of a remainder, being the residue of a particular estate then in being; and since the particular estate was defeasible by an act that could not hurt the remainder, the remainder upon such destruction of the particular estate comes in being.

Co. Litt. 29 b.

A man covenants to stand seised to the use of himself in tail, the remainder to his wife for life, the remainder to B in tail, and then he makes a feoffment in fee to the use of himself and his wife for their lives, as a jointure, the remainder to C, and dies without issue: the wife is remitted, for where a later and defeasible, and a former and indefeasible title concur in the same person, there must be a remitter.

Co. Litt. 348 a.

But in this case the wife hath two titles, both waivable by her; the first indefeasible by any third person, the latter defeasible by a third person; for upon her claiming by the second title she waives the first, and, consequently, the remainder in B commences, and he shall have his action; and therefore she must be in of her former title, to save the contention and trouble of the action.

Co. Litt. 348 a.

But, if an estate is made to the husband in tail, the remainder to the wife for life, the remainder to the right heirs of the husband, the husband afterwards makes a feoffment in fee to the use of the husband and wife for their lives, the remainder to the right heirs of the husband; the husband dies without issue; the wife may claim by which she pleases, and is not remitted *volens volens*, because here are not two titles, the one indefeasible and the other defeasible, by a third person, but both equally firm; for the right heir of the husband, upon the waiver of the first estate by the wife, can claim nothing in the land contrary to the feoffment of his ancestor; and therefore

(H) How far her own or Husband's Acts may defeat her, &c.

that estate which the wife claims is indefeasible, and no stranger is prejudiced by being put to his action.

Co. Litt. 357; Dyer, 351.

But, if she makes no election, she shall be supposed to be in of her elder estate, because every one is presumed to choose what is most for his benefit.

2 Ro. Abr. 422.

If the wife has an old right before the coverture and afterwards takes a jointure of the same lands, she shall be remitted.

Cro. Ja. 490.

An estate settled to the husband for life, remainder to the wife for a jointure, except such of the lands as the husband should devise; this exception is repugnant to the grant, because the settlement might be avoided by the husband devising the whole.

Hob. 72.

(H) How far her own or her Husband's Acts may defeat her of this Provision.

It has been already observed, that if a man make a jointure on his wife, either before or after marriage, and they both join in a (a) fine, that she is so far bound thereby, that if the jointure was made before marriage she is barred to claim dower in any other lands of the husband's: but, if the jointure was made during coverture, she may claim dower in the other lands.

Co. Litt. 26; Dyer, 358. (a) So, a recovery as well as a fine by a feme covert is sufficient to bar her, because the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 Co. 43; 2 Ro. Abr. 395.

But, if a wife joins with her husband in a bargain and sale of the lands by deed indented and enrolled, yet it shall not bind her; for a wife cannot be examined by any court without writ, and there is no writ allowed in this case.

2 Inst. 673; Hob. 225.

But, if a feme covert joins with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her; yet in this case she doth not absolutely depart with her estate for life, but there results a trust to the wife to (b) redeem, and to reinstate herself in her jointure.

2 Chan. Ca. 162. (b) And the money shall be paid out of the personal estate of the husband. Vern. 41, 191, 213; 2 Vern. 436.—So, if a jointure be made of lands which are in mortgage, the wife may redeem, and her executor shall hold over till repaid with interest. Chan. Ca. 271; 2 Vent. 343, S. P. decreed.

If tenant in tail of a trust makes a mortgage, or acknowledges a judgment or statute, and then levies a fine, and settles a jointure, the jointress shall hold it subject to the mortgage or judgment, in the same manner as if the mortgagor or consor had been tenant in tail of the legal estate, and, after the mortgage or judgment, had levied a fine, and made a jointure; because the subsequent declaration of the use of the fine is merely the act of the tenant in tail, and he cannot, by any act of his own, make a subsequent conveyance take place of a precedent; and the rather, because the feme claims under that fee which tenant in tail got by the fine, and that fee was subject to all the charges he had laid upon it.

Chan. Ca. 119, 120.

(I) How far a Jointress is entitled to the Aid and Assistance of a Court of Equity.

If a man before marriage articles to settle a jointure on his intended wife, and the marriage is consummated, and the husband dies before any settlement made, an execution of the articles will be decreed in (a) equity.

2 Vent. 343; 2 P.Wms. 222; 1 Str. 596; 9 Mod. 12. (a) That a jointress in equity is considered as a purchaser for valuable consideration, who may set aside a prior voluntary conveyance as fraudulent against her. Chan. Ca. 100.—But, where by a marriage agreement the son's intended wife was to have more than would have been left for the father, (though indebted,) his wife and two daughters unpreferred, the Court of Chancery would not decree it, principally by reason of the extremity of it, but left the party to her remedy by law. 2 Chan. Ca. 17.

So, where A gave a voluntary bond after marriage to make a jointure to his wife, and he made a jointure accordingly, and then the wife delivered up the bond, and the jointure was evicted; the court held, that it should be made good out of the personal estate, especially as there were no creditors affected by it; for the delivery of the bond by a feme covert could no way bind her.

Vern. 427; Beard and Nuthal.

So, if a jointress brings her bill to have an account of the real and personal estate of her late husband, and to have satisfaction thereout, for a defect of value of her jointure lands, which he had covenanted to be and to (b) continue of such value, and the defendant insists that this is a covenant which (c) sounds only in damages, and properly determinable at law, though it be admitted that a court of equity cannot regularly assess damages, yet in this case a master in Chancery may properly inquire into the value of the defect of the lands, and report it to the court, who may decree such defect to be made good, or send it to be tried at law upon a *quantum dammificat*.

Abr. Eq. 18. (b) If a man covenants to settle lands of such a value as a jointure, and this covenant is omitted in the settlement, yet it subsists in equity; but the value of the lands is not to be estimated according to the present value, but as they were at the time of the jointure settled, unless the covenant be so. Vern. 217, Speake v. Speake. (c) An action on the case brought at law for not making a jointure. 2 Ro. Rep. 488.

If there be a jointress, and a covenant that her jointure shall be of such yearly value, and it fall short, though her estate be not without impeachment of waste, yet she may commit waste so far as to make up the defect of the jointure, and equity will not (d) prohibit.

Abr. Eq. 221, 222, Carew and Carew. (d) But on a motion to restrain a jointress tenant in tail after possibility, &c., from committing waste; the court held, that she being a jointress within the 11 H. 7, c. 20, ought to be restrained, being part of the inheritance which by the statute she is restrained from aliening, and therefore granted an injunction against wilful waste. Abr. Eq. 221, Cook and Winford. But see Williams v. Williams, 15 Ves. 419; 12 East, 209.

J S made a settlement on his eldest son for life, with remainder to his first and other sons in tail, remainder over, with power to his son to appoint any of the lands not exceeding 100*l. per annum* to any wife he should afterwards marry, for a jointure, (the father being under an apprehension that he was then married to a woman whom the father disliked, and had no intention his son should provide for;) the father died, and the son married that very woman, (though there was strong presumptive proof that he was married to her before,) and after marriage appointed certain lands to trustees in trust for her, for a jointure, and covenanted, that if they were not of 100*l. per annum* value, that upon request made to him any time during his life, he would make them up so much out of other lands in his power. He lived several years, and no complaint was made that the lands were not of that

(K) Where the Wife shall hold her Dower, &c.

value, nor request to make it up, and died; upon issue on a bill brought by the widow to have the jointure made up 100*l.*, my lord keeper said, that a provision for the wife or children was not to be considered as a voluntary covenant, and therefore decreed the deficiency to be made up, notwithstanding the circumstances of the case, and her neglect in not requesting it during coverture; for the laches of a feme covert cannot be imputed to her.

Abr. Eq. 232; Hil. 1701, Fothergill and Fothergill.

|| Where tenant for life, with power to make a jointure of 1000*l.* *per annum*, gave a particular of lands mentioned to be 1000*l.* *per annum*, which were settled for the jointure, but which proved to be only 600*l.* *per annum*; it was decreed, that the jointure should be made up 1000*l.* *per annum* against the issue in tail, though neither privy to the marriage, nor guilty of any fraud.

Lady Clifford v. Lord Burlington, 2 Vern. 379.||

If a bill is brought by an heir at law or any other person against a jointress, whereby the party would avoid the jointure, under pretence that his ancestor was only tenant for life, &c., and he seeks for a discovery of deeds and writings, whereby he would avoid the title of the jointress, he shall never have such a discovery, unless he by his bill submits to confirm her title, and then he shall.

Towers v. Davys, Vern. 479. || So Petre v. Petre, 3 Atk. 511; Senhouse v. Earl, 2 Ves. 450. She is not obliged to discover upon the offer to confirm, but may wait till the act done. Leach v. Trollop, Ibid. 662. Without an offer to confirm, she may plead the settlement in bar; but the plea must set it forth with sufficient certainty. Chamberlain v. Knapp, 1 Atk. 52.||

So, if a jointress prays a discovery against an heir at law of deeds and writings, if the heir submits by answer to confirm the jointress's title, she shall have no such discovery.

(K) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her.

THE wife shall hold her dower discharged of judgments, recognisances, statutes, mortgages,\* or any other encumbrances made by the husband after marriage, because after his death her title, which is now consummate, has relation to the marriage and seisin of her husband, which were before the encumbrances. But, if she joins in a grant of a rent by fine out of such land, or makes a lease for years rendering rent by fine to the husband and his heirs, she shall hold her dower subject to such rent or term, because she was examined upon the fine, and by such means might bind her own inheritance.

4 Co. 64, 66; 10 Co. 49. \*The widow of a mortgagor not barred of her dower, if she did not join in the mortgage. 4 W. & M. c. 16, § 5. β See 2 Dall. 127; 4 Dall. 301. And when she joins in the mortgage she is entitled to dower in the equity of redemption. Swaine v. Perine, 5 Johns. Ch. 492. See Russel v. Austin, 1 Paige, 192. γ

If the husband die indebted to the crown, yet his wife's dower is by law privileged from any distress; and if she be distrained, she may have a writ to the sheriff, commanding him not to distress her, or to redeliver the distress, if any be taken, unless such debts were contracted before her title of dower accrued, for then it will be liable thereto. And the reason she shall not be distrained for debts to the crown, contracted after the marriage, seems to be, her prior title by relation.

Co. Litt. 31 a; F. N. B. 150, *per tout*.

If the husband seised of three manors grant a rent-charge out of all, and



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die, and the wife have one manor assigned to her by the heir in lieu of dower of all the three manors, she shall hold it charged for a third part of the rent, because this endowment was against common right, by which she ought to have had the third part of each manor. But, if she had recovered her dower, and such assignment had been made by the sheriff, she should have held it discharged, because she pursued the proper means to obtain it clear, and then it is not reasonable the sheriff's act in mis-executing the judgment of the court should prejudice her, especially when the heir is not more hurt by the whole charge falling upon the two manors than he would if it had fallen upon two parts of all the three manors.

Perk. 330, 332; Ro. Abr. 683, 684.

A wife may demand dower of a rent-charge granted to her husband and his heirs, without showing the deed, because the deed belongs not to her, but her estate is created by law.

Plow. 41 a, 81 b.

Tenant in dower is allowed by the statute of Merton, c. 2, to devise the corn growing upon the land at the time of her death, of which before that statute it was doubted if she might: and the word *blada* there extends likewise to hemp, flax, and other things, which grow by the industry of man, but not to grass, trees, &c., which come *suapte natura*.

2 Inst. 81; Keilw. 125.

In dower against an infant who makes default upon the *grand cape* returned; it was held *per tot. Cur.* that judgment shall be given upon the default: for the infant shall not have his age in dower, which being but for life, the widow may be totally defeated of it by his frequent defaults; though some of the books say, that if judgment be given upon the *grand cape* before appearance, this is error: *sectis*, if he appears by guardian, and after loseth by default; for then if any default be in the guardian, he shall recover against him in a writ of *disceit*: and other books doubt if the infant shall not be allowed his age in dower; but the contrary seems the more reasonable opinion.

Cro. Ja. 111, 392; Cro. Eliz. 309, 331, 557, 567, 638; Moore, 342, 847, 848; 2 Brownl. 118; 2 Leon. 59, 189.

In error to reverse a fine levied by the plaintiff and her husband, the heir is summoned as terretenant, and appears, and pleads that he is within age, and prays that the parol may demur; plaintiff counterpleads the age, showing that she was entitled to have dower before the fine levied, and now is barred of her dower by this fine, which is erroneous, and sets forth the errors, and seeks to be restored to her writ of dower; but upon demurrer and solemn argument it was held in this case that the parol should demur.

Herbert v. Binion, Cro. Ja. 392.

(L) To whom the Tenant in Dower shall be attendant, and by what Services.

AND here the rule is, that the dowress is to be attendant to the reversion dependent upon her estate, for the services which were paid during the life of her husband, unless the original feudal contract increases such feudal services, and then she shall be an attendant for the services increased.

Perk. 424, 425; 9 Co. 135. But though in most cases she shall be attendant to him in the reversion by the third part of the services, by which he holds over, yet may she be attendant to others, and by other services; and therefore if lord, mesne, and tenant are by knight's service, and 3s. rent, and the tenant marries, and dies, his issue within age, and the mesne seises the ward of the body and land of the heir, then she shall be

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attendant to the mesne by 1s. rent; and if he dies during the minority of the heir, then she shall be attendant to his executors in the same manner till the full age of the heir, because till then the profits belong to the guardian and his executors in their own right; but for this vide Keilw. 124, 129; Ro. Abr. 685; Brook, 64.

If the heir grant the reversion of the tenancy in dower to a stranger, and the tenant in dower attorn, she shall be attendant to the grantee by her own agreement.

Perk. 427.

If one makes a gift in tail, rendering 20s. rent, and dies, and the donee marries and dies without issue, and his wife is endowed by the heir of the donor, she shall be attendant to him for a third part of the rent, though the estate tail and the rent are both determined; for her estate being a continuance of her husband's, and the donor thereby kept out of possession for a third part during her life; it is but reasonable she should pay her proportion of the rent reserved. So, though the lord had released to the tenant, who was donor, all his right to the tenancy, yet the wife of the donee should be attendant in the same manner, by reason of the express reservation; and she is a stranger to the release.

Co. Litt. 46 a, 241 a; Brook, 64; Perk. 431.

If tenant holds by fealty, and a horse of 40s. price, his wife, being endowed, shall be attendant to the heir by the third part of the 40s. only; but, if it was of a horse to be rendered yearly, she should render to the heir a horse every third year.

Perk. 434.

(M) Of the Proceedings and Damages in Dower *unde nihil habet*.

BEFORE the statute of Marlb. c. 12, in dower *unde nihil habet* there were days of common return, as in other real actions, which was mischievous to the wife, by reason of the long delay, she claiming but an estate for life; but this is now remedied by that act, and four days of return in the year are given at least, and that act extends likewise to the vouchee, but not to a writ of right of dower, nor to dower *ad ostium ecclesie*, nor *ex assensu patris*; but 32 H. 8, c. 21, extends to and gives the same return in every writ of dower.

2 Inst. 124.

In dower the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded, and the tenant at the day *in banco* informed the court that he was but tenant for life, and the reversion in one A, who at the day in banc ought to be received, and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance seems idle.

Brownl. 126.

In dower of lands in L, M, and N, the sheriff returns *plegi de proseq.* A, B, C, D, and the names of the summoners E, F, G, H, and that after the summons made, and 14 days and more before the return of it, at the most usual church-door of L, where part of the lands lay, such a Sunday after sermon ended, he publicly proclaimed all and singular the things contained in the writ, to be proclaimed according to the form of the statute in that case made, and endorses his name to the return; and exception was taken to this return, because proclamation was not made at all the church-doors: but *per Cur.*, proclamation at any of the church-doors is sufficient.

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But the return was held ill, because he says he had proclaimed all and singular the things in that writ contained, without saying what.

Allen v. Walter, Hob. 133. The proclamation by the 31 Eliz. c. 3, ought to be at the parish church-door, though it be in another county than where the land lies. Cro. Eliz. 472. Error of a judgment in dower, in that the proclamation is said to be at H. in the Spring, and it doth not appear that it is within the parish of W. H., where the demand is: but by Weston for the defendant, this is cause why no grand cape should issue, by 31 Eliz. c. 3, but it is no cause of error; and the judgment was affirmed nisi. Keb. 529. Upon a writ of summons in dower it was returned *ad ostium ecclesie proclamari feci juxta formam statuti secundum exigen. brevis*, and held good by two justices against one, though what the error was does not appear. Keb. 680. On a motion for a supersedeas, to stay proceedings on a grand cape in dower, *quia erronee emanavit*; 1st, because the return of the summons was not according to the statute of 31 Eliz. c. 3, for the statute is after summons. 2dly, The land lies in a vill called Heroick, and the return is of a proclamation of summons at the parish church of Halifax, and it does not appear that the lands lie within the parish. 3dly, The return is *proclamari feci secundum formam statuti*, and it is not returned to have been made upon the land; for all which causes it was held erroneous, and the grand cape was superseded. Furnis v. Waterhouse, 1 Mod. 197.

Error to reverse a judgment in dower at the grand sessions in Wales: it appeared by the record that the tenant appeared at the return of the summons, and day was given over, *et adtunc venit per attornat. et nihil dicit in barram*; whereupon *considerat. est quod tertia pars terrar. et tenement., capiatur in manus d'ni regis*; and upon day given *ad audient. judicium*, judgment was given *quod recuperet*, and error assigned that they ought not to have awarded a *petit cape*, because the defendant appeared, and then they ought to have given judgment upon the *nihil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default as the *grand cape* is before appearance to answer the default and demand. But it was held no error, being only an awarding of more process than needs be, and it was an advantage to the tenant by delaying the demandant; and *per* Twisden, if erroneous, they might now give judgment upon the *nihil dicit* in this court.

Williams v. Gwinn, 1 Vent. 60; 2 Saund. 46, S. C.; 2 Keb. 450, 551, 605, S. C.

Error of a judgment in dower in the court of Newcastle; because the proceeding was by plaint, and no special custom certified to maintain it; and it was held error, because pleas of frank tenement cannot be held without original writ, unless there be a special custom for it.

Lomax v. Armoror, Vent. 267; 2 Lev. 98, 123, S. C.; 3 Keb. 277, 326, 421, S. C.

In dower, if tenant makes default, by which *grand cape* issues, the demandant shall make her demand, for no certainty appears before the demand made. Brook, 96.

In dower, one appears upon the *grand cape*, who in truth was but lessee for years, and so might plead non-tenure; and if now he might wage his law of non-summons, and the writ be abated, was the question; because it was said, that by wager of his law he affirms himself to be tenant; but two justices only in court held, that he would be at no mischief, for being but lessee for years, if judgment and execution were against him, he might, notwithstanding, enter upon the demandant. Another matter was, that where the writ of dower was *de tertiâ parte rectoria de D.*, and the *grand cape* made upon it accordingly; yet the sheriff by colour thereof took the tithes severed from the two parts, and carried them away; and *per Cur.*, this is not such a seizure as is by the writ intended, for he ought only to have seized generally, but not to carry them away; and the court had a mind to have committed him for a misdemeanor.

Michell v. Hyde, Leon. 92.

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In dower, tenant demands the view ; demandant counterpleads the view, because her husband died seised, *et hoc parat. est verificare et petit judicium et dotem suam de tenement. prædict. sibi adjudicari* ; tenant *protestando*, that the husband did not die seised, demurs and shows for cause that the counterplea *male concludit*, for it ought to have been *et petit judicium et quod tenans de visu excludatur*, and the counterplea is but dilatory, and ought not to conclude peremptorily for final judgment ; and of this opinion was Levinz, but two other justices held it not ill. Also, the demand was of three mesuages, &c., where it ought to have been only of the third part of them ; and if this might be amended was doubted.

Whelpdale's case, 3 Lev. 169.

In dower, *unde nihil*, &c., tenant demands the view, demandant counterpleads it, because the husband *alienavit tenement. prædict.* to the tenant *et hoc*, &c., and it was demurred, because *alienavit* does not show what estate he aliened, for it may be a lease for years ; but *per Cur.*, alienation implies all the estate which he had, and the statute W. 2, 48, ousts the view, where the husband aliens to the tenant, or any of his ancestors ; and this is in the very words of the statute ; and a *respondeas ouster* awarded, but no notice taken whether the view was allowable in dower *unde nihil habet*.

Bernes et Ux. v. Rich, 3 Lev. 220. Note : in the dower the view is ousted by W. 2, c. 48, in these words, *In brevi de dote cum petatur dos de tenemento quod vir uxoris alienavit tenenti aut ejus antecessori, cum ignorare non debet tenens quale tenem. vir uxoris alienavit sibi vel antecessori suo, licet vir non obiit seisis, nihilominus tenenti de cætero non erit visus concedendus* ; and my Lord Coke in his exposition thereof says, it extends not to a writ of dower *unde nihil habet*, for thereon no view lay at the common law, because the demandant should not be delayed, having nothing to live on ; but it extended to other writs of dower, whether for dower at common law, *ad ostium ecclesie, ex assensu patris*, or by the custom ; and where the view has been granted, it is to be intended in those cases. Vide 2 Lev. 117 ; 3 Keb. 360 ; Dyer, 179 ; 2 Ro. Abr. 725 ; 2 Inst. 481.

At the common law, before the statute of W. 1, c. 49, if a woman had accepted any part of her dower, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of dower ; for if she brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant in such a town or county. This being a great mischief to the woman, is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her dower of any other person before the writ purchased ; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her dower.

2 Inst. 261.

In dower the tenant pleads, that after marriage the husband had settled other lands on the demandant for life, for her jointure, and that she after his death agreed thereto, and entered accordingly ; the demandant replies, that it was a voluntary settlement of her husband, and traverses that it was for her jointure ; and issue thereupon ; and at the *nisi prius* the tenant made default, and a *petit cape* awarded, and returned, and judgment, that the demandant have seisin ; and the demandant suggests that her husband died seised, and prays a writ to inquire of the damages, returnable such a day ; the sheriff returns that he hath delivered seisin of the lands particularly, and also an inquisition which finds that the lands are worth 114*l.* 11*s.* *per annum*, and that her husband had been dead six years and three-quarters, and that she had sustained damages *occasione detentionis dotis ultra valorem*

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*præd. et ultra misas et custag. sua 195l. et pro misis et custag. 20s.*; and upon this the demandant *gratis* releases the 195l. and demands judgment only for the 20s. and judgment is given that the demandant recover *tam valorem tertiæ partis prædict.* from the death of her husband, which came to 257l. *quam* the 20s. and 11l. *de incremento, in toto* 269l. and the tenant brings error, for that the damages being released by the demandant, there ought to have been no judgment against him for the value of the land. But the whole court resolved, that the release was only of the damages sustained *occasione detentionis dotis*, and not of the mesne profits of the lands, for they are two distinct things, as appears by Co. Litt. 33 a; Rast. Entr. 237, where the writ is to inquire not only of the value of the land, but also of the damages *ratione detentionis*; and the judgment is always entered accordingly, and a *fiery facias* lies for the damages; and therefore the judgment was affirmed.

Harvey v. Harvey, Sir T. Raym. 366. Note: The mesne values and damages are to be recovered against the tenant in a writ of dower, and so it appears in the judgment of this case, and in Co. Litt. 33 a, and Bendl. 155.

As to damages in dower, they are given by the statute of Merton, c. 1, but that statute extends only to the possessory action of dower *unde nihil habet*, and not to the writ of right of dower; because they are intended to be given for the detention of the possession; and on writs of right, where the right itself is questionable, no damages are given, because no wrong done till the right be determined. Also, that statute extends only to lands whereof the husband died seised; and therefore judgment for the damages was reversed, because the jury did not find that the husband died seised; for otherwise she shall have no damages: as, if the husband aliens and takes back an estate for life, the wife shall recover dower, but no damages; because this dying seised was only of an estate of freehold; but, if he makes a lease for years only, rendering rent, she shall recover a third part of the reversion with a third part of the rent and damages, because there he died seised as the statute speaks.

Co. Litt. 32; Dyer, 284, pl. 33; Yelv. 112; Dr. and Stud. lib. 2, c. 13, f. 166; 2 Inst. 80. The words of this statute are, *Quod viduæ quæ post mortem virorum suorum expelluntur de dotibus suis, et dotes suas vel quarentenam suam habere non possunt sine placito, quod quicumque deforcianerit eis dotes suas vel quarentenam suam de tenementis de quibus viri sui obierint scisiti, et ipsæ viduæ postea per placitum recuperaverint, ipsi qui de injusto deforciamiento convicti fuerint, reddant eisdem viduis damna sua, scilicet valorem totius dotis eis contingentis a tempore mortis virorum suorum usque ad diem quo ipsæ viduæ per judicium curiæ seisinam suam inde recuperaverint.*

Damages must be after demand of dower, (a) for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which cannot divide without the concurrence of the wife. But a demand *in pais* before good testimony is sufficient; and if the heir appear the first day on summons, and plead that he hath been always ready, and still is, to render her dower; she may plead such request; and issue may be taken upon it. But the feoffee of the heir cannot plead *tout temp prist*, because he had not the land all the time since the death of the ancestor, and therefore she shall recover the mesne profits and damages against him; and if he hath not provided his indemnity and recompense against the heir, it is his own folly.

Co. Litt. 32. (a) [But the statute is express that the widow shall have her damages, viz., *valorem totius dotis ei contingentis a tempore mortis viri sui*; and in a modern case, which underwent a great deal of discussion, damages were awarded her from the death of her husband, though she had delayed bringing her writ of dower for above two years.

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Dobson v. Dobson, Ca. temp. Hardw. 19; 2 Barnard. K. B. 180, 207, 443, S. C. In that case, however, it is to be observed, the tenant did not plead *tout temps prist*. And though he plead such plea, yet the widow shall recover damages from the teste of the original to the execution of the writ of entry. Vide cases *supr.* and Bull. Ni. Pr. 117.] Note; the statute of Merton extends to copyholds, whereof the wife is dowable by custom. 4 Co. 30; Co. Litt. 33.

If the heir or feoffee assign dower, and the wife accept thereof, she loseth her damages, because, having the dower, which is the principal, she cannot sue for the damages, which are but consequential or accessory.

Co. Litt. 33 a.  $\beta$  When the dowress commences a suit at law, and dies before her right is established, her personal representatives have no remedy either for the mesne profits, or for costs. Johnson v. Thomas, 2 Paige, 377. See Whitehead v. Clynch's heirs, 1 Mur. 128. $\gamma$

In dower the tenant, as to part, pleads non-tenure, and to the residue, definue of charters, and issue taken upon both pleas, and both found against the tenant; and it was found further, that the husband died seised such a day and year, leaving issue a son, which son, together with the demandant, as his mother and guardian, took the profits for six years after the husband's death, and that such a time the son died without issue, and the land descended to the tenant as uncle and heir to him, and that he entered and took the profits till the purchase of the original writ; and the yearly value of the land was found, and damages were assessed for the detaining of dower and costs; and the plaintiff had judgment for the damages from the death of the husband without any defalcation. In this case my Lord Coke says there are many things observable, but the most material seems to be the recovery of damages from the husband's death, though there was no demand of dower, and though the demandant herself took the profits for six years, which seems to be the consequence of the tenant's pleading non-tenure, which being found against him, the other matter found was superfluous, except as to the damages, for which he then remains deforfeor.

Belfield v. Rous, Co. Litt. 33 a; Moore, 80, S. C.; Bendl. 153, S. C.

In dower upon default, a *grand cape* was awarded, and on suggesting that her husband died seised, a writ of inquiry of the value of the lands was awarded likewise, and inquisition taken and returned, and 60*l.* damages for the value of the land; and it was moved to stay the filing of the writ of inquiry, because no notice was given to the tenant thereof, nor of the execution of it; and though it was answered that in real actions no personal notice is to be given, but the tenant ought to take notice, because the summons is always executed on the land, and not elsewhere; yet *per Curiam*, the *grand cape* is a judgment, and by that the suit is determined at common law, and the damages for the value of the land are added by the statute of Merton, and personal notice ought to be given of the writ, and of the execution of it, as in other cases of writs of inquiry; and therefore for want of notice they discharged the inquisition, and awarded restitution of the damages. But Levinz makes a *quære* of it, and says the practisers informed him that it is not usual to give notice of the executing of the writ of inquiry in case of dower.

Perkins v. Lamb, 3 Lev. 409. Upon a trial at bar the issue was, whether there was a demand of dower, and refusal, to entitle the plaintiff to damages? the plaintiff proved an actual demand of the heir, being of the age of 14 years, then in her custody, though by his father's will committed to another; the infant said his guardian would not let him assign dower; resolved *per tot. Cur.* upon debate; 1st, That it was demandable of the heir, though he had been under age. 2dly, That his guardian was but in nature of a guardian in socage, and that the dower was not demandable of him, but of the heir,

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though not in the custody of the guardian; and that if the heir had entered upon the land to assign dower, he had been no trespasser upon the guardian, though the custody of the land during such nonage was committed to such guardian. 3dly, That his not assigning dower upon demand, though he did not refuse to do it, was a refusal in law to entitle the plaintiff to her damages. Hil. 29 & 30 Car. 2, in C. B. between Corseilles and Corseilles. Bull. Ni. Pri. 117.

In dower, the tenant to part pleads non-tenure, and to other parts *detinue* of charters; and judgment for the demandant; but it was reversed in error, because the tenant, being within age, appeared by attorney, where it ought to be by guardian. Then a new writ of dower was brought, and the tenant pleads *tout temps prist*; the demandant pleads the first record to estop him; tenant rejoins *nul tiel record*, because it is reversed; which the court agreed; but they held that the demandant might take issue that he had not been *tout temp prist*, and give in evidence the first record to prove it.

Rich's case, Dalis. 100; 3 Leon. 52, S. C. Note: The case in truth was, that after her husband's death she entered and abated without assignment of dower, and occupied for five years, and then the tenant re-entered, and she brought dower; and agreed that in such case the tenant need not say *tout temp prist* generally, but show the abatement and re-entry, for the time of her occupying shall be considered and recouped in damages.

In dower, judgment was given upon *nilh dicit*, and because the husband died seized, a writ of inquiry of damages was awarded; by which it was found that the third part of the value of the land was 8*l. per ann.*, and that eight years had elapsed *a die mortis viri sui proxime ante inquisition. et assident damna* to 80*l.*, and upon the record it appeared that after the judgment in the writ of dower the demandant had execution by *habere fa. seisinam*, and that damages were assessed for eight years; whereas it appeared upon all the records, that the demandant had been seized for part of the eight years; and therefore error was brought and assigned, 1st, That damages are assigned till the time of the inquisition taken, where they ought to be but to the time of the judgment; but this was disallowed. 2dly, That the value being found but 8*l. per annum*, the damages for eight years are but 64*l.*; but *per Cur.*, it may be that by the long detaining of dower demandant had sustained more damages than the bare value; but because it appeared that damages were assessed for the whole eight years, where the demandant herself was seized for part of them, by force of the judgment and execution, it was held erroneous.

Walker v. Nevil, 1 Leon. 56.

[Upon the execution of a writ of inquiry in an action of dower *unde nilh habet*, the jury assessed damages to the amount of the third part of the value of the land, from the death of the husband to the day of the inquisition, without making any deduction for land-tax, repairs, or chief rents. The inquisition was set aside, the court being of opinion, that as there are in a writ of dower *unde nilh habet* the words *ultra reprisas*, a deduction ought to have been made for land-tax, repairs, and chief rents; and that the jury (a) ought only to have assessed damages to the day of awarding the writ of inquiry.

Penrice v. Penrice, Barnes, 234. (a) The opinion of the court in this latter point is contrary to the preceding case, and to the express words of the statute of Merton, c. 1, and also to the cases of Spiller v. Andrews, 8 Mod. 25. Dobson v. Dobson, Ca. temp. Hardw. 19; 2 Barnard. K. B. 180, 207, 443, and Kent v. Kent, 2 Barnard. 357.] [In the case of Atwood v. Lamprey, 3 P. Wms. 128, note, land was mortgaged on condition to pay a widow 20*l. per annum* in satisfaction of her dower; whereupon the court held, that this being an annual payment secured on land, should answer taxes in proportion as the land paid; but refused to make the widow refund in respect of the payments she had received tax-free, and for which the party paying had omitted to deduct.]

## (M) Of the Proceedings and Damages, &amp;c.

In dower if demandant recovers by confession, or otherwise, yet she may after, upon suggestion and averment that her husband died seised, have a writ to inquire of the value and damages.

Brook, 49, 73, 78, 93.

[If the heir sell to J S, and the widow recover her dower against him, he must pay the whole mesne profits from the death of the husband, though he have not himself been half the time in possession : she is entitled by the statute, and can recover only against the tenant.]

Brown v. Smith, Hil. 25 & 26 Car. 2; Bull. Ni. Pri. 117.]

In dower *unde nihil habet*, the demandant had judgment, and a writ of seisin executed, and the tenant brought error, and the judgment affirmed ; but pending this, the tenant aliens the land, and dies : and now the demandant brings *scire facias* against the heir of the heir, and against the alienee, to have her damages, suggesting that her husband died seised ; the tenants severally plead the matters aforesaid ; and judgment against the demandant ; but therein agreed that the judgment is complete at common law without the damages, and error lies of it before the damages given, and that it is time enough to suggest the dying seised of the husband, in order to recover damages after the judgment given for the dower ; but the statute of Merton gives damages *contra deforciores*, which here neither the heir of the heir, nor the alienee are ; and therefore they are lost by the death of the heir, and are not a lien upon the land to pass with it. For if they should be recovered, from what time must this recovery be ? Not from the husband's death, because none of the present tenants had the land from that time ; nor from the death of the heir against whom the judgment was, for none of the now tenants are deforciores ; and therefore they are like damages in trespass, which die with the party ; and when the tenant dies before judgment for the damages, the judgment for the dower remains as at common law.

Aleworth v. Roberts, Lev. 38 ; Sid. 188, S. C. ; Keb. 85, S. C. 646, 711 ; Brownl. 127, *contr.*

A widow brought a writ of dower, and recovered, and this judgment was affirmed in a writ of error, after which she took out a writ of inquiry of damages, but died before the same was executed ; the damages are lost, being no duty till they are assessed ; and therefore a *scire facias* by her administrator in this case was held not maintainable.

Mordant v. Thorold, 3 Mod. 281 ; Salk. 252, S. C. ; Carth. 133, S. C. ; 1 Show. 97, S. C. ; 3 Lev. 275, S. C.

[If the defendant plead *ne unque seise que dower*, the demandant may give in evidence a release to her husband, or a surrender to him by one who was seised as jointenant with him. So, if the demand be of an advowson or rent-charge, she may give a grant of the advowson or rent-charge in evidence, and that her husband died the day before payment or presentation.

2 Ro. Abr. 676, pl. 10 ; Bull. Ni. Pri. 118. ¶ On the issue *ne unques seisie*, the demandant need not prove the marriage nor the death of the husband ; it is only requisite to prove the seisin during the coverture. Sheppard v. Wordle, 1 Cox. 452. *g* But *qu.* as to the surrender in this case ? For one jointenant cannot surrender to another, by reason of the unity of possession. Perk. § 586, 587. See 40 E. 3, pl. 21, 41 b, *contr.* See also Watk. on Descents, 33, note.

If the tenant plead *ne unques accouple in loyal matrimonie*, it shall not be tried by a jury, but a writ shall issue to the bishop to certify it. To a demand of dower as the widow of J. R., the defendants pleaded *ne unques*



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*accouple*; the plaintiff replied a sentence of the ecclesiastical court in a cause of divorce brought by Sir W. W. against her, charging that she was his wife, and had committed adultery with J. R.; to which she pleaded, that she was the lawful wife of J. R., and not of the said Sir W. W.; and that afterwards J. R. died, and the cause coming on to be heard, the judge declared, that the plaintiff had been the wife, and was then the widow of J. R.; and she prayed judgment whether the defendants were not estopped to plead *ne unques accouple*. The court held it no estoppel, as the bishop's certificate in an action between the plaintiff and other defendants would have been.

*Robins v. Crutchley*, 2 Wils. 118, 127.

In dower, the defendant pleaded, that T. D. was seised in fee, and made a lease to J. C., but did not show when seised in fee, or that the term was assigned to him; so it might be after coverture. After judgment for demandant, the said J. C. claiming by lease for years from T. D., father of the demandant, prayed to be received, but the court would not admit him.

*Green v. Roe*, Com. Rep. 581. A recovery in dower will estop the tenant, and all claiming under him, from giving a prior term in evidence on an ejectment afterwards brought by the widow under the judgment. *Booth v. Marquis of Lindsey*, 2 Ld. Raym. 1293.

By 16 & 17 Car. 2, c. 8, § 3, 4, execution shall not be stayed by writ of error upon any judgment after verdict, unless the plaintiff in error become bound to pay damages and costs, in case the judgment be affirmed, or the plaintiff discontinue, or be nonsuited: and the court wherein execution ought to be granted upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment; and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit.

Where there are two tenants in dower, and one dies after judgment for damages, and his heir and the other bring error, the whole of the original damages shall be recovered against the survivor. But the value from the time of the judgment to the affirmance cannot be recovered against the surviving plaintiff only; nor can the court compute such damages after the rate of the damages found by the first jury, but they must award a writ of inquiry.

*Kent v. Kent*, 2 Str. 971; 2 Barnard. 357, 386, 441; Ca. temp. Hardw. 50.

If the judgment be affirmed in *dom. proc.* and costs given, the defendant in error may bring an action upon the recognisance for such costs, without suing out a writ of inquiry.

*Doe v. Roach*, And. 153; Ca. temp. Hardw. 373.

The writ of dower is now little in practice, and will probably in a short time fall quite into desuetude. The Court of Chancery seems at length to be in possession of a concurrent jurisdiction with the common law courts in all cases of assignment of dower. That the Court of Chancery had jurisdiction in matters of dower, for the purpose of assisting the widow to a discovery of the lands or title-deeds, or of removing any impediments to her rendering her legal title available at law, seems indeed never to have been doubted. But (a) it has been questioned, whether it could give relief in those cases in which there appeared to be no obstacle to her legal remedy? However, the language of that court now is, (b) "that the widow labours under so many disadvantages at law, from the embarrassments of trust terms,

## (N) Of the Admeasurement of Dower.

&c., that she is fully entitled to every assistance that a court of equity can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained." And in the exercise of this jurisdiction it will enforce a discovery,(c) even against a purchaser, for a valuable consideration without notice. And though (d) the widow should die before she had established her right at law, it will, in favour of her personal representative, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable;] || and the account of arrears it will carry back to the time her title accrued, unless some reason be shown to bar her. || [But courts of equity consider themselves as so far proceeding merely on a right which may be asserted at common law, that, as in a court of common law no costs can be given on a mere writ of right of dower, or a writ to assign dower, so no costs are given in a court of equity on a bill brought for the same purpose,(e)] || unless there has been a vexatious resistance to the claim; and there indeed the widow would be entitled to costs at law under the statutes of Merton (20 H. 3, c. 1) and Gloucester, (6 E. 1, c. 1.)||

(a) Wallis v. Everard, 3 Ch. Rep. 87. (b) Curtis v. Curtis, 2 Br. Ch. Rep. 634; Mundy v. Mundy, 4 Br. Ch. Rep. 294, and 2 Ves. jun. 122; Mitf. Eq. Tr. 97, 98. || A purchaser shall not protect himself against the claim of dower by a term attendant on the inheritance, unless he has procured an assignment of it in that very transaction, though the term has in a prior transaction been declared attendant on the inheritance. Maundrel v. Maundrel, 7 Ves. 567; 10 Ves. 246; Oliver v. Richardson, 3 Ves. 222; Dormer v. Fortescue, 2 Atk. 282; 3 Atk. 124, 130, 131; Worgan v. Ryder, 1 Ves. & Beam. 20; Co. Litt. 32 b, note (4), 14th edit.; Lucas v. Calcraft, 1 Br. Ch. Rep. 134; 1 Ves. & Beam. 20, notes, S. C. || (c) Williams v. Lambe, 3 Br. Ch. Rep. 264. (d) Wakefield v. Childs, 8th July, 1791, cited in Fonbl. Eq. Tr. 20. (e) Mitf. Eq. Tr. 98.

§ A widow can claim damages from the alienee of her husband only from demand and refusal on his part to pay her, or assign her dower.

Steiger v. Hiller, 5 Gill & Johns. 121. See Tod v. Baylor, 4 Leigh. 498.

A widow is not entitled to damages in dower for the detention of the lands unless the husband died seised.

Whitehead v. Bellamy, 2 Hayw. 240; Golden v. Maupin, 2 J. J. Marsh. 240.

Damages are not recoverable, in law or equity, for the detention of dower in lands aliened by the husband in his lifetime.

Kendall v. Honey, 5 Monro, 283.

Where there were several heirs and terretenants, the amount was directed to be assessed upon them, respectively, according to the time of their enjoyment of the land.

Hazen v. Thurber, 4 Johns. Ch. 604; Hale v. James, 6 Johns. Ch. 258.g

## (N) Of the Admeasurement of Dower.

If the heir within age assign to the wife more land in dower than she ought to have, he himself shall have a writ of admeasurement of dower at full age by the common law. So, if too much be assigned in dower by the heir within age, or his guardian in chivalry, and the heir die, his heir shall have such writ to rectify the assignment: but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir. If a disseisor assigns too much, the heir of the disseisee shall have admeasurement by the common law.

F. N. B. 148; Co. Litt. 39 a; 2 Inst. 367; Stoughton v. Leigh, 1 Taunt. 402. § On

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the death of the husband, the widow entitled to dower becomes tenant in common with his heirs, and remains such until her dower is assigned to her in severalty. *Stedman et al. v. Fortune*, 5 Conn. 462. And her right is paramount to that of the heirs or creditors, before it is assigned and set out to her. *Calder et ux. v. Bull*, 2 Root, 50.<sup>g</sup>

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of admeasurement of dower, by the statute of W. 2, c. 7, before which statute the guardian had no remedy, because the writ of admeasurement, being a real action, lay not for the guardian, who had but a chattel. Also, by the same statute it is provided, that if the guardian pursue such writ faintly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the faint pleading or collusion generally.

2 Inst. 367.

If the wife after assignment of dower improves the lands, so as thereby they become of greater value than the other two parts, no writ of admeasurement lies. So, if they be of greater value, by reason of mines open at the time of the assignment, no writ of admeasurement lies, because the land in quantity was no more than she ought to have; and then it is lawful to work the mines which were open at the time of such assignment.

F. N. B. 149; 2 Inst. 368; 5 Co. 12, Saunder's case.

If the sheriff assigns too much in dower, by one book it seems that the heir shall have a writ of admeasurement. But *qu.* whether he shall have that or a *scire facias* upon the recovery, which was of no more than the third part?

Palm. 266; [Bro. tit. *Dower*, pl. 83, *Extent*, pl. 13; Fitzh. *Execution*, 165; 2 Ld. Raym. 1294, 1295.] || The heir in such case shall have a *scire facias* to obtain an assignment *de novo*. *Stoughton v. Leigh*, 1 Taunt. 402. When the feme recovers dower, and the sheriff assigns it by award of the court, and by the inquest of twelve men, the sheriff is no wrongdoer though he assigns more than her share, so that the heir can have no assize against him, but he must apply himself to the court for a new inquest, and therefore must call in the tenant in dower by *scire facias*. *Gilb. Dower*, 389. ||

|| If the heir, being of full age, assign excessive dower, he has no remedy at law.

*Stoughton v. Leigh*, (*ubi sup.*) ||

These writs of admeasurement of dower are *vicontiel*, (*a*) and not returnable; and the parties may plead before the sheriff in the county, if they think fit: but if they are removed in C. B. by a *pone*, as the plaintiff may, without showing any cause, and the defendant upon showing cause, and thereupon process goes out, *viz.*, summons, attachment, and *distringas*, then the sheriff cannot make admeasurement, but ought to extend all the lands particularly, and return it in C. B., and upon that admeasurement shall be made.

F. N. B. 148. (*a*) || It was *vicontiel*, because it was presumed, that the first assignment was in the court of the heir; and if there was any mistake there, it was to be rectified in the court of the sheriff. Vide 13 E. 3; *Admeasurement*, 17. Yet Bracton saith, if she hath lands in dower in divers counties, there it ought to be *coram justiciariis*. And note, there the tenant shall have several writs. *Gilb. Dower*, 382. ||

(O) Of the other species of Dower.

1. *Dower by the Custom.*

THIS kind of dower varies according to the custom and usage of the place, and is to be governed accordingly; and where such custom prevails, the wife cannot waive the provision thereby made for her, and claim her thirds at common law, because all customs are equally ancient with the common law itself.

Co. Litt. 33 b; Cro. Eliz. 825; Leon. 62, 133.

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By the custom of gavelkind in Kent, the wife shall have the moiety so long as she keeps herself chaste and unmarried. The reason of this provision for the wife seems to be founded on the equal distribution, which is observed in this kind of inheritance in the same family for their equal support; and therefore when she proves unchaste, or marries again, and thereby contracts a new alliance, this provision as to her ceases, and returns again into the family. But the presumption of her chastity is to continue till it be proved she was delivered of a child, begotten during her widowhood, which may be in any action brought by or against her.

Co. Litt. 33 b, 111 a; F. N. B. 150; Stanf. Prer. 44 b; Ro. Abr. 558; Brook, tit. *Dower*, 70; Brook, tit. *Custom*, 67, 69, 72; 2 Jon. 6; Sid. 136; Lambart's *Perambulation*, 555. [But authorities are not wanting to show, that not only child-bearing, a casual consequence of fornication, and the detection of it in this public manner, but the commission of the act of fornication itself is a forfeiture of her estate. Rob. Gavelk. 165; and the authorities there cited.]

Dower, and demands the third part of the lands of A, her late husband, lying in Kent, &c., defendant pleads that the custom there is, that wives shall have the moiety of their husband's lands in dower, so long as they live chaste and unmarried, and *non aliter* or *non secundum cursum communis legis*; and that the demandant, after the death of her first husband, had married the other demandant, &c.; *et per Cur.*, the custom is good, and is the law in Kent; and therefore she can claim no other dower, nor in any other manner, and the rather, by reason of the negative conclusion.

Hunt et Uxor v. Gilburn, Leon. 62; Cro. Eliz. 121, S. C. adjudged; Moore, 260, S. C. adjudged; Cro. Eliz. 825, S. P. and S. C. cited.

By the custom of borough-english, the widow shall have the whole of her husband's lands in dower, which is called her freebench.

Co. Litt. 33 b, 110 b; F. N. B. 150; Cro. Eliz. 415. The reason seems to be, that in these boroughs the eldest son was introduced into the trade of his father, and therefore the youngest son inherited the land, and, consequently, the wife, that was intrusted with the younger children of her husband, had the whole during her life.

Upon a special verdict, the case was this: a custom of a manor was found to be, that if a copyholder in fee died seised, his wife should hold it during her life as *frank bank*; the lord enfeofs the copyholder, who died seised; and adjudged that her customary estate was gone, because by the accession of the freehold the copyhold estate was extinguished, and so her husband did not die seised thereof. *Secus*, if the lord had enfeofed a stranger, for then the copyhold remained so still, and the custom with it.

Lashmer v. Avery, Cro. Ja. 126; Dugworth v. Radford, Sir W. Jon. 462.

Custom of a manor was, that the wives of copyholders for life should enjoy their husband's estates during widowhood; and the case was, that A, a copyholder for life, purchased the freehold and inheritance of his copyhold, but took the conveyance to B and his heirs during the life of A, remainder to A in fee, and then A dies: adjudged that his wife should have her customary estate, because the customary estate of A, her husband, continued during his life, and was not extinct, nor altered by the purchase of the freehold, which, during his life, was in B, and then all customary incidents to such customary estate remain, whereof this is one, and grows out of it as an excrescence or fruit, and she may enter (a) without admittance.

Howard v. Bartlett, Hob. 181; Cro. Ja. 573, S. C. (a) || She may enter before admittance, because, as she takes the *whole* of her husband's estates, the law casts the possession on her as it does on the heir in cases of descent. But, when she takes only a *part* of the estates, it should seem that the possession is not cast upon her any more

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than at common law; and, consequently, that she will not be warranted in entering without assignment. And as she shall hold that portion of the lord, and not of the heir, as at common law, it should seem also that the regular mode for her to obtain assignment is by plaint in the lord's court; upon judgment in which she shall also recover damages by the statute of Merton. For it has been determined that copyholds are within that statute in this respect, and that the manor court may award damages under it as far as the demandant is damnified, to whatsoever amount. 2 Watk. Copyh. 90; Gilb. Ten. 183; Shaw v. Thompson, 4 Co. 30 b; Cro. Eliz. 426, S. C.; Moore, 410, S. C. ||

Custom of a manor was, that the copyholders' wives should have their freebench of all copyholds whereof their husbands died seised; and a copyholder, being married, surrenders to A in fee by way of mortgage, for securing 70*l.*, and this surrender was presented to be enrolled; but, before admittance, the surrenderor dies, and after his death A is admitted; and if the wife should have her freebench, was the question. For the wife it was said, that, till admittance, the copyhold remained in the husband, and then he died seised, and so his wife within the custom; and though the admittance after his death has relation to the time of the surrender, yet that is only by fiction of law between the parties, but shall not prejudice the wife, who is a stranger: also, the admittance hath relation to the marriage, which was before, and is perfected by, the death of the husband, and so her title was begun and perfected too, before the title of the surrenderee. But the court denied that the wife had any initiate title by the marriage in this case, as women have to their dower at common law; but she hath only a conditional inception of a title, subject to the husband's power of preventing it by alienation, as here he might have done; for she is not to have her freebench but where the husband (a) dies seised; and this, by the relation of the surrender, he did not; and adjudged accordingly.

Benson v. Scot, 3 Lev. 385; 4 Mod. 251, S. C.; Salk. 185, pl. 3, S. C.; Carth. 275, S. C.; Skin. 406; 12 Mod. 49. (a) || Hinton v. Hinton, 2 Ves. 631; Godwin v. Winsmore, 2 Atk. 526; Rex v. Inhabitants of Lopen, 2 T. R. 580; Brown v. Raindle, 3 Ves. 256. ||

|| If the husband contract for the sale of his copyhold, and die without any actual surrender, a court of equity will compel the widow to relinquish her dower.

Hinton v. Hinton, 2 Ves. 631, 638; Brown v. Raindle, 3 Ves. 256. ||

[The custom of a manor was to grant copyholds for three lives: the first life had a power of surrendering the whole estate, and the widow of a tenant, who died seised, was entitled to her freebench. F, a copyholder for three lives, surrendered to H, the deceased husband of the defendant; who afterwards, by license from the lord, demised to J S for ninety-nine years by way of mortgage: then H died, and J S assigned to the plaintiff. At the trial, only one instance of a lease by license was given in evidence; whereupon it was insisted for the defendant, the widow, that there being no special custom to let by lease, the only way of transferring the copyhold was by surrender. And therefore in this case, if the estate of H the husband was not determined according to the custom of the manor, he must be deemed to have died seised of the copyhold, and the widow still entitled to her freebench. But the court said, that here, the right of the husband was confined to such estate as he should *die seised of*; consequently, as between lord and tenant, they might defeat the wife's estate when they pleased.

Salisbury v. Hurd, Cowp. 481; Farley's case, Cro. Ja. 36, S. P.; Anon. Freem. 516, S. P.]

The custom of a manor was, that the wife of a copyholder dying seised  
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should have her widow's estate; a commission of bankruptcy is taken out against the copyholder, and his estate sold by the commissioners, but before the vendee was admitted the copyholder dies; and yet adjudged that the widow's estate was gone, because her husband did not die seised, his estate and right being bound by the sale, to which the admittance after has relation, and divests the widow's estate.

Parker v. Bleeke, Cro. Car. 569; Sir W. Jones, 450, S. C.

If the custom of a manor be, that if any of the tenants marry a widow she shall have no dower; this is good; but a custom, that the wife of tenant in fee shall not be endowed, is not good.

Ro. Abr. 562; Dav. 30 b.

If there be a custom, that where the husband sells his lands and his wife receives part of the money, or if it be expended in the family, that his wife shall be barred of her dower, this may be good.

Ro. Abr. 562; Brook, tit. Custom, 53, 78.

Ancient rent, or common in borough-english, gavelkind, &c., is of the nature of the land there, and women shall have dower accordingly; and so it seems to be of rent, common, &c., newly granted, though some have held the contrary; and in all these cases, whether it be of land or rent, the custom must be shown specially.

Brook, tit. Custom, 44, 58, 65, 69.

If the custom be, that the wife shall have for her dower the moiety of the lands and tenements of her husband, &c., she shall not be endowed of a fair or bailiwick, because the custom shall be taken strictly, and these are no tenements: *secus*, if they were appendant to a manor, whereof she is dowable, for then she shall have a moiety of the profits as appendant to a moiety of the manor.

Perk. 435, 436; 2 Sid. 139.

## 2. Dower ad Ostium Ecclesiæ.

Dower *ad ostium ecclesiæ* is where a man of full (a) age, seised of lands in fee, after marriage endows his wife at the (b) church-door of (c) a moiety, a third or other part of his lands, declaring them in certainty; in which case, after her husband's death, she may enter into such (d) lands without any other assignment, because the (e) solemn assignment at the church door is equivalent to the assignment *in pais* by metes and bonds: but this assignment cannot be made before marriage, because before she is not entitled to dower.

Litt. § 39; Co. Litt. 34 a, 36 b, 37 a. (a) Cannot be made by one under age. Perk. 438. (b) Dower *ad ostium cameræ* is not good. F. N. B. 150; Co. Litt. 34. (c) It was formerly held that it could not be of more than a third part of the husband's estate. F. N. B. 150; Co. Litt. 34 b, 36 a. (d) This dower cannot be of the capital barony held of the king *in capite*, or of the capital messuage held by knight's service. (e) This dower, before the statute of frauds and perjuries, was held to be good without deed, or without livery and seisin. Perk. 437; Brook. 7, 80; Dyer, 18, pl. 108; Co. Litt. 34 a, 35 a.

If this dower be assigned, with a clause, that, notwithstanding any divorce that shall happen, the wife shall hold it for her life, this is good, because *modus et conventio vincunt legem*.

Co. Litt. 32 a.

If tenant in tail assigns such dower, this shall not bind his issue against the statute *de donis*, nor him in the reversion after the estate ended.

Co. Litt. 38.

## (O) Of the other Species of Dower.

### 3. *Dower ex Assensu Patris.*

*Dower ex assensu patris* is where the father is seised of lands in fee, and his son and heir (a) apparent after marriage endows his wife by the father's assent, *ad ostium ecclesiæ*, of a certain quantity of them; in which case, after the death of the son, his wife may enter into such parcel, without any other assignment, though the father be living: but this assent of the father must be by deed, because his estate is to be charged *in futuro*, and this may likewise be of more than a third part.

Litt. § 40; Co. Litt. 35, 36; Perk. 444; Brook. 7, 80; Plow. 304 b; Cro. Ja. 169; *Dower ex assensu matris* is as good. Perk. 441; Co. Litt. 35. This endowment of a reversion expectant on an estate for life is not good, nor of lands held by the father in jointenancy, because not dowerable of them. Co. Litt. 35 a; Perk. 445; F. N. B. 150. (a) Can be only by the heir apparent. Perk. 442; F. N. B. 150; 3 Co. 38; 6 Co. 22; Co. Litt. 35. But it is good, though the heir apparent be within age, for the estate does not move from him. Co. Litt. 35 b, 38 a; Brook, 80.

These dowers, *ad ostium ecclesiæ*, or *ex assensu patris*, if the wife enters and assents to them, are a good bar of her dower at common law; but she may, if she will, waive them, and claim her dower at common law, because being made after the marriage she is not bound by them.

4 Co. 1; Co. Litt. 36; Brook, 97; 3 Leon. 272.

These dowers ensue the nature of dower at common law, and the wife may have a writ of dower for them, though they are certain, as well as for her dower at common law, and as well against the guardian as the terretenant.

Co. Litt. 35; F. N. B. 150.

These dowers are good, though the wife be under the age of nine years at the time of her husband's death, being made by consent.

Co. Litt. 30 a, 37 a.

But they are forfeited for high or petit treason in the husband; and so they were anciently, if he were attainted of felony or murder; though now in these last cases they are saved by the statutes 1 E. 6, c. 2, and 5 Edw. 6, c. 11, but remain forfeitable by his attainder of high or petit treason.

Co. Litt. 37 a, 41; Stanf. 195 a.

### 4. *Dower de la plus Belle.*

*Dower de la plus belle* is where there is a guardian in chivalry, and the wife occupies lands of the heir as guardian in socage, if the wife brings a writ of dower against such guardian in chivalry, he may show this matter, and pray that the wife may be endowed *de la plus belle* of the tenements in socage; and it will be adjudged accordingly. And the reason of this endowment was to prevent the dismembering of the lands holden in chivalry, which are *pro bono publico*, and for the defence of the realm.

Litt. § 48; Co. Litt. 38, 39 a, b.

After judgment given, the wife may take her neighbours, and in their presence endow herself of the fairest part of the tenements, which she hath in socage, for her life.

Litt. § 49.

If the lands, which the wife hath as guardian in socage, are not of value sufficient for her dower; or if a rent-charge be issuing out of them; upon her showing this matter, she shall recover of the guardian in chivalry to make it up.

Perk. 450.

(A) For what Duress a Man shall avoid his Deed, &c.

If all the lands which the husband had were holden in socage, and his wife hath them as guardian in socage, she shall be allowed the third part of the profits upon her account in allowance of dower. But she cannot endow herself of the third part thereof, because that would be to make herself judge in her own cause; neither can the heir, in a writ of dower brought against him, plead that she is guardian in socage, and may endow herself.

Perk. 451, 452.

Guardian by tort in socage cannot endow herself *de la plus belle*, because the law will not encourage such wrong and violence.

5 Co. 30.

## DURESS.

(A) For what Duress or Degree of Restraint or Terror, a Man shall avoid his Deed or Contract.

(B) On whom and by whom the Duress must be committed.

(C) What Contracts or Securities may be thus avoided.

(D) The Manner of avoiding them.

(A) For what Duress or Degree of Restraint or Terror, a Man shall avoid his Deed or Contract.

It seems clearly agreed, that where a person is illegally restrained of his liberty by being confined in a common jail, or (a) elsewhere, and during such restraint enters into a bond, or other security, to the person who causes the restraint, that he may avoid the same for duress of imprisonment.

Co. Litt. 253; Jenk. 166. (a) For every restraint of the liberty of a freeman is an imprisonment. 2 Inst. 482.

But, if a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment: for this is not by duress of imprisonment, because he was in prison by (b) course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment, or the duress that is offered (c) in prison, or at large, is tortious and unlawful; for *executio juris non habet injuriam*.

2 Inst. 481. (b) That duress of imprisonment is intended only where the party is wrongfully imprisoned till he makes a bond, and not where a man is lawfully imprisoned for another cause, and for his delivery makes a bond. 3 Leon. 239, *per Cur.* (c) If a man be lawfully in prison, yet, if he makes an obligation against his agreement and will, he may avoid it by duress. 43 E. 3, 10 b; Ro. Abr. 687.—Where after judgment the defendant, having no good cause of action, caused the plaintiff to be arrested and detained in prison, threatening him that if he would not seal a release to him, he should lie there and rot; and thereupon he sealed one, and was discharged; it was ruled at Guildhall by Bridgman, C. J., that this release could not be avoided by duress, because he was in custody in the course of law by the king's writ when he sealed, but he offered it should be found specially if Baldwin would pray it, which he did not; and therefore the release was held good. Lev. 69.

My Lord Coke says, that for menaces, in four instances, a man may avoid



(A) For what Duress a Man shall avoid his Deed, &c.

his own act. 1st. For fear of loss of life. 2dly. (a) Of loss of member. 3dly. Of mayhem. 4thly. Of imprisonment.

2 Inst. 483. (a) 2 Ro. Abr. 24 S. P. 2 Fear of unlawful imprisonment is sufficient duress to avoid a bond. *Inhabitants of Whitefield v. Longfellow*, 1 Shepl. 146.g

But menacing to commit a battery, or to burn his houses, or spoil his goods, is not sufficient to avoid the act; for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him.

2 Inst. 483; Bro. Abr. *Duress*, pl. 16; *Sumner v. Ferryman*, 11 Mod. 203, cited in 2 Str. 917, *contr.*; Ro. Abr. 697, pl. 3.

If a man is taken by virtue of a process issuing out of a court that hath no power to grant such process, and for his enlargement gives bond to appear in the said court, this may be avoided because taken by duress. Adjudged in an action upon such bond, given by one who was taken upon an attachment under the privy seal of the court of requests; for that court had (b) no power to grant such process, and therefore it was no warrant to the sheriff to take his body.

Cro. Eliz. 646, *Stepney and Lloyd*; 4 Inst. 97, S. C.; Cro. Car. 596. (b) So, where the arrest was by the pursuivant of the high commission by their command, until he entered into a bond to appear, &c., it was held void. Ro. Abr. 687.

If A falsely charges B with felony for stealing his horse, and procures a warrant from a justice of peace to a constable, whereby he is taken, and being in custody, upon A's promise to discharge him, seals a bond for 10*l.* to A, and is thereupon immediately discharged; this bond may be avoided by duress; and so ruled, it appearing that the horse was B's own horse, and that these proceedings were only to cover the deceit.

Allen, 92. Ruled by Roll accordingly upon the trial of an issue on the duress.

Also in equity, if a man by compulsion enters into a bond, though the terror and force are not sufficient to make it duress at common law, yet it may be relieved against.

2 Vern. 497, *per Cur.* || 2 Ves. 634, 635; 1 Ves. jun. 43. In these cases, though the validity of the instrument must be tried at law, yet that trial will be in an issue under the control of the court of equity, in which the attention of the jury will be called not only to the circumstances of the execution, but to the state of the party's mind, from the effect of former acts of violence and oppression. *Peel v. —*, 16 Ves. 157; *Lady Strathmore v. Bowes*, 2 Br. Ch. Rep. 345; 1 Ves. jun. 22.||

|| Where A, a foreigner, had arrested B, a foreigner, upon an obligation entered into in their own country by B as surety, which according to the law of that country could not affect the person; and whilst he was in custody under the arrest, had taken from him bills of exchange, upon which he afterwards arrested him again; he was restrained by injunction from proceeding in his action.

*Talleyrand v. Boulanger*, 3 Ves. 447. A court of law has discharged a defendant upon common bail arrested on a contract made in France, under which his person would not there have been liable. *Melan v. Fitzjames*, 1 Bos. & Pull. 138. But see *contr. per Heath, J.*, *Ibid.* 142, and *Lord Ellenborough*, 2 East, 455.||

But in this every case must depend on its own circumstances; for where A being taken by the husband going to bed to his wife, gave securities for payment of 500*l.* and a bill was brought to be relieved against the securities, suggesting a plot to catch him: and that the defendant with an axe threatened to cut him in pieces; there being no proof of a plot, and it appearing that the securities were entered into at three several times, and when

## (B) On whom and by whom Duress must be committed.

the plaintiff was in cool blood, and that he joined in concealing the consideration thereof, the court refused to relieve.

Woodman and Skute, Pr. Ch. 266; Gilb. Eq. Rep. 9, S. C.

Also, by a rule of the Court of Common Pleas, 14 & 15 C. 2, and of the Court of King's Bench, P. 15, C. 2, all warrants for confessing judgments, taken by any sheriff or bailiff from any person in his custody by arrest, if not executed in the presence of some sworn attorney of either court, (which attorney, by a rule of the Court of B. R. of 4 G. 2, and of C. B. of 14 G. 2, must be an attorney on behalf of the defendant,) and his name set or subscribed thereto as a witness, shall not be good, or of any force; and upon oath made that this was not done, the same shall be set aside, and the sheriff or officer may be punished for so doing; and if judgment be entered thereon, the same on motion will be vacated and set aside; and if the execution thereon be executed, the party will have restitution awarded him.

|| This rule extends only to cases where the defendant is in custody on mesne process; Watkins v. Hanbury, 2 Str. 1245; Fell v. Riley, Cowp. 281; Birch v. Sharland, 1 T. R. 715; Crompton v. Steward, 7 T. R. 19; and at the suit of the party to whom the warrant to confess judgment is given. Finn v. Hutchinson, 2 Ld. Raym. 797; Churchy v. Roase, 5 Mod. 144; Holcombe v. Wade, 3 Burr. 1792; Charlton v. Fletcher, 4 T. R. 433; Smith v. Burlington, 1 East, 241; Gilman v. Hill, Cowp. 142. Nor is the case of persons in the custody of the marshal strictly within it, as it mentions only persons in custody of the sheriff's officers. Parkinson v. Caines, 3 T. R. 616. Neither does it apply to cases where the defendant is himself a practising attorney, Walton v. Stanton, Barnes, 37, nor where, being aware of the rule, he means to convert it into an instrument of fraud. Gilman v. Hill, Cowp. 142; Jeyes v. Booth, 1 Bos. & Pull. 97. The attorney present need not be an attorney of the court in which the judgment is to be entered up, Wilmot v. Barry, Barnes, 44; Bland v. Pakenham, 1 Str. 530; neither need he be the defendant's own attorney, or previously acquainted with him. Osborne v. Davis, 4 Taunt. 797. *Qu.* this case, and see what is said by Lord Hardwicke in 2 Ves. 634, 635. But he must be actually an attorney at the time. Barnes v. Ward, Barnes, 42. It seems not to be competent to the party in custody to waive the benefit of the rule by consenting to the plaintiff's attorney acting as his attorney also. Hutson v. Hutson, 7 T. R. 7; Woodin v. College, Ca. temp. Hardw. 177. Nor can the rule be dispensed with, though other persons not in custody join in the warrant. Valentine v. Gulland, 2 Taunt. 49. The rule must be complied with, though the warrant be executed out of England. Fitzgerald v. Plunkett, 2 Str. 1247. In cases not strictly within the rule the courts will, under their general jurisdiction, relieve a party, who has been oppressed or imposed upon in consequence of such a warrant executed without the presence of any attorney on his behalf. Ruffle v. Hitchcock, 2 Bl. Rep. 1097; Waraker v. Gascoyne, Ibid. 1297; Parkinson v. Caines, 3 T. R. 616.

## (B) On whom and by whom the Duress must be committed.

THE duress that will avoid a deed must be done to the party himself; therefore if A and B enter into an obligation, by reason of duress done to A, B shall not avoid this obligation, though A may, because he shall not avoid it by duress to a stranger.

Montal and Woolington, Ro. Abr. 687, pl. 7. [Wayne v. Sands, Freem. 351, *acc.*] Huscombe v. Standing, Cro. Ja. 187, S. P. adjudged, and that the bond may stand good as to one, and be avoided as to the other, where it is joint and several. Ro. Abr. 686, pl. 6. Duress by a stranger, by procurement of the party that shall have the benefit, is a good cause to avoid, &c. 43 E. 3, 6; Ro. Abr. 688, S. C.—But duress by a stranger, without making the obligee party thereto, is no cause to avoid, &c. Keilw. 154 a.

But (a) a son shall avoid his deed by duress to his father; so shall (b) the father his deed, by reason of duress to his son.

(a) Ro. Abr. 687. (b) 2 Brow. 276. [But *per* Twisden, J., a man shall in no case avoid his deed by duress to another, let him be related how he will. Freem. 351.]

(D) The Manner of avoiding them.

Also, the husband shall avoid a deed made by duress to his wife.

Ro. Abr. 687; 2 Brownl. 267, S. P. For the husband and wife are but one person. Sid. 123, cited to be adjudged.—For duress of imprisonment of the plaintiff's commoign. Keilw. 154.

But a servant shall not avoid a deed made by duress to his master, nor *vice versa*.

Ro. Abr. 687; 2 Brownl. 276.

(C) What Contracts or Securities may be thus avoided.

If a man makes a (a) lease by duress, and the lessee enters, the lessor shall have an assize against him as a disseisor; for the free consent of parties being essential to all contracts, where either of the parties is under force and violence, his free assent cannot be supposed, and therefore such contract is void, and the person who enters by virtue of it is a wrongdoer.

Bro. tit. *Disseisin*, 68. (a) So, if a man under duress makes a letter of attorney to give livery, he shall have an assize. Bro. tit. *Disseisin*, 63. β To constitute duress by imprisonment, the original restraint or detention of the person must have been unlawful, or there must have been an abuse of legal power. *Crowell v. Gleason*, 1 Fairf. 325, See *Meek v. Atkinson*, 1 Bailey, 84.

But, if a man by duress make a feoffment and livery in person, he shall have no assize against the feoffee, because such duress shall not be presumed, for then the power of the *pais*, present at the solemnity, would have been supposed to have come in to his rescue.

Bro. tit. *Disseisin*, 63. Vide 2 Inst. 483, where it is said that a feoffment made by duress is not void, but voidable only.

So, if a man acknowledges and enrolls a deed, he cannot afterwards plead duress.

Moore, 42; Cro. Eliz. 88, S. C. And the court inclined accordingly. Ro. Abr. 862, S. P. And that no averment shall be taken, that a deed enrolled was made by duress.

But a statute merchant may be avoided by *audita querela*, because it was made by duress of imprisonment.

Ro. Abr. 687; Owen 142, S. C. Vide Vidian Ent. 107.

In debt for the arrears of an account, the defendant may show that the plaintiff, of his own wrong, imprisoned the defendant, and assigned auditors to him, being in prison, and that so the account was by duress.

Leon. 13, The Earl of Northumberland's case, adjudged by all the judges.

A will shall be (b) avoided by duress or menace of imprisonment.

Dyer, 143 b. (b) So, if a man makes a will in his sickness by the over-importunity of his wife, to the end he may be quiet, this shall be said to be a will made by restraint, and shall not be good. Styl. 427.

If a man takes A S to wife by duress, though the marriage be solemnized *in facie ecclesie*, yet it is merely void, and they are not husband and wife, for without a free consent (c) there can be no marriage.

Keilw. 52 b; 1 N. Dyer, 13, in margin; Sid. 65. (c) Though *de jure* it cannot, yet *de facto* it may, and so within the statute 3 H. 7, c. 2; Cro. Car. 488.

(D) The Manner of avoiding them.

If a man executes a deed by duress, he cannot plead *non est factum*, for it is his deed, though he may void it by special pleading judgment *si actio*.

5 Co. 119; Resolved *per Cur.*, 2 Inst. 483, S. P. Vide Keb. 516. That in pleading the special manner of the duress, viz., whether it was *per minas vite, minas imprisonam, &c.*, must be set forth; and note, so are all the entries.

## EJECTMENT.

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§ EJECTMENT is the name of an action which lies for the recovery of the possession of real property, and of damages for the unlawful detention. This action has silently taken place in several of the states of the United States of all *real actions*, strictly so called.

“Ejectment was not originally designed for *trying the title* to land ; but has been adapted to this object by means of a series of fictions. In arriving at its present state, it has passed through three distinct stages. At first, it was only used by the lessee of land, who had been ejected or ousted therefrom, to recover damages for the ouster. The next stage was to enlarge its scope, so as to enable the lessee to recover possession of the land, as well as damages for the ouster. But for this purpose it was necessary to show a better title than the *ejector*, which incidentally brought up for examination the *title of the lessor*, since the lessee could have no other title than that derived from him. Now in this state of things it was perceived by the lawyers, that by recourse to only four fictions, the trial of the lessor’s title might be made the direct and main object of the action, instead of being an incidental circumstance. For this purpose, there were only wanting a fictitious lessee, a fictitious lease, a fictitious ejector, and a fictitious ouster ; and for the sake of getting rid of the almost endless technicalities and subtleties of real actions, the courts readily sanctioned the introduction of these fictions, which have now been acquiesced in for more than three centuries ; and the result is, that if I claim title to a piece of land of which you are in possession, I begin by alleging that I lease the land to a fictitious person, say John Doe ; that he entered into possession ; and that another fictitious person, say Richard Roe, ejected him therefrom. Thus John Doe becomes the nominal plaintiff, and Richard Roe the nominal defendant ; but the courts permit you, being in possession, to be made defendant afterwards, in the place of Richard Roe, who is called the *casual ejector*, provided you will first confess the fictions, which I of course could never prove ; namely, the *lease*, *entry*, and *ouster*, which I have falsely alleged. The proceedings are then confined to the *trial of my title*. Such is the circuitous manner in which one of the most important of legal remedies is made to effect its immediate object. The form of the action still remains that of trespass to recover damages for the ouster, as during its first stage ; and though much has been gained by thus superseding real actions, yet this action is now liable to one objection which belongs to no other action ; namely, that by changing the fictitious parties, you may try the same question over again as often as you please, a former decision not being conclusive.” Walk. Intr. 512.

In Pennsylvania, New York, and perhaps some other states, these fictions have all been abolished, and the writ of ejectment simply sets forth the possession of the plaintiff, and an unlawful entry on the part of the defendant.

The subject will be considered by taking a view §

- (A) Of the Nature of the Action, and Ancient Manner of Proceeding in Ejectment ;  
§ and of Parties in such Action.

1. *Of the Nature of the Action of Ejectment.*

2. *Parties to this Action.* §

- (B) Of the Modern Manner of Commencing and Proceeding in Ejectment : And  
herein,

(A) Of the Nature of the Action, &c.

1. *Of serving the Declaration, Notice to the Tenant in Possession, and entering into the common Rule.*

2. *Of adding proper Parties.*

3. *Of the Costs.*

(C) In what Case the Ancient Form is still to be adhered to.

(D) Of the Declaration of Ejectment: And herein,

1. *Of what Things an Ejectment will lie.*

2. *What shall be a sufficient Description thereof.*

3. *Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.*

(E) Of the Plea and General Issue in Ejectment.

(F) Of the Verdict and Judgment in Ejectment

(G) Of the Writ of Execution: And herein,

1. *Of the Time when the Writ is to be sued.*

2. *How the Writ is to be executed.*

3. *How the Plaintiff is to be quieted, and what Relief he has where his Possession is disturbed.*

(H) Of the Mesne Profits, and how to be recovered.

(I) Of bringing a new or second Ejectment.

(A) Of the Nature of the Action, and Ancient Manner of Proceeding in Ejectment.

§ 1. *Of the Nature of the Action of Ejectment.*

An ejectment is a mixed (*a*) action, in which a lessee for years, when ousted, shall recover his term, as also his damages.

5 Co. 105; 9 Co. 77. (*a*) For it is *real* in respect of the *lands*, and *personal* in respect of the *damages* and *costs*. Comb. 250. *β* Mere nominal damages and costs are recovered in this action; in order to complete the remedy for damages, when the possession has been long detained, an action of trespass for the *mesne profits* must be brought after the recovery in ejectment. 1 Chit. Pl. 188; Cummings and Wife v. Noyes, 10 Mass. 435; Harvey v. Snow, 1 Yeates, 159; Emigh v. Rinehart, cited 1 Yeates, 157. In Pennsylvania, the mesne profits may be recovered to the time of the verdict, in an action of ejectment, Dawson v. McGill, 4 Whart. 230, but notice of an intention to recover such damages must be given in reasonable time before trial. Cook v. Nicholas, 2 Watts & Serg. 27; Batten v. Bigelow, Pet. C. C. R. 452.*g*

[It is also a *possessory* action grounded on a *right* to the possession of the premises in question between the parties. It is always necessary, therefore, for the plaintiff to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute.

10 Mod. 177; 1 Burr. 119; 21 Ja. 1, c. 16.] *β* In Pennsylvania, an ejectment may be sustained on an equitable title, as there is no Court of Chancery in that state. Lessee of Swayze and Wife v. Burke et al., 12 Pet. 11; 1 Wash. C. C. R. 354; 2 Wash. C. C. R. 33. In Kentucky, a mere equity can neither maintain nor bar an ejectment. Gilpin v. Davis, 2 Bibb, 416; Innis v. Crawford, 2 Bibb, 412. And in Indiana, an equitable title cannot be set up in opposition to legal one. Smith v. Allen, 1 Blackf. 23. So in Ohio, Lessee of Spencer v. Markel, 2 Ohio, 264. See Robinson v. Campbell, 3 Wheat. 212.*g*

*β* In its nature ejectment is a mere possessory action: the plaintiff must therefore be entitled to possession. It is not sufficient that he has the title; he must be entitled to the possession; and if he have leased the premises to another, whose term has not expired, he cannot recover against his lessee.

Lessee of Penn v. Devillin, 2 Yeates, 309; City of Cincinnati v. White, 6 Pet. 431; Gumes v. Dunn's Lessee, 14 Pet. 322; Strother v. Lucas, 12 Pet. 410; Lessee of Devatch v. Newsam, 3 Ohio, 59.

## (A) Of the Nature of the Action, &amp;c.

In ejectment, it is the title of the lessor, and not the nominal title of the lessee that is to be decided.

Carrol et al., Lessee, v. Norwood's heirs, 5 Har. & Johns. 173.

In ejectment only the right of possession is tried, and not the mere right to the land.

Troublesome v. Estill, 1 Bibb, 128.<sup>g</sup>

This remedy was contrived to supply several defects which attended the bringing of real actions; for in these the party could not recover any damages, neither could he regularly bring a second action if he was barred in the first. 6 Co. 7, Ferrar's case.

But the concluding the demandant by one action being oftentimes found to be very prejudicial to his right; to supply this, and several other inconveniences which attended the bringing of real actions, the manner of forming a term for years, and the lessee's bringing an ejectment to recover the term, thereby to assert the title of the lessor of the plaintiff, was found out and was (a) first introduced in the 14 H. 7, (b) before which time it seems that leases for years were but of very short duration, and were generally defeated or determined before any intricate title could be decided, and were such precarious possessions with respect to the power which the owner of the freehold and inheritance had over them, that every such lessee was looked upon only as his bailiff; and if ousted, could only have recovered damages for the loss of his possession; and if ousted by his lessor, he could only seek a remedy from his covenants.

(a) F. N. B. 220. (b) This method appears to have been settled as early as the reign of Edw. 4. In 7 E. 4, 6, *per Fairfax, si homo port ejectione firmæ, le plaintiff recovers son terme qui est arriere si bien come en quare ejecit infra terminum; et, si nul soit arriere, donques tout in damages.* Bro. Abr. 1. *Quare ejecit infra terminum*, p. 6.]

It seems also, that some time before the above-mentioned period, long terms had their beginning, which, to secure to themselves, the lessee used, when molested, to go into equity against the lessors for a specific performance, and against strangers, to have perpetual injunctions to quiet their possessions. This, drawing the business into the courts of equity, was probably one reason which obliged the courts of law to come to a resolution, that they should recover the land itself in an *habere facias possessionem*. Hence this action became, and still continues, the common method of controverting the title to lands and tenements.

As this resolution brought on a new method of trial unknown before to the common law, it became usual for a man that had a right of entry into any lands to seal leases of ejectment on the lands, and then any person that next entered on the freehold was an ejector. (c) But, as this was a means of turning any man out of possession, because the lessee would recover his term without any notice to the tenant in possession, the courts of justice would not suffer that men should lose their possessions without any opportunity to defend them; they therefore made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a feigned ejector, without delivering the tenant in possession a declaration, and making him an ejector and proper defendant if he pleased.

(c) [The practice of setting up a casual ejector is said by Keeling to have been introduced about the time of the troubles, 1 Keb. 705, but in truth it is of much earlier date. 3 Burr. 1297.]

This was a proper rule: for otherwise the court would be made instrumental in doing an injury to a third person, because a declaration might be

## (A) Of the Nature of the Action, &amp;c.

delivered to a stranger, a feint defence be made, and a verdict, judgment, and execution obtained without the tenant's having any notice of it. For, though it is not to be doubted but that such actions were brought at first against the real ejectors that resided in the possessions; yet because any person that came into the land *animo possidendi* was equally an ejector with him that resided, and the action, in strictness of law, might be brought against him, which might turn to the injury of the residing possessor; therefore the courts declared that they would not give judgment unless the tenant in possession had notice of it, and an affidavit was made that he was served with a copy of the declaration.

F. N. B. 489.

Upon such notice to the tenant in possession, and affidavit as aforesaid, the tenant in possession used to move the court, that as the title of the land belonged to him, he might defend in the casual ejector's name, which motion the court, upon an affidavit of that matter, would grant, and direct that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless. But the casual ejector was not permitted to release errors in prejudice of the tenant in possession, though the suit was carried on in his name by rule of court, and the process for costs was taken out against him; and he was obliged to put the bond of the tenant in possession in suit, who undertook to save him harmless.

Style, 468; T. Raym. 93; Keb. 705, 740.

Also, by the ancient practice, such leases were actually to be sealed and delivered, because otherwise the plaintiff could maintain no title to the term; they were to be sealed too on the land itself, because it was maintenance to convey out of possession.

## §2. Parties to the Action of Ejectment.

A mortgagor may maintain ejectment, on the non-payment of the debt due.

Smith v. Buchanan, cited in 1 Yeates, 13. See Jackson v. Marsh, 5 Wend. 44; Phylfe v. Riley, 15 Wend. 248; Jackson v. Tuttle, 9 Cowen, 233; Dickenson v. Jackson, 6 Cowen, 147; Jackson v. Bronson, 19 Johns. 326; Jackson v. Minkler, 10 Johns. 480.

Jointenants must unite: one of three jointenants cannot, therefore, recover a third of the premises from a stranger.

Milne v. Cummings, 4 Yeates, 577.

It is not requisite that the wife should join with the husband in ejectment, for the recovery of lands conveyed to husband and wife.

Jackson v. Leek, 19 Wend. 339.

An ejectment may be maintained against several defendants having separate titles.

White v. Pickering, 12 S. & R. 435.

The court are bound to take notice of the real parties litigating.

Campbell v. Sproat, 1 Yeates, 20.

Where it appeared that a lessor in ejectment had been made a lessor against his consent, the court directed the attorney to pay the costs.

People v. Bradt, 6 Johns. 318; S. C. 7 Johns. 539. See Jackson v. Ogden, 4 Johns. 140.

When the landlord means to make a defence, he ought to be made a party on the record.

Clayton v. Alshouse, 2 Dall. 150.

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Every person whose title is connected and consistent with the possession of the occupier, may be considered as a landlord, entitled to defend.

*Stiles v. Jackson*, 1 Wend. 316. See 1 Wend. 103; 6 Cowen, 589.

But one claiming in opposition to the title of the tenant, is not entitled to be admitted as a defendant with the tenants.

*Jackson v. Flint*, 2 Cowen, 594.

A mortgagee in possession, (a) or the assignee of a mortgagee (b) may be let in to defend.

(a) *Jackson v. Stiles*, 11 Johns. 407. (b) *Jackson v. Babcock*, 17 Johns. 112.

An executor may maintain ejectment.

*Jones v. Moffatt*, 5 S. & R. 523.

An ejectment lies against any one in actual possession, as the man-servant of another, when such servant is in unlawful possession, and in the character of a beneficial occupier.

*Doe v. Hamilton*, 1 Chit. R. 118; *Doe v. Strangling*, 2 Stark. 187; 11 Serg. & R. 337; 1 S. & R. 521; 3 Binn. 118; 5 Binn. 149.

The landlord whose title is controverted, is in fact the real party.

*Herbert v. Alexander*, 2 Call, 499.

To entitle a mortgagor to recover in ejectment, he must show that the mortgage was satisfied when he instituted the action.

*Beal et al., Lessee, v. Harwood*, 2 Har. & Johns. 172.

Several tenants claiming several parts of the land may be joined as defendants in ejectment.

*Camden et al. v. Haskill*, 3 Rand. 462.

In North Carolina, an alien cannot maintain ejectment.

*Barges v. Hogg*, 1 Hayw. 485.

An assignee under the bankrupt law of the United States may maintain ejectment.

*Barstow v. Adams*, 2 Day, 70.

A mortgagee may bring ejectment against the mortgagor in possession without a demand or notice to quit.

*Rockwell v. Bradley*, 2 Conn. 1. See *Lessee of Ely v. McGuire*, 2 Ohio, 223.

In Vermont, tenants in common may maintain a joint action of ejectment.

*Hicks et al. v. Rogers*, 4 Cranch, 165.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,

1. *Of serving the Declaration, Notice to the Tenant in Possession, and entering into the common Rule.*

ACCORDING to the modern practice there is regularly no necessity of sealing and delivering leases on the land; but the party who claims a title feigns a lease, and in the name of the feigned lessee delivers a (c) declaration to the tenant in possession in the name of the casual ejector, who is also now some feigned person; on which declaration there is (d) notice to the tenant in possession in the casual ejector's name.

(c) [Which is the first process. *Roe v. Doe, Barnes*, 173.] In the courts of the United States, the remedies in ejectment are at common law or equity, not according to the practice of the state courts, but the principles of common law and equity as distinguished and defined in England. *Robinson v. Campbell*, 3 Wheat. 212. (d) Which notice is, that as the casual ejector does not claim title, unless the tenant appears and defends his title, the casual ejector will suffer judgment to pass by default, whereby the



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tenant will be turned out of possession. [It must be signed by the casual ejector, Barnard. K. B. 43, or by the nominal plaintiff. 3 T. R. 351.] ¶ The name of the tenant in possession must also be prefixed to it; and when the possession of the disputed premises is divided between several, it is usual to prefix the names of all the tenants to each declaration; though it does not seem necessary to prefix more than the name of the individual tenant upon whom the particular declaration is served. *Roe v. Roe*, 7 T. R. 477.]

It hath been holden, that the service of the declaration ought to be on the tenant himself, or his wife, and that the service on any of his children or (a) servants is not good; and now by the 4 G. 2, c. 28, it is enacted, "That in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment; and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place or stead of a demand and re-entry," &c.

Salk. 255. (a) [But by the modern practice, service on the child or servant of the tenant is deemed good service, provided the affidavit of service state that it was made on the premises, and afterwards received by the tenant or his wife. *Barnes*, 175, 176, 180, 188, 190, 192; 2 Wils. 263; and that, though it should not clearly appear that the declaration came to the hands of the tenant before the essoign day of the term. *Goodtitle v. Thrustout*, *Barnes*, 183; *Smith v. Hurst*, 1 H. Bl. Rep. 644. ¶ But, though such be the practice of the court of C. P. in this respect, yet the court of K. B. require a statement in the affidavit, that the declaration was delivered to the tenant before the essoign day. *Roe v. Doe*, 14 East, 441.] The service, if made personally on the tenant himself, need not be on the premises. *Savage v. Dent*, 2 Str. 1064. ¶ So, if made on the wife, provided it be sworn, that she and her husband were living together as man and wife, when the service was made. *Jones v. Marsh*, 4 T. Rep. 464; *Doe v. Bayliss*, 6 T. Rep. 765; *Goodright v. Thrustout*, 2 Bl. Rep. 800; *Doe v. Roe*, 2 Bos. & Pull. 55; *Jenny v. Cutts*, 1 N. B. 308. The mere acknowledgment of the wife that she has received a declaration in ejectment and given it to her husband, if it be not personally served upon her, will not be good service, *Goodtitle v. Badtitle*, 1 B. & P. 384; but, where the service was upon the daughter, and on a subsequent day the wife acknowledged that she had received the declaration, and showed it to the attorney, who then read it over to her, and explained it, upon which she then said that the paper should be sent to her husband, the service was holden sufficient. *Smith v. Hurst*, 1 H. Bl. 644.] β *Doe d. Warne v. Roe*, 2 Dowl. 517; 1 Har. & Wol. 371; *Doe d. Wilson v. Smith*, 3 Dowl. 379; *Doe d. Southampton v. Roe*, 1 Hodges, 24. Service on the daughter on the premises will not be sufficient unless it appear that the declaration came to the hands of the father with proper explanations. *Doe v. Roe*, 2 Dowl. 414. See also as to service on children, *Doe d. Harris v. Roe*, 1 Harr. & Woll. 372; *Doe d. George v. Roe*, 3 Dowl. 9; *Doe d. Luff v. Roe*, 3 Dowl. 575; *Doe d. Chaffey v. Roe*, 9 Dowl. 100. See *Lessee of Campbell v. Harper*, 3 Wash. C. C. R. 356; *Doe d. Collins v. Roe*, 1 Dowl. P. C. 613; *Doe d. Cockburn v. Roe*, 1 Dowl. P. C. 692.γ But, if the tenant abscond, or keep out of the way, to avoid being served, it is usual, if there are any special circumstances, to serve a declaration on some person residing at his house, or if that cannot be done, to affix the same upon the door; and then, on an affidavit of the circumstances, to move the court for a rule upon the tenant, to show cause why the service mentioned in the affidavit should not be deemed sufficient; though, if the plaintiff is aware of the difficulties, it is better to move prior to the service, why a service of such a nature should not be sufficient. *Sprightly v. Dunch*, 2 Burr. 1117; *Goodright v. Noright*, 1 Bl. Rep. 290; *Fenn v. Denn*, 2 Burr. 1181; *Gulliver v. Wagstaff*, 1 Bl. Rep. 316.] β See *Jackson v. Salisbury*, 3 Wend. 430;

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*Evans v. Moran*, 12 Wend. 180; *Baron v. Abeel*, 3 Johns. 481; *Jackson v. Stiles*, 1 Cowen, 223; *Ryers v. Hillyer*, 1 Caines, 112. Service on partner sufficient. *Doe d. Overton v. Roe*, 1 Dowl. N. S. 183. Service on an under jointenant is good service on him and a jointenant. *Doe d. Hutchinson v. Roe*, 2 Dowl. 418.<sup>g</sup>

§ If the declaration in ejectment is not served ten days prior to the first day of the term, the tenant has until the first day of the subsequent term to appear and enter into the consent rule.

<sup>h</sup> Den ex dem. *Wade v. Fen*, 3 Halst. 133.<sup>g</sup>

After the declaration delivered, the plaintiff's attorney (except as is above excepted by the statute) is obliged to make oath that he delivered to J D tenant in possession of the premises in question, a true copy of the annexed declaration, with the before-mentioned subscription, which subscription the deponent did then read to the said J D, and acquaint him with the contents thereof.

This affidavit is to be positive, that J D was tenant in possession, or that the defendant acknowledged himself to be so, because no man should be turned out of possession without a positive affidavit, on which he may charge the defendant with perjury.

*Barnard. K. B.* 330, 429. [Affidavit of service on A B, tenant, or C his wife; or the wives of A and B, who or one of them are tenants: neither sufficient. *Barnes*, 173, 174.—The affidavit required, where the declaration is served in pursuance of 4 G. 2, c. 28, is, in substance, as follows: "That the declaration was fixed on such a place, being the most notorious part of the premises in question, (there being no person in possession, on whom the declaration could be legally served:) that half a year's rent was then due from the tenant: that no sufficient distress was to be found on the premises to answer the arrears then due: that the late tenant held such premises by virtue of a lease from the lessor of the plaintiff; and that therein is contained a clause of re-entry for non-payment of that rent." *Cas. Pr. C. P.* 68.]

|| Regularly, the affidavit should be made by the person who served the declaration. But an affidavit by a person, who saw the declaration served upon, and heard it explained to, the tenant in possession, has been admitted.

*Goodtitle v. Badtitle*, 2 Bos. & Pull. 120.

Upon this affidavit the plaintiff moves for judgment against the casual ejector, which is always granted, unless the defendant in due time enters into the common rule of confessing lease, entry, and ouster. This rule being made by assent of parties, an attachment lies for non-performance of it, as for all other rules of court that are disobeyed; and this is all (a) the remedy which the parties on both sides have for their costs.

(a) *Salk.* 259.

If there be several persons that claim title, the rule may be drawn generally or particularly: generally, as that J H, who claims title to the premises in question in his possession, should be admitted defendant for such messuages; and this puts a necessity on the plaintiff at the assizes to distinguish by proof what tenements are in each defendant's possession, because by the rule he is to confess lease, entry, and ouster, only for the lands in his possession: and if the plaintiff cannot distinguish by proof what tenements are in each defendant's possession, he can have no verdict against him, and, consequently, no judgment.

Or the rule may be drawn specially, that J H, who claims title to such lands, expressing them particularly, should be admitted defendant; and that supersedes the necessity of proof that the lands are in his possession; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may summon him before

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a judge, who will order the rule thus specially to be drawn up, in case the party in possession will admit himself to be defendant.

[In the King's Bench, if the premises are situate in London or Middlesex, and the notice requires the tenant to appear on the first day, or within the first four days of the next term, the plaintiff should regularly move for judgment against the casual ejector, in the beginning of the term; and then the tenant must appear within four days inclusive after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred till the latter end of the term, the court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; though if the motion be not made before the last four days of the term, the tenant need not appear until two days before the essoign day of the subsequent term. And should the notice in such case require the tenant to appear in the next term generally, the tenant has the whole of that term to appear in.]

Runnington's Eject. 165.

In the Common Pleas, if the premises are situate in London or Middlesex, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector, for default of appearance, unless such motion be made within *one week* next after the first day of every Michaelmas and Easter terms, and within four days next after the first of every Hilary and Trinity terms. But it has been holden, that this rule does not extend to the case of a vacant possession under 4 G. 2, c. 28.

Reg. Tr. 32; Car. 2, C. B.; Barnes, 172.

In country causes, though the declaration be delivered before the essoign day of Easter or Michaelmas term, yet the tenant, in both courts, is allowed till four days after the next issuable (that is, Hilary or Trinity) term to appear, and if the cause arise in Cumberland, or in any other county where the assizes are holden only once a year, the tenant is not compellable to appear till four days after the term preceding the assizes. But in the King's Bench, the plaintiff must move for judgment the same term in which the tenant has notice to appear; though the practice is different in the Common Pleas, for there he may move for judgment at any time during the next issuable term. By a late rule of the Court of King's Bench, which has been adopted by the Court of Common Pleas, the clerk of the rules is, for the future, to keep a book, in which are to be entered all the rules which shall be delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry is to specify the number of the entry; the county in which the premises lie; the name of the nominal plaintiff; the *first* lessor of the plaintiff, with the words "*and others*," if more than one; and also the name of the casual ejector. And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term in which the ejectment shall be moved, no rule is to be drawn up, or entered, nor any proceeding had in such ejectment.]

¶ The notice may be to appear in the next issuable term, and judgment against the casual ejector may be then moved for. *Doe v. Roe*, 4 Taunt. 738. [1 Salk. 257; M. 31 G. 4; 4 T. Rep. 1; E. 48 G. 3; 1 Taunt. 337.]

If on the trial the defendant will not appear and confess lease, entry, and ouster, the course is to call the defendant and his attorney, if he be within the rule, and then to call the plaintiff himself and nonsuit him, and then

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upon the (a) return of the *postea* (b) judgment will be given against the casual ejector.

(a) But the judgment against the casual ejector cannot be entered till the *postea* be returned, on which is endorsed, that the nonsuit was for want of confessing lease, entry, and ouster; for it does not appear that the defendant has not complied with the rule till after the assizes at which the cause was to have been tried, and therefore the judgment cannot be entered till the next term after such assizes. [And such is the practice of the Court of King's Bench. Doe on the dem. of Lord Palmerston v. Copeland, 2 T. Rep. 779. But in the Court of Common Pleas, the plaintiff may, in this case, enter up judgment against the casual ejector, and take out execution, *immediately* after trial. Throgmorton on the dem. of Fairfax v. Bentley, C. P., Hil. 27 G. 3, Ibid.] (b) Of which judgment the defendant cannot bring a writ of error, for he was no party thereto; and if he brings such a writ in the name of the casual ejector, the casual ejector being a friend to the plaintiff's lessor, may either release the errors, or upon a motion for a *non pro.* the court will order it to be entered.—But, if an infant be tenant in possession, and the plaintiff obtain judgment against the casual ejector for want of confession of lease, entry, and ouster, and the infant bring a writ of error in the casual ejector's name; and the defendant in error set up a release from the casual ejector; upon making this out to be the case of the infant, on motion on the writ of error, the court will not suffer such a release to be pleaded in bar to such writ of error, because no laches can be imputed on the infant for want of confession of lease, entry, and ouster. See *infra*, n.

If the plaintiff in ejectment, who, is but a nominal person, dies, yet the action shall not abate; for if there be any other person of the same name, the court will intend him to be the person mentioned in the declaration, because he is only nominal, and therefore while there is any person of the name living, the lessor of the plaintiff, who is only concerned in the interest, may proceed in the suit.

3 Keb. Rep. 372.

Also if plaintiff, who is only a trustee for the lessor, releases the action, he may be committed for the contempt.\*

Salk. 260. \*The constant mode now is, to declare in a fictitious name, such as John Doe, &c., for the lessor of the plaintiff is the real party.

The rule in the Common Pleas is, that the tenant in possession shall forthwith appear and receive a declaration: and this supersedes the necessity of an original writ, because the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unless a writ of error; but when a writ of error is brought, they must file an original, unless it be after a verdict, when it is helped by the statute 18 Eliz. c. 14.

Carth. 288.

Also in the King's Bench, where a person may proceed as well by original as by bill, there is no need of an original nor of a *latitat*, or bill of ejectment; but before there be any proceedings, common bail must be filed for the casual ejector. But in case of a writ of error, the party must file a bill of ejectment, besides the plea-roll, before the errors are assigned.

2 Show. Rep. 249; Boucher and Friend, 5 Mod. 333.

The court hath changed the plaintiff in ejectment after the declaration delivered, and hath (a) enlarged the term where the cause hath been long in agitation, and judgment entered against the plaintiff after he is dead.

Sid. 24. (a) In Carth. 3, Comb. 13, 15, it is said, that the court will enlarge the term; but in Carth. 401, 402; 6 Mod. 130; Comb. 110; Salk. 257, it is said, that it cannot be done without consent of parties, although the plaintiff is hung up by an injunction in Chancery, or delayed by a writ of error brought in the Exchequer Chamber, for that this would be altering records; and it was the party's fault in not delivering a declaration of a term long enough to get judgment. [However, in a sub-

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sequent case, the term was enlarged without consent, from five to ten years. *Oates v. Shepherd*, 2 Str. 1272. And as the demise is now considered to be mere matter of form, the courts feel no difficulty in altering it, where the justice of the case requires it. *Doe v. Pilkington*, 4 Burr. 2447; *Small v. Cole*, 2 Burr. 1159; *Goodright v. Strother*, 2 Bl. Rep. 706; *Roe v. Ellis*, *Ibid.* 940; *Vicars v. Haydon*, Cowp. 841.]

If a lease contains a proviso for re-entry on nonpayment of rent, *being lawfully demanded*, still, if there be no sufficient distress on the premises, the lessor may re-enter without any demand.

*Doe dem. Scholesfield v. Alexander*, 2 Maule & S. 525, *diss. Ld.* *Ellenborough, C. J.*; and see tit. *Rent*. And *qu.*, Whether the statute has put a landlord in a better situation than the crown is in, who, it seems, is bound to make a demand if expressly stipulated, though in virtue of the prerogative not bound to make any demand where not stipulated.

If a lease contain a proviso for re-entry in case rent in arrear by a certain time, "although no legal or formal demand should be made," an ejectment may be brought without actual re-entry, and without any demand of rent.

*Doe dem. Harris v. Masters*, 3 Barn. & C. 490.

In proceeding on the 4 G. 2, c. 28, § 2, it is no objection that the declaration was served on a day subsequent to the day on which the demise was laid, that being after the rent became due, because the title of the lessor accrues on the day on which the forfeiture would accrue at common law by non-payment of the rent.

*Doe dem. Lawrence v. Shawcross*, 3 Barn. & C. 752; and see 15 East, 286.

A difference between the rent proved to be due and the rent stated in the particulars, is not material.

*Tenny v. Moody*, 3 Bing. R. 3.

The penalty of three years' improved rent incurred by a tenant for concealing a declaration in ejectment under the 11 G. 2, c. 19, is not the rent reserved, but such a rent as the landlord and tenant might fairly agree upon at the time of delivering the declaration in ejectment, in case the premises were then to let.

*Crocker v. Fothergill*, 2 Barn. & A. 652.

The mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had.

*Doe dem. Whitfield v. Roe*, 3 Taunt. 402.

By the 1 G. 4, c. 87, intitled *An Act for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants*, it is enacted, that where the term or interest of a tenant holding under lease, or agreement in writing, shall have expired or been determined by notice to quit, and such tenant, or any one claiming under him, shall refuse to deliver up possession after demand in writing made and signed by the landlord or his agent, and served upon or left at the dwelling-house of a tenant, and the landlord shall proceed by ejectment, it shall be lawful for him, at foot of the declaration, to address a notice to the tenant, requiring him to appear on the first day of the next term, to be made defendant and find bail, if ordered by the court; and on the appearance of the party it shall be lawful for the landlord producing the lease or agreement, or some counterpart, and proving the execution, and that the premises have been actually enjoyed under it, and that the tenant's interest has expired or been determined by notice to quit and possession demanded, to move that the tenant should

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undertake to give plaintiff a judgment of the term preceding trial, and enter into recognisances to pay the costs and damages to be recovered by plaintiff, and the court shall, if they see fit, make such rule absolute.

Where a tenant holds from year to year without lease or agreement in writing, the case is not within this statute.

*Doe dem. Bradford v. Roe*, 3 Barn. & A. 770; *Doe dem. Phillips v. Roe*, 5 Barn. & A. 766; and see 6 Moo. R. 54.

A tenancy, by virtue of an agreement in writing, for three months certain, is a tenancy "for a term" within the statute.

See 1 M'Clel. 492.

It is not necessary to express in the rule *nisi* the amount of security required.

A tenancy for years determinable on lives is not a holding for any "number of years certain" within this act.

*Doe dem. Pennington v. Roe*, 7 Barn. & C. 2.

By statute 1 Will. 4, c. 70, § 36, after reciting the delays suffered by landlords in recovering possession of their lands, it is enacted, "that in all actions of ejectment to be brought in any of his majesty's courts at Westminster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a declaration in ejectment, entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenants in possession to appear and plead thereto, within ten days, in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; provided also, that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his majesty's superior courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes; and that it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient."

By § 37 it is enacted, "that in making up the record of the proceedings on any such declaration in ejectment, it shall be lawful to entitle such declaration specially of the day next after the day of the demise therein, whether such day shall be in term or in vacation, and no judgment thereon shall be avoided or reversed by reason only of such special title."

And by § 38 it is enacted, "that in all cases of trials of ejectment at *nisi prius*, where a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried, to certify his opinion upon the back of the record, that a writ of

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possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued: provided always, that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly that the cause came on for trial at *nisi prius* at such a time and place, and before such a judge, (naming the time, place, and judge,) and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately."

## 2. Of adding proper Parties.

No person is admitted to defend in ejectment unless he be tenant, and is or hath been in possession, or (a) receives the rent, because it is an act of champerty for any person to interpose to cover the possession with his title. To make any person defendant with another, who was not concerned in the possession of the tenements, was a mischief at common law, because, if the plaintiff recovered against one of the defendants, the stranger, who was acquitted, had no remedy for his costs. But that is remedied by 8 & 9 W. 3, c. 11, whereby costs are given to the persons "so acquitted," unless the judge certifies immediately on the trial, that the plaintiff had a probable cause for making him a defendant.

By Holt, C. J., Comb. 209. (a) To make the landlord a defendant in ejectment, is of right; for otherwise he might be prejudiced in his inheritance, by combination between the plaintiff and tenant in possession. Salk. 257. So, the landlord, though a peer, Comb. 339, or a member of parliament, must be joined, if he applies for it; for every person, who has any privilege, has it by law, which the courts cannot compel him to waive. Salk. 256.—[Such, it seems, was the right of the landlord at common law: yet, by stat. 11 G. 2, c. 19, § 13, it is enacted, "that the landlord may, by leave of the court, make himself defendant with the tenant in possession, in case he appear; and in case such tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector. But, if the landlord shall desire to appear by himself, and consent to enter into the like rule as the tenant, in case he had appeared, ought to have done, the court shall permit him" (as the court often did permit before the passing of this statute, see the authorities collected in 3 Burr. 1290) "so to do, and order a stay of execution upon such judgment until further orders." And by the same statute, § 19, "the tenant being served with a declaration in ejectment must give notice thereof to the landlord, under the penalty of three years' improved rent." This penalty, however, does not attach on the tenant of a mortgagor who omits to give notice of an ejectment brought by the mortgagee in order to enforce an attornment. *Buckley v. Buckley*, 1 T. R. 647. A lord, claiming by escheat, or it seems a mortgagee, who is out of possession, (though as to the latter it hath been holden otherwise formerly, *Jones v. Williams*, Barnes, 194,) may be admitted to defend. *Fairclain v. Shantille*, 3 Burr. 1299. So, the immediate heir of the person last seized, or remainderman claiming under the same title with the original landlord. *Heblethwaite v. Roe*, 3 T. R. 783, n.; or a devisee in trust, *Lovelock v. Doncaster*, 4 T. R. 122; though they have never been in possession. But, if the person who wishes to defend be neither tenant nor actual landlord, but have some interest to sustain, he must move the court, on an affidavit of the fact, to be made defendant instead of, or with the casual ejector, which may now be done without the consent of the tenant. *Sty.* 368; 3 Burr. 1290. And such new defendant may give a rule to reply, and *non pros.* the plaintiff, but cannot have costs. *Goodright v. Badtite*, 2 Bl. Rep. 763. And in no event will it be permitted to a lessee to defend alone against his landlord, or those who claim under him on a supposed defect of title. *Driver v. Lawrence*, 2 Bl. Rep. 1259.]—But a landlord may refuse to be made defendant. Salk. 256, pl. 6.—Where it was moved, that the wife of the lessor of the plaintiff might be made defendant, the plaintiff's title being by a pretended marriage, which was controverted, and the court inclined accordingly; but perceiving it to be a trick to gain time, and so to put off the trial, it was refused. Salk. 257.—One who is only a trustee need not be joined. Comb. 332.—If a material witness is also made a defendant, the right way is for him to let judgment go by default; but, if he pleads, and by that means admits himself tenant in possession, the court will not afterwards upon motion strike out his name. *Dormer v. Fortescue*, Mich. 9 G. 2.

## (B) Of the Modern Manner of Commencing, &amp;c.

In ejectment, where there are two defendants for the same premises, and one appears and confesses lease, entry, and ouster, and the other does not, the plaintiff cannot proceed against the other, but he must be nonsuited, because both the defendants not admitting the demise, and the plaintiff not proving an actual entry and demise, he cannot maintain his declaration. (a) But, if there appeared any covin between such person not appearing, and the lessor of the plaintiff, the court will stop the judgment against the casual ejector, for the part of him who appeared, and oblige him who did not to release the costs, because a declaration was delivered to each of them for their respective parts; and therefore, where one does not pay obedience to the rule, the plaintiff has judgment against the ejector for his part only.

Vent. 255; 2 Vent. 195. (a) [The practice in this case is now to proceed against the one who does appear, and to enter a verdict against the other, endorsing on the *postea* the cause of such verdict, which as to that defendant entitles the plaintiff to judgment against the casual ejector. *Claxmore v. Searl*, 1 Ld. Raym. 729; *Thrustout v. Foot, Barnes*, 149; *Ellis v. Knowles*, *Ibid.* 174.]

And where there are several defendants to whom the plaintiff delivers declarations, that are severally concerned in interest, and the plaintiff moves to join them all in one declaration, yet the court will not do it; but the plaintiff must deliver several declarations to each of them; because each defendant must have a remedy for his costs, which he could not have if they were joined in a declaration, and the plaintiff prevailed only against one of them. And by this means the plaintiff might have a tenant of his own, defendant with others, in order to save the costs.

2 Keb. 524. ¶ In the case of jointenants, tenants in common, or coparceners, where actual ouster is denied, they may confess it, under a special order of the court, that it shall be without prejudice; *Doe v. Roe*, Anstr. 86; or the confessing of ouster may be wholly omitted in the rule. *Doe v. Roe*, 2 Taunt. 397.¶

[But, where several ejectments are brought for the *same premises*, upon the *same demise*, the court on motion, or a judge at his chambers, will order them to be consolidated.]

*Grimstone v. Burgers, Barnes*, 176.]

## 3. Of the Costs.

The parties by entering into the common rule are under the power of the court, by virtue whereof the court awards costs, which being taxed by the master, if demanded of the party, and he refuses to pay them, the court on affidavit thereof will grant an attachment.

Salk. 251. [If a verdict be given for the defendant, or the plaintiff be nonsuited for any other cause than the want of confession of lease, &c., the defendant must tax his costs on the *postea*, as in other actions; and sue out a *capias ad satisfaciendum* for the same against the plaintiff, which he must show, under seal, to the plaintiff's lessor, and at the same time serve him with a copy of the consent-rule; and if the lessor, being required, refuse to pay the costs, the court, on motion, will grant an attachment against him. *Tilly v. Baily*, M. 6 G. 2.—If the lessor of the plaintiff die before the commission-day of the assizes, and the plaintiff be afterwards nonsuited, because the defendant did not confess lease, &c., the executor of the lessor of the plaintiff is not entitled to costs. *Thrustout v. Badwell*, 2 Wils. 7; *Doe v. Ford*, 2 Smith, 407. But, if he die after the trial of the cause, the executor shall have the costs, which had been taxed on the consent-rule. *Goodright v. Holton, Barnes*, 119. ¶ This case, it is observed by Mr. Adams, in his *Treatise on Ejectments*, p. 262, is rather unintelligible, unless it means that the lessor of the plaintiff had waived his right to a *ca. sa.* or *fi. fa.* on the judgment, and, at the defendant's request, had taxed his costs on the consent-rule in lieu thereof.¶—If the tenant appear, confess lease, &c., and a verdict be given against him on the trial, the judgment thereupon is entered against the tenant, on which the plaintiff may take out execution, as in ordinary cases; for this is not a case provided for by the rule. *Runningt.* 415.]



## (B) Of the Modern Manner of Commencing, &c.

And although the plaintiff in ejectment be but a nominal person, yet if he be not to be found, or if he be not able to pay the costs, the attorney or solicitor is liable, or may be committed until he pay the costs, or produce a plaintiff that is able to pay them.

2 Lev. 66; 6 Mod. 309; 12 Mod. 318; Str. 402.

So, if a stranger carries on a suit in another's name, who has a title, and yet is so poor that he cannot pay costs; in case he fails, upon affidavit of this matter, the court will order such person, who carries on the suit, to pay costs to the defendant.

If an infant delivers a declaration to the defendant, some friend or guardian must be set up as plaintiff to answer the defendant's costs; but, if such person dies insolvent, so that the defendant has no remedy, by this rule the infant himself must answer the costs, because the rule was entered into for the infant's benefit; and even infants must not disturb the possession of others by unlawful entries, without being punished with costs.

Str. 694; 2 Str. 932; 2 Barnard. K. B. 140; 2 Kel. 55, pl. 17. [Ca. temp. Hardw. 56; 1 Wils. 130. Previously, however, to any motion in court, inquiry should be made, whether there be a real and substantial plaintiff or not? for on inquiry, the guardian may undertake to pay the costs, in which case the court would probably decline to interpose. Cowp. 128.—It hath likewise been holden, that upon the death of the plaintiff's lessor, proceedings may be stayed, till the plaintiff shall have given the defendant security for his costs. East v. Nonelly, Barnes, 147; Thrustout v. Grey, 2 Str. 1046. So, where an ejectment was brought on the demise of a person residing at Antigua, Cusack v. Jones, H. 33, G. 3, B. R.; and in another case, where the lessor of the plaintiff resided in Ireland, the plaintiff was compelled to give the defendant a similar security. Denn v. Fulford, 2 Burr. 1177. In the latter case, the ejectment was brought under the direction of the Court of Chancery, where the bill was retained till after trial of the ejectment, and security had been there given to the amount of 40*l*. But excepting such instances, and that of a former ejectment, the court will not compel the lessor of the plaintiff to give security for the costs. Doe v. Alston, 1 T. R. 491.]

If there be baron and feme lessors in ejectment, and one dies after entering into the rule, the surviving person is liable to pay costs.

1 Keb. Rep. 827, pl. 1.

If ejectment be brought to be tried at bar to bring a matter in question, as the validity of a will, and a parcel of land be inserted in the declaration, which is not concerned in the question, but to which the plaintiff hath undoubted right, and the defendant confess lease, entry, and ouster of the whole, not observing this part, the plaintiff shall not on this account be excused from the costs; but the court will give the defendant leave to retract his confession as to this parcel. The like was done in (a) a case where a parcel of copyhold land was inserted in the declaration, which was not touched by the will, no surrender being made to the use of the will.

(a) Mich. 27 Car. 2, B. R., between Oddye and Preston.

|| If the lessor of the plaintiff abandon the action after the appearance of the tenant or landlord, and refuse to join in the consent rule, he is holden not liable for the defendant's costs, because, until he has put his signature to the rule, he is not considered as consenting to proceed against the new defendant.

Smith v. Barnardiston, 2 Bl. Rep. 904.

If the lessor of the plaintiff sue *in formâ pauperis*, he will be dispaupered in case of vexatious delay; though, it would seem, not compelled to pay the defendant's costs.

Doe v. Trussel, 6 East, 505.

(C) In what Case the Ancient Form is to be adhered to.

Where there are several defendants, the lessor of the plaintiff may pay costs to which of them he pleases.

Taylor v. Horde, 1 Burr. 60, 88; Anon. 2 Sid. 165.]

(C) In what Case the Ancient Form is still to be adhered to.

WHERE the houses or things for which the ejectment is brought are (a) empty, in such case no declaration can be delivered, nor affidavit made thereof, by reason of which the court cannot proceed to give judgment against the casual ejector; and therefore it is necessary to proceed the old way, by sealing a lease on the land, and giving rules to plead, and when these rules for pleading are out, affidavit must be made of the whole matter: upon which the court grants judgment. But (b) there can be no judgment against the casual ejector without moving the court for that purpose, though the rules for pleading are out, because the court will not grant any judgment against the casual ejector, who is only nominal, without such proper affidavit, lest otherwise a third person should be tricked out of his possession.

(a) But by 4 G. 2, c. 28, in all cases between landlord and tenant, in case there be no person residing in the house, or in case the declaration cannot legally be served, it is sufficient to affix it to the door of the house or on some notorious place on the lands, in case the ejectment be for lands. [But a very little matter is sufficient to retain the possession; and therefore where the tenant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment was set aside. *Savage v. Dent*, 2 Str. 1064.] (b) *Salk*. 255.

So, if the tenant in possession kept his door shut, it was thought the best way to seal a lease on the land, and proceed in the old way: but in this case it seems, that if the practice and fraud of the tenant be made appear to the court by affidavit, the court will grant judgment against the casual ejector *nisi*.

§ When premises are totally deserted, proceedings must be had as upon a vacant possession. *Doe d. Norman v. Rowe*, 2 Dowl. 399. See *Doe d. Roupel v. Roe*, 1 Harr. & Woll. 367; 3 Dowl. 691; 2 C. M. & R. 42.g

It has been held, that where a corporation is lessee of the plaintiff, they must give a letter of attorney to some person to enter and seal a lease upon the land, for a corporation cannot make an attorney or bailiff but by deed, nor can they appear but by making a proper person their attorney by deed. They cannot therefore enter and demise upon the land in person as natural persons can; nor can they substitute an attorney to enter into a rule for their costs; nor will an attachment go against them for disobedience to that rule, and, by consequence, they are put to make an (c) actual lease upon the land, which lease must try their title, and then the attorney may proceed in the common method, which is not altered by the said statute.

(c) But in *Carth*. 390, *Patrick v. Balls*, in ejectment, where the plaintiff declared upon a demise made to him by the aldermen and burgesses—without setting forth that it was by deed, or under the seal of the corporation; on a writ of error, it was held well enough; and that this being a fictitious action to try the title, the demise need not now be set out to have been by deed. 1 *Ld. Raym*. 136. [And the law is the same before verdict; for in *Farley on the demise of the Mayor, &c., of Canterbury v. Wood*, *Kent Summ. Ass.* 1794, where the declaration stated the lease to have been made to the plaintiff under the common seal of the corporation; it was objected that the lease ought to be proved; but Lord Kenyon said, that by the common rule and appearance the lease was admitted as stated. *Runningt*. 150. If a corporation be aggregate of many, they may set forth the demise in the declaration without mentioning the Christian names of those who constitute the corporation; but, if the corporation be sole, the name of baptism must be inserted; because in the former case, the name wholly consists in

(C) In what Case the Ancient Form is to be adhered to.

its character; in the latter, in the individual person; therefore, there cannot be a sufficient specification of that person without mentioning his name. Dy. 86.]

Another instance, where the old method is still to be observed, is, where the several interests of the lessors of the plaintiff are not known: and there it is a good way to seal a lease upon the premises, lest they should fail in setting out in their declarations the several interests which each man passes.(a)

(a) [But there seems to be no necessity for so doing, even in this case; inasmuch as by the common rule, according to the modern practice, the lease would, of course, be admitted; and though there be several defendants, yet each appears and defends only for such part of the premises as is in his possession. Runningt. 151.]

So, where the proceedings are in an inferior court, there, they must proceed by actually sealing a lease, because they cannot make rules to confess lease, &c., inasmuch as such courts have not an authority to imprison for disobedience to their rules. And the reason is, the inferior courts having but a limited authority cannot make any new rules to bind persons that do not come in by proper process of such courts; but the courts above, having an unlimited authority in every thing within their jurisdiction, shall bind any person that consents to their rules: and therefore in such inferior courts, the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector, to save expense.

If an ejectment be brought in an inferior court, and a *habeas corpus* be brought to remove it, and the plaintiff in ejectment declare against the casual ejector, there may be a rule to confess lease, &c., as if he had originally declared in the court above, and the court will not grant a *procedendo*.

If a *habeas corpus* be brought to remove a cause in ejectment out of an inferior court, and the lands lie within their jurisdiction, and the lessor of the plaintiff seal a lease on the premises, the courts above will grant a *procedendo*, because the title of the land is a local matter, properly within the jurisdiction of the court below, where, if they proceed regularly, they shall not be prohibited; but, if the lessor has not sealed a lease on the premises, they will not.\*

2 Keb. 119. \*Sed. qu. as to a *procedendo*, if the inferior court has not an exclusive jurisdiction?

But, if the lands lie partly within the Cinque Ports and partly without, the defendant cannot plead above the jurisdiction of the Cinque Ports; for though the land be local matter, yet the demise is transitory and triable anywhere; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he takes proper measures for that purpose; yet, if he will lay it above, since the demise is transitory, the defendant cannot stop his proceeding, because the courts above for such transitory matters have a proper jurisdiction.

Hall v. Hughes, 2 Keb. 69.

If the defendant in an inferior court enter into a rule to confess lease, &c., and the cause be removed by *habeas corpus*, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court will grant an attachment against such judge for compelling obedience to their rules, and thereby obstructing the business of the superior courts, since the defendant is not bound by the rule he entered into in the inferior court, such rule being only the practice of the superior courts.

Moore, 86; Keb. 785.

(D) Of the Declaration in Ejectment: And herein,

1. *Of what Things an Ejectment will lie.*

An ejectment does not lie for a rent or common appendant, or other things that lie merely in grant, because these, being (a) incorporeal things, are in their nature invisible, *quæ neque tangi nec videri possunt*; and therefore not capable of being delivered in execution. (b)

Cro. Car. 202; Cro. Ja. 146. (a) Co. Lit. 9 a. [(b) But for common appendant or appurtenant ejectment will lie, because the sheriff may give possession of such common, by giving possession of the land to which it belongs. *Newman v. Holdmyfast*, Str. 54; Andr. 107. So, it will lie for so many acres of land with common of pasture, *cum pertinentiis*. *Baker v. Roe*; Ca. temp. Hardw. 127.] β An ejectment may be maintained for land by its reputed name. *Foulke et al. v. Kemp's Lessee*, 5 Har. & Johns. 137.g

So, an ejectment does not lie *de quodam rivulo, &c., aquæ cursu*, called *locar* in L., for *rivulus sive aquæ cursus* lies not in demand; for *non moratur*, but is always flowing; nor (c) can execution by *habere facias seisinam* be made thereof, and therefore the action ought to be of so many acres of land *aqua coopert*: but if the land under the river does not belong to the plaintiff, but the river only, then upon a disturbance the remedy is by action upon the case only.

*Challener v. Thomas*, adjudged, Yelv. 143; Brownl. 142. S. C.; Poph. 167, S. C. cited, and vide Godb. 157, which seems contrary. (c) For this reason an ejectment does not lie *de piscariâ* in such a river more than of a common apprenore or rent: adjudged upon a writ of error upon a judgment out of Ireland, and the judgment for this reason reversed. Cro. Car. 492; 8 Mod. 277. But Jones said, perhaps an assize would lie for it, because it is *proficuum in certo loco capiend.*; and vide Cro. Ja. 146. [And in the case of the King v. Old Alresford, 1 T. R. 364, Ashhurst, J., is reported to have said, "there is no doubt but that a fishery is a tenement. Trespass will lie for an injury "to it, and it may be recovered in ejectment."] An ejectment lies *pro stagno*, because in law the word *stagnum* comprehends both land and water. Yelv. 143; Co. Litt. 5; Regist. 227.—So, *de gurgite* is good for the same reason. Co. Litt. 5.

So, an ejectment does not lie *de pannagio*, because this is only the masts that fall from the trees which the swine feed on, and no part of the soil itself, as the herbage is.

*Pemble v. Stern*, adjudged, 1 Lev. 212; Sid. 416, S. C., adjudged.

But an ejectment lies of a boiary of salt; that is, where a man hath no inheritance in the soil in which there is a well of salt-water, but only a lease or grant of so many buckets of the water as will arise, (which are called the boilaries,) and these are withheld from him, he may bring his ejectment for so many boilaries as his grant was.

Cro. Ja. 150, said to have been adjudged. Sid. 161; Lev. 114, S. P. admitted.

So, an ejectment lies for a coal mine, because it is not to be considered as a bare profit *apprendre*; but a coal mine comprehends the ground or soil itself, which may be delivered on the execution; and though a man may have a right to the mine without any title to the soil, yet the mine itself being fixed in a certain place, the sheriff has a thing certain before him to deliver in execution.

*Comyn v. Kincto*, adjudged, Cro. Ja. 150; Noy, 121, S. C.; Ro. Rep. 483, S. C. cited: Hard. 57, S. C. cited to be adjudged; Carth. 277; 4 Mod. 143; Comb. 201; Show. Rep. 364; Salk. 255; 1 Burr. 627.

An ejectment lies *pro primâ tonsurâ*, that is, if a man hath the grant of the first grass that grows on the land every year, he may recover it in ejectment of him that withholds it from him; for the first grass, or *primâ tonsurâ*, is the best profit and grant of the property; and therefore he that hath it shall be esteemed the proprietor of the land itself till the contrary be

(D) Of the Declaration in Ejectment.

proved; for the after-grass or feeding is in the nature of commonage. As, therefore, he that hath the first grass, or *tonsure*, has the most signal profit of the land, and may keep it longer or shorter on the land, according to the seasonableness of the year, it is but reasonable to give him this remedy against the person that ousts him of it, especially, when it is a fixed determinate thing, which the sheriff may put him in possession of, which distinguishes it from a right of common or other profit *apprendre*: for the commoner cannot assign any one acre which he hath a right to separate from the rest of the commoners; whereas the grantee of the first grass has in reality a right to the land itself till the crop be taken off; for no man can enter on the land till that be off, without being a trespasser.

Ward v. Petifer, Cro. Car. 262.

So, an ejectment lies *pro herbage*, because the herbage is the most signal profit of the soil, and the grantee hath at all times a right to enter and take it.

Wheeler v. Thompson, Hard. 303, 401.

|| So, an ejectment, it seems, will lie on a demise of the haygrass (before severance) and aftermath.

Rex v. Stoke, 2 T. R. 453.]

So, an ejectment lies (a) *pro pasturâ centum ovium*; that is, for so much land as will feed one hundred sheep.

Dal. 95. (a) In Hard. 58, a case is cited to have been adjudged, that ejectment lay *not de pasturâ*. [But see Rex v. Piddlerenthide, 3 T. R. 772; Rex v. Tolpuddle, 4 T. R. 671; Burt v. Moore, 5 T. R. 329.]

Although tithes are esteemed part of the incorporeal inheritance, and by the common law were only of ecclesiastical consusance, yet being in the hands of lay proprietors, they are now considered as a temporal estate: for by the 32 H. 8, c. 7, it is provided, that every (b) lay person having any estate of inheritance, freehold, right, term, or interest in tithes, and being thereof disseised, ousted, wronged, or otherwise kept from the same, shall have his remedy in the courts of law for them in like manner as for lands; and hence it is that an ejectment lies for tithes.

Cro. Car. 301; Jon. 321; 2 Ld. Raym. 789; 3 Wils. 30. (b) This remedy is given only to lay impropiators, and therefore the act of parliament leaves spiritual persons to pursue their old remedy in the spiritual court. Co. Litt. 159; Dyer, 116.

An ejectment lies *pro rectoriâ*, because a rectory consists of a church, glebe lands, and tithes.

Latch. 62.

It was formerly held, that an ejectment did not lie *pro capellâ*, because it was *res sacra*, which was not demisable; but now since it is become a lay inheritance, it is recoverable in ejectment, as other lay estates; but it must be demanded by the name of a messuage, or it is not formal.

11 Co. 25; Style, 101; Doct. Pl't. 191; Salk. 256. [In an ejectment for a chapel and lands in Hampstead, the court refused to make the chaplain a defendant, *quoad* his right of entry into the chapel to perform divine service. Martin v. Davis, 2 Str. 914; 2 Barnard. K. B. 28.—In the case of the King v. Bishop of London, it was said (*in argument*) that an ejectment would lie for a prebendal stall, after collation or admittance, for then it becomes a freehold. 1 Wils. 14.]

¶ The thing for which ejectment is brought must be such that possession of it can be delivered by the sheriff.

Black v. Hepburne, 2 Yeates, 321; Jackson v. Buel, 9 Johns. 298; Jackson, ex dem Saxton, v. May, 16 Johns. 184. See Bear v. Snyder, 11 Wend. 592; Stackpole v. Healy, 16 Mass. 35. Ejectment will not lie for a ferry. Rees v. Lawless, 6 Litt R. 184.

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## (D) Of the Declaration in Ejectment.

Ejectment will lie for land below high water-mark.

Nichols v. Lewis, 15 Conn. 137.*g*

2. *What shall be a sufficient Description of those Things for which an Ejectment will lie.*

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover; (a) for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing specifically demanded. But the judges did not confine themselves to those rules which govern the *præcipe*, but allowed some things to be recovered in this action, which could not be demanded in a *præcipe*; because, since the establishment of that real action, (b) many things have been added and improved by art, and acquired new appellations that are perfectly understood now by the law, which are not found in the ancient law-books; and as men began to contract by new names, which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts.

(a) [At this day, however, the practice is otherwise. The sheriff now delivers possession according to the direction of the plaintiff, who therein acts at his peril. The plaintiff himself must now show the sheriff, that which under the writ he is to deliver possession of; and is to take possession, at his peril, *only* of what he has title to; for if he takes more than he has recovered, and proved title to, the court will, in a summary way, set it right. 1 Burr. 629; 5 Burr. 2673.] (b) Hence it is said in Palm. 337, by Noy, *arguendo*, that an ejectment will lie of a hop-yard. [So, it will lie for *alder car*; a well-known term in Norfolk for land covered with alders. Barnes v. Peterson, 2 Str. 1053. So, for a *beast-gate*, a provincial term in Suffolk, importing land and common for one beast. Bennington v. Goodtitle, Ibid. 1083; Andr. 106, S. C. So, for a *cattle-gate*, a Yorkshire term, said to be synonymous with *beast-gate*. Metcalf v. Roe, Ca. temp. Hardw. 106; 1 T. R. 137.]

But the judges did not extend this action as far as they went in an (c) *assize*, because the recognitors having the view of the thing demanded in the *assize*, must have more certain knowledge of the thing demanded than could be given in ejectment.

Dyer, 84, pl. 85. (c) And therefore it hath been held, that an ejectment will not lie *decroft*, though an *assize* will. Style, 30. [But in Sty. 194, Roll, C. J., said, that an ejectment would lie in this case: and according to positive law (4 & 5 Ann. c. 16, § 3; 3 G. 2, c. 25, § 14) and modern practice, a view may (on motion in the usual manner) be had of the *locus in quo* in ejectment, as well as in the ancient *assize*, or any other action.]—But, if an ejectment be brought for a *croft* and an acre of meadow, and the plaintiff have a verdict, he may have a special judgment for his acre of meadow, releasing the damages for the rest. Lev. 58.—Also, an ejectment will lie *de uno crofto vocat.* B. Lev. 50, *per* Twisden.

An ejectment lies of an *orchard*, because it is a word of a certain signification, though in a *præcipe* it must be demanded by the name of a garden; and it being well enough understood, the sheriff may with certainty deliver it upon an execution.

Wright v. Wheatley, adjudged, Noy, 37; Cro. Eliz. 854, S. C. adjudged, because but by a personal action, wherein damages are the principal. Ro. Rep. 55, S. C.; Cro. Ja. 654; Palm. 337, S. P. adjudged; Hard. 55, S. P., by Baldwin, *arguendo*. Lev. 58, S. P. *per* Twisden.

So, an ejectment lies of (d) a stable, because it is a word of a determinate signification, and may be delivered by the writ of execution.

Lev. 58, Lady Dacres's case, adjudged upon view of several precedents of recoveries *de stabulo*. (d) So, an ejectment lies of a cottage. Cro. Eliz. 818; Cro. Car. 555; Hardr. 57.

An ejectment of a house is good, though in a *præcipe* it ought to be de-

(D) Of the Declaration in Ejectment.

manded by the name of a messuage; because the ejectment is an action of trespass in its nature; and as a trespass, *wherefore he broke into the house*, has been allowed; so it has been allowed to be good in ejectment: and the import and certain signification of the word *domus* or house is well enough understood in the law; for in waste the thing itself is recovered, besides damages, and yet the action of waste is given *de domibus*.

Royston v. Eccleston, adjudged, Cro. Ja. 654; Palm. 337, S. C. adjudged, and vide 3 Lev. 97; Hard. 76.

So, an ejectment of a chamber in the second story of such a house was held good, there being certainty enough to direct the sheriff in the execution.

3 Leon. 210; Noy, 109; Hard. 57, S. P. [So, an ejectment for part of a house in A hath been adjudged to be well enough. Sullivaine v. Seagrave, 2 Str. 795; Rawson v. Maynard, Cro. Eliz. 286.]

But an ejectment *de coquina, Anglice* a kitchen, is naught; for though the word is well enough understood, yet because any chamber in the house is applicable to that use, the sheriff hath not certainty enough to direct him in the execution, in regard the kitchen may be changed between the judgment and execution.

Ford v. Lerk, adjudged, Noy, 109. § An ejectment may be maintained for land by its reputed name. 5 Har. & Johns. 137.

An ejectment lies not of (a) a close, because it is of an uncertain extent; nor will it mend the declaration, though the close be called by a particular name, because that also leaves the extent of it uncertain, so that the sheriff cannot tell what quantity of land to deliver in execution; and though the number of acres contained in the close should be mentioned in the declaration, and be set forth to belong to a messuage for which the ejectment was also brought; yet even that hath been (b) held too general, because the nature and quality of the land is thereby left uncertain, so that the sheriff is still at a loss what to deliver the possession of, whether meadow, pasture, &c.

Godb. 53; 11 Co. 55; Ro. Rep. 55; Bridg. 56, adjudged, being of an uncertain extent, and that the giving it a name did not help it; but vide Cro. Eliz. 235, 339; Cro. Ja. 654, which seem contrary. (a) An ejectment of a piece of land called D, without showing the contents, Palmer's case, Owen, 18; the court was divided, but after adjudged that it was well enough, because it was but an action of trespass, and damages were the principal, though it would be otherwise in a *præcipe*; but upon a writ of error in the Exchequer Chamber, this judgment was reversed. Hetl. 176; Moore, 422. (b) So, adjudged in Savil's case, 11 Co. 55, and the S. P. held and admitted to be law, in Style, 164; Lev. 212; Bridgm. 56; Hardr. 133; Palm. 102; 3 Lev. 97; Salk. 254, where Savil's case is affirmed to be law by Holt, Ch. J.

But an ejectment for a close called D, containing three acres of land, is good, because the quality of the land is mentioned, the word *terra* signifying in law arable land.

Cro. Ja. 573; Palm. 102; 4 Mod. 98. [Cowp. 349.]

An ejectment does not lie for a messuage and forty acres of land, meadow and pasture thereto belonging, (c) without distinguishing how much of one sort, and how much of the other.

Goodier v. Platt, Cro. Car. 471; Martin v. Nichols, adjudged, Ibid. 573; S. P. adjudged, Hard. 59, S. C. cited. (c) So, where an ejectment was brought for five closes called *furlong*, containing ten acres of arable and pasture, it was held naught, because not specified how many acres of each there were, so that the sheriff had no rule to govern himself by in the execution. Knight and Syme, adjudged, Salk. 254; Holt, 263; Show. 338; Carth. 204; 4 Mod. 97; Comb. 198, S. C.—But an ejectment of twenty acres *jamorum et bruer*. is well enough, because intended of lands of the same nature, viz., heath, on which *græse* and *furze* grow. Cro. Car. 179; Mod. 90. [So, in modern times, it hath been holden, that it will lie for fifty acres of furze and heath, and fifty acres of moor and marsh. Connor v. West, 5 Burr. 2572.]

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An ejectment *de uno messuagio sive tenemento* is naught for the (a) uncertainty of the word *tenement*; for being of a more extensive signification than the word *messuage*, it is uncertain what is demanded by the ejectment.

Wood v. Pain, adjudged, Cro. El. 186; 3 Leon. 228, S. C.; Poph. 197, 203; Noy, 86; Cro. Ja. 125; Style, 364, S. P.; Sid. 295, S. P. adjudged. [Barnes, 173; 2 Str. 834; 3 Wils. 23.] (a) For this vide Cro. Eliz. 116; March, 96; 2 Ro. Abr. 80. [After verdict an ejectment for a messuage and tenement had been holden good. Doe v. Denton, 1 T. R. 11.] || But this determination was afterwards overruled, "for that it passed by surprise, and was not law, being contrary to adjudged cases." Doe v. Plowman, 1 East, 441. However, in a later case, Goodtitle v. Otway, 8 East, 357, where the plaintiff had declared for a messuage and tenement, the court permitted the lessor (pending a rule nisi to arrest the judgment for this uncertainty) to enter the verdict according to the judge's notes for the messuage only, and that without releasing the damages. || β The word tenement, in an action of ejectment, is sufficiently certain. Den v. Woodson, 1 Hayw. 222.g

It is no error if the declaration in one count is for a messuage and *tenement*, for the damages may be referred to the messuage; *aliter* if they were in separate counts.

Doe v. Dyeball, 8 Barn. & C. 70.

It is not necessary to state the premises to be in a parish, for if described as in the parish of A and B, and there is no such parish, the word parish is surplusage.

Goodtitle v. Walter, 4 Taunt. 671.

But an ejectment for a messuage or tenement called the Black Swan is good, because the addition reduceth it to a certainty of a dwelling-house.

Sid. 295; 3 Mod. 238; 4 Mod. 136.

So, an ejectment for a messuage or burgage in H is good, because both signify the same thing in a borough.

Danvers v. Wellington, Hard. 173; Rochester v. Rickhouse, Poph. 203.

An ejectment does not lie *de repositoio*, because it signifies a *voider* or *cupboard*, as well as a *warehouse*, and therefore uncertain what is demanded; but, if it had been with an *Anglicè*, a warehouse; this had confined it to that particular thing.

Cro. Car. 555; Jon. 454, S. C.

An ejectment for one hundred acres of waste, or *pro centum acris* (b) *montis*, was held naught for the uncertainty, because both waste and mountain comprehend several sorts of lands; but an ejectment for one hundred acres of (c) *bog* is good in Ireland, because the word bog there hath but one signification, and comprehends but one sort of land.

Hard. 57; Hancock and Price, adjudged, because it may contain land of any quality. (b) Palm. 100; Stafford and Macdonnough, adjudged upon a writ of error out of Ireland, and the first judgment reversed accordingly. Ro. Rep. 166, S. C. But both are denied to be law in 9 Vin. Abr. 336, pl. 19, and Stra. 71. (c) Cro. Car. 512, Mulcarry and Eyres, adjudged; Palm. 100, S. P.; Salk. 254; Show. 338, S. C., cited and admitted to be law. [So, it will lie for mountain in Ireland, because there, the word "mountain" is rather descriptive of the quality than of the situation of the land. Lord Kildare v. Fisher, 1 Str. 71. So, for a "quarter" of land in Ireland; for it may be a term as well known there as mountain is; and that the courts will intend. 1 Burr. 623, 627, 629, 630; Cowp. 348. So, "20 villis et terris" in Ireland, 2 Keb. 745; 1 Burr. 627. In the case of Cottingham v. King, 1 Burr. 623, the following description was holden to be sufficient on a writ of error, after judgment in the Common Pleas, affirmed by the King's Bench in Ireland; viz., "5000 messuages, 5000 cottages, 10,000 acres of land, &c., in all those the lordships, manors, and late dissolved abbey or monastery of Boyle and Insemacranaw, and quarter of land of Tallagh, with the town and tenement of Boyle, and fairs and markets thereunto belonging, in the county of Roscommon: and all those the lands and hereditaments called Grangemore, and part of



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Sumternat, &c., a large deer-park, &c., and the parsonage of Longford, &c. in the county of Roscommon: and a small park or field in the possession of, &c." This case was after verdict; and after verdict an ejectment may be presumed to have been brought for such things *only* of which it will lie. 1 Str. 54.]

The plaintiff in ejectment declared upon the lease of a house, ten acres of land and twenty acres of meadow, by the name of a house and ten acres of meadow, be the same more or less, and had a verdict, but the judgment was arrested; for the declaration was so repugnant and uncertain, that even the verdict could not help it, in regard the land mentioned in the declaration is of a different nature from that mentioned in the *pernomen*. Besides, the number of acres is so different, that the words more or less cannot reduce it to any certainty, for it were unreasonable to extend them to twenty acres more than was mentioned in the *pernomen*.

Yelv. 166; 4 Mod. 143; Show. 364.

An ejectment for a manor seems ill, without describing the quantity and species of the land contained therein.

Hedl. 146; Lit. Rep. 301; Latch. 61. See Runningt. 129. An ejectment lies for a garden, by the name of three roods of land, for it may be sometimes used as a garden, and at other times ploughed. Godb. 6, adjudged, though it was said it might more properly have been demanded by the name of a garden. An ejectment *pro quatuor molendinis* is good, without saying windmills or watermills, because both are comprehended under that name in the Register. 1 Mod. 90.—An ejectment *de decem acris pisarum* was held good; for the court held ten acres of peas and ten acres sowed with peas to be all one, and therefore certain enough. 1 Brownl. 150.

An ejectment was brought for ten acres of (a) wood, and ten acres of underwood; it was insisted (in error) that this was a *bis petitum*; but the objection was disallowed, because plainly they are of different natures; and those who argued for the error seemed by their argument to have admitted it themselves, because they insisted that no ejectment lay of underwood, which shows it must be of a different nature from the wood: but that objection was also disallowed, because the nature of underwood is so well understood in the law, that the sheriff will have certainty enough to direct him in the execution.

2 Ro. Rep. 482, Warren and Wakely. [In the case of Savile v. Borlace, Dom. Proc. 1735, it was decided, that *bis petitum* was no objection in ejectment. 1 Burr. 626, 630. See too Harebotle v. Placock, Cro. Ja. 21.] (a) Where the declaration among other things was of so many *acres ligni* instead of *bosc*, it was moved to amend it before the trial came on at bar; but it was denied, and the jury directed to find separate damages as to that particular. Carth. 402, cited to have been so ruled in the case of Thompson and Leech.

[An ejectment will lie for part of a highway; for though the public have a right to pass over it, yet the freehold and all the profits belong to the owner of the soil, subject to the public servitude or easement attached to it. But it must be described as *land*; and though it be built on, such a description will be sufficient.

Goodtitle v. Alker, 1 Burr. 133.]

An ejectment was brought *de castro, villâ et terris*, without expressing the number and certainty of acres; and it was held ill on a verdict, and a writ of error brought thereon, because it was too generally demanded, and it was impossible for the sheriff to know what quantity of land he must deliver upon the *habere facias possessionem*.

Yelv. 118, adjudged upon a writ of error out of Ireland.

An ejectment *de omnibus et omnimodis decimis in decem acris in D.*, without saying *garbarum feni, lanæ agnellorum*, or some other certainty of

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the nature and quality of the tithes, is ill, as it would be for one hundred acres of land, without expressing the several natures and qualities of the land; for in this action the plaintiff must be as particular and certain in his demand, as he would be of land.

Harpin's case, 11 Co. 25; Moore, 837, pl. 1130; Ro. Rep. 68, S. C.; Palm. 101, S. C. cited.

But in this action the plaintiff is not obliged to set forth the quantity of every sort of tithe, as he must do of every sort of land, because it is in its nature uncertain, the quantity depending entirely on the goodness and fruitfulness of the land and seasons; and, therefore, an ejectment *pro quiddam portione granorum et fœni* was held good, because impossible to say how much the quantity would be.

11 Co. 25; Hard. 57; Dyer, 116.

|| Where the plaintiff declared on a lease of tithes belonging to the rectory of D. in R. and that the defendant entered upon him, and took *such* tithes severed from the nine parts in R., without saying that they belonged to the rectory of D., the description was holden ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in R. which did not belong to the rectory of D.

Baldwin v. Wine, Sir W. Jones, 321. But *quæ* this case, and see Goodright v. Strother, 2 Bl. Rep. 706, where the vill in which the demised lands lay was omitted, it was adjudged after verdict that it might be collected from the vill in which the ejectment was laid.||

An ejectment for a certain place called the Vestry in D. is well enough, because that place belonging to a church is perfectly known by that name, and therefore the thing demanded is sufficiently described to have execution thereof.

3 Lev. 26, Hutchinson and Puller, adjudged.

In ejectment in the county palatine of Durham, the plaintiff declared upon a demise *de mineris carbonum in parochia de D.* generally, not saying how many mines, and had a verdict, and judgment: upon a writ of error brought in B. R. the error assigned was in the declaration, because of the uncertainty thereof, for not setting forth the number of coal mines, so as the sheriff might know of how many to give possession; and for this reason the court inclined, that the judgment was erroneous; but then the plaintiff producing several precedents in Durham, and alleging that all the entries there in ejectments for coal mines were the same as in this case, the judgment was affirmed.

Andrews v. Whittingham, Carth. 277; 4 Mod. 143; Comb. 201; Show. 364; Salk. 255, S. C.

## 3. Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.

Although by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule of lease, entry, and ouster, which he is obliged to enter into; yet that being only designed for expedition in the trial of the right, and not to give the plaintiff a right of action which he had not at law; therefore it must appear by the declaration, that the plaintiff had actually the possession, and was ousted thereof by the defendant. Hence it is, (a) that if A, a lessee for years, makes a lease to B at will, and B is ejected, A cannot have this action upon that ouster, because, though the possession of B was in law the possession of A,

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yet the trespass *vi et armis*, which is complained of in this action, must be against the actual possession, and that was in B.\*

(a) *Stone v. Grubham*; Ro. Rep. 3. §The consent rule confesses that the lessor executed the lease as stated in the declaration, but does not admit the ability of the lessor to make the lease. *Coleman v. Maberry*, 3 Monro, 220. § \*But A may maintain an ejectment, if the person who ousted B refuses to deliver up the possession to A. See the next note.

So, if A be lessee for years, the remainder to B for years, and A be ejected, and then his term expire, B shall not have an ejectment on the ouster of A, because the possession was not actually in him, and therefore he cannot complain of a trespass done to another.

Also, the lessor of the plaintiff must have a right of entry when this action is brought; for if his entry were taken away, he is a disseisor, and cannot enter to make a lease to try the title; and therefore where tenant in tail makes a discontinuance, the issue in tail is put to his *formedon*, and cannot have his ejectment, because his entry by the discontinuance is taken away.

Vide tit. *Discontinuance*.

Also, by the statute of limitations, 21 Ja. 1, c. 16, none shall make an entry into lands, but (b) within twenty years after their right or title, which shall first descend or accrue to them; but this act hath the usual savings for infants, feme coverts, &c., which vide under title *Limitations*.

(b) Where the plaintiff was nonsuited, because not able to prove that he had been in possession for twenty years. *Keb. 681*; *Hard. 461*. This statute shall not affect the king or his tenant. *Hard. 176*; *2 Leon. 206*; *Cro. Eliz. 331*. Nor a common person, whose tenant has been in possession, and has paid the rent, for the possession of the tenant is the possession of the landlord. *2 Keb. 127*.—So, the possession of one jointenant is the possession of the other, so as to prevent the statute from being a bar in the ejectment. So, of coparceners. *Salk. 285*. [Twenty years' adverse possession is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of possession, and gives a positive title to the defendant: for the plaintiff must show a right of possession as well as of property; and therefore, the defendant need not plead the statute of limitations, as in other cases. *1 Burr. 119*. And by *Holt, C. J.*, "a possession for twenty years is like a descent which *tolls* entry, and gives a right of possession which is sufficient to maintain an ejectment:" as, where A had the possession of lands for twenty years without interruption; B then acquired the possession, on which A was put to his ejectment: here, though A was plaintiff, yet his possession for twenty years was deemed a good title, and he recovered accordingly. *Stokes v. Berry*, *2 Salk. 421*. For, if no other title appears, a clear undisturbed possession for twenty years is evidence of a fee. *Cowp. 597*. ¶ It would seem also, that this doctrine holds between the party having had the adverse possession for twenty years and the legal owner of the lands, though the party having had such possession afterwards desert the premises, and the right owner peaceably enter thereon. *Doe v. Reade*, *8 East, 353*. But note, a possession will not be considered as adverse, when it can be reconciled with the title of the other party, or he has never, in contemplation of law, been out of possession. *Bull. N. P. 102*; *Co. Litt. 212 b*; *Doe v. Brightwen*, *10 East, 583*; *Doe v. Danvers*, *7 East, 299*; *Keene v. Deardon*, *8 East, 248*; *Hatcher v. Fineux*, *1 Ld. Raym. 740*; *Roe v. Ferrers*, *2 B. & P. 642*; *Reading v. Rawsterne*, *2 Ld. Raym. 829*; *Ford v. Gray*, *1 Salk. 205*; *Smales v. Dale*, *Hob. 120*; *Doe v. Keen*, *7 T. R. 386*.]

§ A right of entry does not accrue to the remainderman or heir, till the particular estate has been determined; and if then the person entitled be a feme covert, she is not bound to bring her action within twenty years thereafter, but is protected by the statute during the coverture. (c) But a subsequent disability will not impede or suspend the statute. (d)

(c) *Jackson d. Beekman v. Sellick*, *8 Johns. 262*. (d) *Broadstreet v. Clarke*, *19 Wend. 603*; *5 Cowen, 74*; *3 Johns. 129*.

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When an adverse possession has commenced in the lifetime of the ancestor, the operation of the statute is not suspended, but continues notwithstanding the title descends to a *feme covert*.

Jackson d. Leivington v. Robins, 15 Johns. 169.*g*

If a rent be granted in fee, or otherwise, to B, with a clause or proviso, in case it be in arrear, to enter and hold the land till the arrears be satisfied out of the profits thereof; if the rent be in arrear, A may recover the possession in an ejectment; for this proviso creates an interest in the land to answer the rent. And regularly, whoever hath an interest may demise the same to another, and, consequently, the person claiming under such demise may maintain an ejectment. And this is now a settled point, whether the rent be created by grant at common law, or by way of use. But in this case there must be an (a) actual entry made, because the title of the land accrues by the grantee's entering.

Cro. Ja. 511; Lev. 170; Sid. 223, 262, 344; Saund. 112; Raym. 135. (a) For it seems now clearly agreed that the confession of lease, entry, and ouster, is not a confession of any entry sufficient to make out the plaintiff's title, where an entry is necessary thereto, but the party must actually enter, as appears by Saund. 319; Sid. 233; Mod. 10; Vent. 42, 332; 3 Keb. 218; Salk. 246; Skin. 424. But by the stat. 4 Geo. 2, c. 28, in all cases between landlord and tenant, the landlord for non-payment of rent may deliver a declaration in ejectment, or serve the same, as by the statute is prescribed, and such serving shall be sufficient without a demand or re-entry. ¶ To avoid a fine levied *with proclamations*, (for it is otherwise in the case of a fine at common law, or where all the proclamations have not been made: Doe v. Watts, 9 East, 17; Jenkins v. Pritchard, 2 Wils. 45; but see Tapner v. Merlott, Willes, 177,) there must be an actual entry, and the action must be commenced within a year afterwards, and the demise must be laid subsequently to the entry. Oates v. Brydon, 3 Burr. 1897; Berrington v. Parkhurst, 2 Str. 1086; Andr. 125, S. C.; 13 East, 489, S. C.; 4 Br. P. C. 353, S. C.; Tapner v. Merlott, Willes, 177.¶ If a man enters and delivers a declaration in behalf of the lessor of the plaintiff; this is no entry to avoid a fine, unless an express authority was given for that purpose, because the entry must be pursuant to the intention, and that was to deliver a declaration in order to try the plaintiff's title, and not to make any title to the lessor of the plaintiff. Clark v. Rowell, 1 Mod. 10; 1 Saund. 319, S. C.; 1 Ventr. 42, S. C.; 2 Keb. 555, S. C. [But, if a man enter on the premises, on behalf of the lessor of the plaintiff, though without any previous authority for that purpose, and the lessor afterwards assent to the entry, before the day of the demise laid in the declaration, such *assent* will be equal to an actual entry, and need not be either by deed or in writing; Fitchet v. Adams, 2 Str. 1128.] ¶ provided it be given within the five years. Pollard v. Luttrell, Poph. 108; Moore, 450, S. C.; Audley's case, Moore, 457; Podger's case, 9 Co. 106; Audley v. Pollard, Cro. El. 561. If a tenant for life levy a fine with proclamations, an actual entry is necessary by the remainderman or reversioner, before he can maintain an ejectment. Doe v. Hicks, 7 T. R. 433. So, if a lessee for years make a feoffment, and then levy a fine, an actual entry is necessary. Hunt v. Bourne, Salk. 339; Pomfret v. Windsor, 2 Ves. 472. But it would seem that no entry is requisite to avoid a fine with proclamations levied by a tenant for years without a previous feoffment, and Lord Kenyon has said, that in this case no entry by the landlord will be necessary to enable him to maintain an ejectment at the end of the term. Peaceable v. Read, 1 East, 574. However, Lord Ellenborough has declared, that there is no case which establishes a difference between tenant for life and tenant for years, as to the necessity of an entry to avoid their estates, in case of a forfeiture incurred by the levying of a fine, but that an entry is necessary in both. Fenn v. Smart, 12 East, 451. An actual entry is not necessary to maintain an ejectment on a clause of re-entry for non-payment of rent. Goodright v. Cator, Dougl. 477.¶

A covenanted to stand seised of land to the value of 100*l.* *per ann.* to the use of himself for life, and after to the use of his daughters, who should be unmarried at the time of his death, till they severally should receive and levy 500*l.* apiece, the remainder to his son; A died the 30 Eliz., and the eldest son entered 42 Eliz.; the eldest daughter (there being four of them)

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brought her ejectment, but did not recover the lands, because her entry was taken away, she having passed the time allowed her to enter and receive the profits; otherwise she might keep the other daughters out of the perception of the profits: for if the eldest daughter lets the son enjoy during the time the profits may be levied, she lapses her time, and must therefore have remedy against the son who received the profits in her prejudice, and cannot charge the land with her portion, which is then operated with portions to be raised for the younger sisters.

Cro. Eliz. 800; Noy, 33. Note: That in these cases the usual method now is, to apply to a court of equity.

The plaintiff must lay the commencement of his supposed lease in his declaration to have been preceding the ouster and ejectment by the defendant; for though such ouster be a wrong, yet it can be no wrong to the plaintiff if it was done before his title commenced; (a) as, where the plaintiff declared on a lease made the 27th of April *anno primo regis*, and laid the ouster by the defendant to be the 26th of April *anno primo predict.*, this was held bad, because it was plain the plaintiff had no title till the 27th, and therefore that ouster the 26th was no trespass or injury to him.

Law Ejectm. 76. (a) Yelv. 182.

So, if the lease had been made 27 April, *habend. a dict. 27 April. virtute cujus* the plaintiff entered and was possessed till the defendant *postea eodem 27 die Aprilis* did eject him; this is bad; because the ejectment was before the plaintiff's title commenced, for the lease did not commence till 28 April.

1 Sid. 8; 3 Mod. 198; Cro. Ja. 135, 258; Cro. Ja. 96; 2 Bulstr. 29, *cont.*

But, if the lease be made the 27th, *habend. from thenceforth*, there, the ejectment may be laid the 27th, because the lease commences the 27th, and an ejectment may be the same day the plaintiff's title commences.

Cro. Ja. 258; 5 Co. 1. [As the lease is now considered as a fiction, these cases cannot have much (if any) weight at present.]

But the law doth not necessarily oblige the plaintiff expressly to mention the day of the ouster, so it appear to be after the term commenced, and before the action brought; for where the declaration was on a demise the 25th of March *primo regis*, for three years, by virtue whereof the plaintiff entered and was possessed, until the defendant *postea, viz., anno supradict.* entered and ejected him, without specifying the day of the ejectment; this was held good in error; for the action being commenced *secundo regis*, and the ejectment laid to be *primo*, it was plain from the declaration, that the ouster and ejectment were after the plaintiff's title commenced, and before the action brought.

Merrel v. Smith, Cro. Ja. 311.

Neither is the plaintiff, as it seems, necessarily obliged to allege the particular day of his entry in the declaration; and therefore where the plaintiff declared on a lease to commence at a future day, *virtute cujus* he entered, and was possessed till ejected by the defendant; this was held good on a writ of error, because it is said he entered by virtue of the lease, which could not be before it commenced, for he could not enter by virtue of the lease till the lease commenced: *aliter*, if the declaration had been *pretextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under a pretence of the lease.

2 Ro. Rep. 466; Latch. 199.

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The plaintiff declares in ejectment in the Common Pleas, and after an imparlance (as the course of the court is) makes a second declaration; if in such case the plaintiff by the first declaration should lay the ejectment and ouster before the commencement of his term, or omit any matter of substance in the first declaration, though the second were right, and the ouster were laid after his term commenced, yet the plaintiff shall not recover, because the declaration on the imparlance roll is the material one on which the action is grounded, and must be supported by it, and the plea roll is but a recital of the other, and therefore ought to begin with an *alias prout patet*, &c.

Law Ejectm. 78; Cro. Ja. 311.

And though the declaration in law relates to the first day of the term, because the term is in law considered as one day, yet the plaintiff may declare on a lease made some time after the first day of the term, and shall recover thereon. But then it must appear to the court that the declaration was filed after the day of the commencement of the supposed lease, for otherwise the plaintiff complains of an ejectment before he had title; and if the time of filing a bill were not examinable, the act of law, which makes the relation of bills to the first day of the term, would be an act of injury to the plaintiff, and delay his right; for then a man ejected of a lease made in term-time could not complain till term was over.

2 Vent. 174; Sid. 432.

The plaintiff declares on a lease made the 6th of May, *anno 7* of the king, &c., setting forth, that the plaintiff was possessed *quousque postea* the defendant the 18th day *ejusdem mensis anno sexto supradict.* ejected him: it was objected in arrest of judgment, that the ejectment was laid to be *anno sexto*, which was the year before the commencement of the lease, that being laid to begin the 6th of May, *anno septimo*; but the declaration was allowed to be good by the court, because the ejectment was laid to be the 18th *ejusdem mensis*, which could not be if it were done in the 6th year, and therefore they rejected the word *sexto* as inconsistent and void.

Law Ejectm. 79, 80, but vide Carth. 401, 402.

So, where the declaration was of a lease 22 May, *habendum a primo die Maii* for three years, *virtute cujus* the plaintiff entered and was possessed *quousque postea*, viz., *eodem die et anno*, the defendant ejected him; this on a writ of error was allowed a good declaration, though it was insisted, that *eodem die et anno* must refer to the first day of May, which was the last antecedent, and then the ejectment was laid to be twenty-one days before the lease was made.

Rutter v. Miles, Cro. Ja. 662.

The plaintiff in ejectment declared, that whereas J S, by indenture the 9th day of June, (without saying when it was made or delivered,) did demise, &c., *habend. a die dat. sigillationis et deliberationis indenturæ predict.*, *virtute cujus* the plaintiff entered and was possessed till the defendant the same day ousted him. It was moved in arrest of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the sealing and delivering, being mentioned in the declaration: yet judgment was given for the plaintiff, because after a verdict the lease shall be intended not only to bear date, but also to be sealed and delivered the day mentioned in the declaration, which was the 9th; for all deeds are presumed to be delivered the day that they bear date, till the contrary appear.

Law Ejectm. 81.

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But, where the limitation of the lease is altogether uncertain, the plaintiff cannot recover, because where the commencement of the lease is uncertain, the lease is void in itself, and then the plaintiff cannot have a title: besides, the court cannot possibly perceive whether the ejectment was before or after the plaintiff's title accrued, if such uncertain lease could give him one. Otherwise it is, where the limitation or commencement is impossible; for in such case the lease commences from the delivery, as if it had no date, and then the court may judge whether the ejectment is laid to be before or after the commencement. But there is this further reason for the difference; for the impossible limitation is rejected, because it could not be part of the agreement or contract; but an uncertain limitation is part of the contract, and vitiates the whole agreement, because the court cannot reduce it to any certainty.

Law Ejectm. 81.

Thus, where the plaintiff declared on a lease, *habend. a die datûs indenturæ prædict.*, without mentioning an indenture before; this was held bad, for the uncertainty when the lease commenced.

Brady v. Johnson, Hott. 63.

But, if the plaintiff had declared on a demise to him *per quoddam scriptum obligat. habend. a die datûs indent. prædict.*, this had been good, because the *scriptum obligatorium* shall be intended an indenture.

Vent. 137; 2 Keb. 796.

The plaintiff declared on a lease of the fourth part of a house, in four parts to be divided, by force of which he entered *in tenement. prædict.* and was possessed till the defendant ejected him *de tenementis prædictis*. It was objected in error, that the plaintiff laid the ouster to be of more than by his lease he had a title to, for the ouster was *de tenementis prædict.*, which at least must be understood of the whole house, and the lease was only of the fourth part: but the objection was overruled, because *de tenementis prædict.* shall be intended only of the fourth part of which the lease was made. Besides, it was but just he should recover as much as he had title to, though he laid his ejectment for more.

Law Ejectm. 82, 83.

The plaintiff declared on a demise the sixteenth day of January, by an indenture dated the second day of January, without saying *primo deliberat.* the sixteenth; yet the declaration was held good; for though all indentures shall be presumed to be delivered the day they bear date, unless the contrary be shown, and that therefore this lease must commence the second day of January, which, if true, would be a different lease from what the plaintiff declared upon; yet in regard he declared on a demise the sixteenth, it must necessarily be intended that it was delivered on the sixteenth, because it cannot possibly be a demise before a delivery, and therefore the delivery must necessarily be intended the day the demise is said to have been made, and not the day of the date of the indenture.

Cro. Eliz. 890; Law Ejectm. 83.

But where the plaintiff does not make mention of any particular day when the demise was made, but only in general says, that J S, by his indenture bearing date 1 January, did demise to him, so that it doth not appear by the plaintiff's own showing, when the lease commenced, the law in such cases construes the delivery to have been the day it bears date; and so the decla-

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ration is held to be good, and not void for the uncertainty of the commencement of the lease.

Cro. Eliz. 773; Law Ejectm. 83, 84.

Though by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule, and by that means the mischief of any variance between the lease declared on and the lease produced and proved on the trial is avoided, which was a danger the plaintiff was exposed to, and often miscarried in by the old method of proceeding; yet in the modern practice the plaintiff must take care to declare on such a lease as suits with his lessee's title. And therefore (a) if there be several lessors, and you lay the declaration *quod demiserunt*, you must show in them such a title that they might demise the whole, for the word *demiserunt* must be taken in pleading according to the legal sense it bears; so that, if any of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them, for it is only his confirmation where he is not concerned in interest; and therefore the confession of this joint lease doth not help, because you do not confess the title by the rule.

Law Ejectm. 84. (a) Cro. Ja. 613; 2 Keb. 376.

So, where the plaintiff declared on a lease made by A and B, and it appeared on the trial that A was tenant for life, remainder to B in fee; this on a special verdict was adjudged against the plaintiff, because it could not be the lease both of A and B, to pass the land *in presenti* to the plaintiff, for during the life of A it could be his lease only, because he was the tenant in possession, and B's joining in the lease amounted only to a confirmation, but could pass no interest during the life of A; and therefore the allegation of the plaintiff, that A and B did demise, was not proved.

Trepot's case, 6 Co. 14 b, 15 a; King v. Bery, Poph. 57.

If the plaintiff declares on a lease made by A and B, and on the trial it appears that they are (b) tenants in common, the plaintiff cannot recover; but, if A and B had been jointenants, a joint lease to the plaintiff had been good, and he might have declared *quod demiserunt*. And the reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several; and if they be disseised they shall be put to their several actions: as therefore the lands of tenants in common are to be considered as different estates depending upon different titles, the plaintiff shall not recover; because that were to allow the plaintiff to try two several and different titles in one issue at the same time; so that the plaintiff to make out his title must show and prove that each demised the whole to him, else he doth not prove the declaration; whereas the discovery of the tenancy in common proves the contrary; for as they have different title to a moiety only, so they could not each of them demise the whole. But jointenants are seised *per my et per tout*, and they derive by one and the same title, and therefore each may be said to demise the whole; and as they must join in an action for any violation of their possession, so for the same reason must their lessee on their joint demise. And coparceners seem to stand on the same foundation and reason, because, both coming in as one heir, the possession must be joint as that of jointenants. (c)

Show Rep. 342; 2 Vent. 214; Comb. 190; Carth. 224. [Heatherley v. Weston, 2 Wils. 232, acc.] (b) Where ejectment is brought by one tenant in common against another, there must be an actual ouster of one by the other, else he shall not be compelled to confess lease, entry, and ouster. *Per* Holt, C. J., 7 Mod. 39. (c) [Yet in



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the old case of *Milner v. Robinson*, Moore, 682, it was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demiserunt*. Heretofore, to avoid difficulty in such cases, the way was for coparceners, jointenants, and tenants in common to join in a lease to a third person, and for that lessee to make a lease, after the ancient course, to try the title.] {One coparcener may bring an ejectment on her separate demise, and recover her own share. 6 East, 173, *Doe v. Pearson*; 1 Johns. Ca. 231, *Jackson v. Sample*.} || It seems, however, from modern cases, not to be compulsory upon jointenants, or parceners, to allege a joint demise: for if a jointenant or parcener bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land; and if all the jointenants, or parceners, join in the action, but declare upon separate demises by each, they may recover the whole premises, because, by the several demises the plaintiff has the entire interest in the whole subject-matter, though the jointenancy is severed by the separate letting. *Doe v. Pearson*, 6 East, 173; *Denn v. Judge*, 11 East, 288; *Roe v. Lonsdale*, 12 East, 39; *Doe v. Read*, *Ibid.* 57. If jointenants may sever, why may not tenants in common join, as each may still be taken to have demised according to his legal interest?||

In ejectment the plaintiff declared upon two demises of several lands by several parties, but laid only one *habendum*, viz., *habendum tenementa prædicta* so demised by the aforesaid several parties for seven years, and lays in his declaration, that the defendant entered into all the aforesaid tenements, *et ipsum* (the plaintiff) *a firmâ suâ prædictâ* (in the singular number) *ejecit, expulsi et amovit*; and it was assigned for error, that the declaration was ill for want of another *habendum*, for that the verdict is general, and it is uncertain to which demise this single *habendum* relates: but the court held, that *reddendo singula singulis* it was well enough.

*Furden v. Moore*, adjudged in B. R. upon a writ of error; Carth. 224; Comb. 190, S. C., adjudged; 2 Vent. 214, S. C., adjudged in C. B.

If the heir brings an ejectment, and pending the suit his ancestor dies, yet he shall not recover, because every man must recover according to the right he had at the time of the action brought; for during the lifetime of the ancestor the ejectment was done to him only, and therefore to be punished by the ancestor; for one man cannot complain in a court of justice of an injury done to another.

Raym. 463.

[A plaintiff cannot recover *against* his own covenant; and a license to inhabit amounts to a lease.

*Right v. Proctor*, 4 Burr. 2208.]

A lease made by a guardian to try the title of an infant seems good; for though such lease may be voidable as to the infant, yet a stranger cannot defeat it: and if the lessee should not be allowed to maintain his ejectment on such lease, the infancy would deprive the minor of that remedy of punishing the trespasser, which persons of full age are entitled to; which were to deny the minor the common right and privilege of other subjects.

Hard. 330. Vide *Parry v. Hodgson*, 2 Wils. 129, 135; *Bedel v. Constable*, Vaugh. 177; *Doe v. Bell*, 5 T. R. 471.—It has been long settled, that an infant himself may make a lease without rent to try his title. 3 Burr. 1806; 2 T. R. 161; 5 Br. P. C. 570.

||The committee of a lunatic is but a bailiff, and has no interest in the land, so that the demise must be in the name of the lunatic.

*Drury v. Fitch*, Hutt. 16; *Cocks v. Darson*, Hob. 215; *Knipe v. Palmer*, 2 Wils. 130. But see 43 G. 3, c. 75.]]

A man may bring an ejectment on a joint lease made by baron and feme, of the lands of the wife, if the lease were made by herself in person, whether it be by parol or indenture; for the contracts of the wife relating to her own estate are but voidable during the coverture, that she may have the

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benefit of them after the death of her husband, if it shall be for her interest to confirm them: but the husband ought to join in the lease, because they are considered in the law but as one person, and he having, during the coverture, an interest in the property of his wife, the whole proprietor would not join in the lease without the husband: and as on such joint lease each may be said to demise the whole, the lessee might, according to the ancient practice, maintain his ejectment on such demise. [But it is not necessary that the husband and wife should join in a lease to try the title to her estate; he alone might make a lease for that purpose;] because during the coverture he hath the power of her property; and therefore all his contracts relating to it are good during his life, because his pleasure must determine her who hath resigned her will to him; though after his death she may avoid the lease.

2 Co. 61; Cro. Ja. 332, 417, 617; Cro. Eliz. 470, 488. See Cowp. 201; Dougl. 53; Cro. Ja. 332; Hob. 5.

But, if the plaintiff declares on a joint lease by baron and feme, and the lease appears on the evidence to have been executed by a third person, by virtue of a letter of attorney from the husband and wife, such evidence will not maintain the declaration, because she cannot delegate a power to a third person to act for her, having already devolved all power and authority on her husband. But the letter of attorney, though void as to the wife, remains as to the husband; and hence it hath been held, that the lessee might, in this case, declare on that lease as the lease of the husband only.

Gardiner v. Norman, Cro. Ja. 617. ¶ In Hopkins's case, Cro. Car. 165, all the court conceived it was a good letter of attorney for both, and the lease well delivered; it is the lease of them both, during the husband's life. But see Wilson v. Rich, Yelv. 1; 1 Brownl. 134, S. C.; Plomer v. Hockhead, 2 Brownl. 248; Noy, 133, *contr.*]

[A copyholder may declare on a lease for any number of years without forfeiture: and the lessee of a copyholder for a year may sustain an ejectment; for his estate is warranted by law, and it is the most easy way for him to recover the possession.

Cro. Eliz. 469, 535; Owen, 18; Latch. 199; Hardr. 330; 1 Lutw. 803; Co. Litt. 398 a; 4 Co. 26 a.]

¶ An award, under a submission to arbitration, will give a good title on which to maintain an ejectment; for though it cannot have the operation of conveying the land, yet the defendant is concluded, by his own agreement, from disputing the title of the lessor of the plaintiff. The parties consent that the award of an arbitrator chosen by themselves shall be conclusive as to the right of the land in controversy between them; and this is sufficient to bind them in the action of ejectment.

Doe v. Rosser, 3 East, 15.

The plaintiff must recover on a legal title. A trustee therefore may maintain the action against his own *cestuy que trust*, (a) and an unsatisfied term outstanding in trustees will bar the recovery of the heir at law, even though he claim only subject to the charge. (b)

Goodtitle v. Jones, 7 T. R. 43, 47; Doe v. Wharton, 8 T. R. 2; Doe v. Luxton, 6 T. R. 289. (a) Roe v. Read, 8 T. R. 118. (b) Doe v. Staple, 2 T. R. 684.

But a jury may in some cases presume a regular surrender to have been made by the trustees of their estate, and thereby clothe the *cestuy que trust* with the legal title, and enable him to maintain this action. Thus a surrender will be presumed, if the purposes of the trust estate have been satisfied; or, if the beneficial occupation of the estate by the possessor may have

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induced a supposition, that a conveyance of the legal estate has been made to the party beneficially interested ; or, when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance. But the presumption will not be made if the surrender be a breach of the trust ; nor, in any case, where the title of the party for whom the presumption is required is a doubtful equity only, until a court of equity has first declared in favour of the equitable title. If the presumption be not made in point of fact, although the circumstances of the case should warrant it ; as, if it should appear on a special verdict, or special case, that the trust estate, though satisfied, is still outstanding, the *cestui que trust* will not be able to recover in the ejectment, unless his trustees be made the lessors of the plaintiff.

Adams's Ejectments, 88 ; Doe v. Staple, 2 T. R. 684 ; Doe v. Sybourn, 7 T. R. 2 ; England v. Slade, 4 T. R. 682 ; Keene v. Deardon, 8 East, 248 ; Goodtitle v. Jones, 7 T. R. 43.

The surrenderee of a copyhold, if admitted before trial, may maintain ejectment brought by him before admittance upon a demise laid between the time of surrender and admittance. The title is perfected on admittance by relation, and then, and not before, the courts of law will look at it.

Doe v. Hall, 16 East, 208 ; Roe v. Hicks, 2 Wils. 15 ; Holdfast v. Clapham, 1 T. R. 600 ; Vaughan v. Atkins, 5 Burr. 2764.]]

Where a copyholder has been admitted tenant, and done fealty to the lord, he is estopped in an action by the lord for a forfeiture from showing that the legal estate was in a trustee, and not in the lord, at the time of the admittance.

Doe v. Budden, 5 Barn. & A. 626.

The visitors and feoffees of a school who dismiss the schoolmaster for misconduct cannot maintain ejectment to recover the house till they have summoned the master before them, and determined his freehold interest.

Doe v. Gartham, 1 Bing. 357.

The trustees under a turnpike act having demised to one of several mortgagees such proportion of the tolls arising from the road, and of the toll-houses and toll-gates, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to recover the interest due to him ; it was held, that he might well maintain the action, notwithstanding a clause in the act that all the mortgagees should be creditors on the tolls in equal degree.

Doe dem. Banks v. Booth, 2 Bos. & Pull. 219.

A and B, tenants in common, having agreed to divide their property, and that Blackacre should belong to A ; the occupier of Blackacre, who, after this agreement, had paid his whole rent to A, was held to have admitted A's title, and on ejectment brought by A could not object that the partition deed was not executed.

Doe dem. Pitcher v. Mitchell, 1 Bro. & Bing. 11 ; 3 Moo. 229, and see 8 Taunt. 241.

If B, claiming under A, let lands for years to C and die, and A afterwards bring an ejectment against C, C cannot dispute the title of A.

Barwick v. Thompson, 7 Term R. 488.

A right of entry cannot be reserved to a stranger to the estate ; or to a *cestui que trust*, where the legal estate is in the trustee.

Doe dem. Barber v. Lawrence, 4 Taunt. 23.

But where lessee made an under-lease, containing a proviso that the lessor

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and lessee might re-enter for breach of covenant, it was held that the lessee might *alone* maintain ejectment without joining the lessor.

*Doe v. Wheeler*, 4 Bing. 276.

The lessor of the plaintiff cannot release the action.

*Doe v. Brewer*, 4 Maule & S. 300.

Where a pauper had been put in possession of a cottage forty years ago by the then existing overseers, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers, till two years ago, when the pauper disposed of it to the defendant, and went away; held, that the existing overseers could not maintain ejectment, having no derivative title from their predecessors, (being no corporation,) and the pauper having done nothing to recognise his holding under them.

*Doe dem. Grundy v. Clarke*, 14 East, 488.

Where an agreement was made between A and B, that A should sell premises to B, if he had a good title to them, and that B should have the possession from the date of the agreement, it was held that A could not maintain ejectment against B without a notice to quit, although the object of the action was to try the title.

*Doe dem. Newby v. Jackson*, 1 Barn. & C. 448.

Where a lease was for twenty-one years, if the tenant, his executors, &c., should so long continue to inhabit the farm-house and occupy the land, and should not assign or part with the same; it was held, that the tenant having become bankrupt, and the assignees having sold the lease, and the bankrupt being out of the farm, the landlord might bring ejectment with an actual re-entry.

*Doe dem. Lockwood v. Clarke*, 8 East, R. 185.

Where there was a proviso for re-entry, on the tenant's assigning without license, it was held that a trust deed executed by the tenant, conveying all his real and personal property to trustees for his creditors, on which a commission of bankruptcy was sued out, was not a valid assignment creating a forfeiture, since the deed was void and an act of bankruptcy.

*Doe v. Powel*, 5 Barn. & C. 308.

One put into a possession upon an agreement for purchase, cannot be ousted by an ejectment before his lawful possession is determined by demand of possession, or otherwise.

*Right v. Beard*, 13 East, R. 210.

Where a defendant enclosed a piece of waste, and occupied it thirty years without paying rent, and then on demand by the occupier of the adjacent land paid 6*d.* per acre for three years, this was held conclusive to show that the occupation began by permission, and to support an ejectment.

*Doe v. Wilkinson*, 3 Barn. & C. 412.

After trial the court will not relieve the tenant by staying proceedings in the ejectment, on payment of arrears of rent and costs.

*Doe v. Masters*, 2 Barn. & C. 490, and see 7 East, R. 363.

The court will not stay proceedings in an ejectment brought by the mortgagee against the mortgagor, on the latter paying principal, interest, and costs, if he has agreed to convey the equity of redemption to the mortgagee.

*Goodtitle v. Pope*, 7 Term R. 185.

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The court will not set aside a verdict and judgment in order to let a party in to defend, though he set forth a clear title and offer to pay costs.

*Doe dem. Ledger v. Roe*, 3 Taunt. R. 506.

After verdict in ejectment against a tenant for not quitting pursuant to notice, a subsequent distress for rent due after the verdict does not waive the notice.

*Doe v. Darley*, 8 Taunt. 538.

The lessor of plaintiff is bound at the trial to prove the defendant in possession of the premises which he seeks, although defendant has entered into the general consent rule to confess lease, entry, and ouster.

*Goodtitle v. Rich*, 7 Term R. 327; and what is evidence of being tenant in possession, see 2 Barn. & A. 371.

Defendant, who held under a tenant for life, received on her death a letter from the lessor of the plaintiff, claiming as heir, and demanding rent. Defendant answered, that he held the premises as tenant to S,—that he had never considered the lessor of the plaintiff as his landlord,—that he should be ready to pay the rent to any one who should be proved entitled to it; but that, without disputing the lessor's pedigree, he must decline deciding on his claim without more satisfactory proof in a legal manner: held, that this was a disclaimer of lessor of plaintiff's title, and that notice to quit was unnecessary.

*Doe v. Frowd*, 4 Bing. R. 557.

Where a lease contained a general covenant to repair, and also a covenant to repair within three months after notice, and a proviso for re-entry for non-performance of the covenants, and the landlord served the tenant with a notice to repair *forthwith*; it was held, that he might bring ejectment on the proviso, before the three months had expired.

*Doe v. Paine*, 2 Camp. 520.

But where the landlord gave a notice to repair *within three months*, according to the covenant, it was held, he was precluded from insisting on the forfeiture till the three months expired.

*Doe v. Meux*, 4 Barn. & C. 606.

Where a lease contained a proviso for re-entry if the lessee committed waste to the value of 10*l.*, and the tenant pulled down some old buildings of more than 10*l.* value, and substituted others of a different description; it was held, that the waste contemplated in the proviso was *waste producing an injury to the reversion*, and that it was a question for the jury, whether *such* waste had been committed.

*Doe v. Bond*, 5 Barn. & C. 855.

Ejectment may be maintained on a power of re-entry in an *agreement* as well as in a deed.

*Doe v. Breach*, 6 Esp. 106; *Doe v. Watt*, 8 Barn. & C. 308.

The forfeiture of a lease by breach of a covenant or condition may be waived, in like manner as a forfeiture for nonpayment of rent or a notice to quit; that is to say, if the landlord do any act, with knowledge of the breach, which can be considered as an acknowledgment of a tenancy still subsisting; as, for example, if he receive rent accruing subsequently to the forfeiture, *(a)* unaccompanied by circumstances which show a contrary intention. *(b)*

*(a)* *Fox v. Swann*, Sty. 482; *Goodright dem. Walter v. Davids*, Cowp. 803. The authority of the case *Doe dem. Scott v. Miller*, 2 C. & P., seems very doubtful. See *Adams on Eject.* 192.

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But a waiver of one forfeiture incurred by breach of covenant will not be a waiver of a second forfeiture incurred by another breach of the same covenant; nor, where the breach is a continuing breach, will the landlord be precluded from taking advantage of it, by having received rent, &c., after the breach was originally committed. Thus, where a right of re-entry was reserved on a breach of covenant not to underlet, it was held that the lessor was entitled to re-enter upon a second underletting, although he had waived his right so to do upon the first.<sup>(a)</sup> So also where the forfeiture incurred was by using rooms in a house in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord might recover after receiving rent, provided the user continued after such receipt.<sup>(b)</sup> So also where a lease of coal mines reserved a certain rent, and contained a proviso that the lease should be void if the tenant should cease working at any time two years, and the tenant did cease working two years and then paid rent, but did not resume the working; it was held, that this was a continuing breach, and that ejectment might be maintained for the ceasing to work after the payment of the rent.<sup>(c)</sup>

<sup>(a)</sup> Doe dem. Boscawen v. Bliss, 4 Taunt. 735. <sup>(b)</sup> Doe dem. Ambler v. Woodbridge, 9 Barn. & C. 376. <sup>(c)</sup> Doe dem. Bryan v. Banks, 4 Barn. & A. 401.

But in a case where a lease contained a covenant to repair, with a right of re-entry in case the lessee should not repair within three months after notice, and the landlord gave notice, and after the three months had expired received rent accruing after such expiration, and then brought an ejectment, the premises continuing out of repair, and the jury found a verdict for the defendant, the Court of King's Bench refused to set the verdict aside, notwithstanding the opinion of Lord Kenyon, as expressed on the trial, that the forfeiture had not been waived. And it seems the jury were right, for the power of re-entry was not given for breach of the general covenant to repair, but "in case the lessee should not repair within three months after notice;" the receipt of rent therefore, after the expiration of the notice to repair, was a waiver of that notice, and consequently a fresh notice was necessary to bring the party within the penalty of the proviso.<sup>(d)</sup>

<sup>(d)</sup> Fryett dem. Harris v. Jeffreys, 1 Esp. 393.

Where the defendant, being the mortgagee of a term, purchased the mortgagor's whole interest in the premises in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the non-completion of the buildings; it was held, that the lessor's right of re-entry was not thereby waived, but suspended only for such reasonable time after the purchase as might be required to complete the buildings, and that ejectment might be maintained for the forfeiture after that time had elapsed, against the purchaser, who had proceeded in part to finish, but had never wholly completed the buildings, or put them in a habitable state.

Doe dem. Sore v. Ekins, 1 Ry. & Moo. 29.

A lease contained a covenant on the part of the lessee to insure the premises in the joint names of himself and the lessor, and in two-thirds of the value of the premises demised. Both parts of the lease continued in the possession of the lessor, and an abstract only was delivered to the lessee, in which it was stated, that the tenant was to insure the premises in two-thirds of the value, but it was not stated in whose name or names the policy was to be effected. The lessee insured in his own name only, and, as was contended, to a less amount than two-thirds of the value of the premises, but to

## (E) Of the Plea and General Issue in Ejectment.

the same amount as the lessor had himself insured the premises, during two years of the lease, when the lessee had been in embarrassed circumstances. Lord Tenterden, C. J., ruled, that although there was no dispensation or release from the covenant, yet if the conduct of the lessor of the premises had been such as to induce a reasonable and cautious man to believe that he would do all that was necessary or required of him, by insuring in his own name, and to the amount proved, he could not proceed against his lessee for a forfeiture; and he left to the consideration of the jury, the question whether such had been the conduct of the lessor; the jury found a verdict for the defendant.

Doe dem. Knight v. Rowe, 1 Ry. & Moo. 343.

A landlord will not lose his right to re-enter by merely lying by (however long the period) and witnessing the act of forfeiture; but it seems that if, with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver, as well as ground for application to a court of equity for relief.

Doe dem. Sheppard v. Allen, 3 Taunt. 78.

## (E) Of the Plea and General Issue in Ejectment.

THE general rule in the issue of this action is, that whatsoever bars the right of entry is a bar to the plaintiff's title: therefore the plaintiff must prove seisin within twenty years in himself or his ancestors, or must prove a seisin in the person that has a particular estate in the land, and that he claimed within twenty years after the reversion accrued, or that he was an infant, *non compos*, imprisoned, beyond the sea, or, if a woman, under coverture, at the time when the title accrued, [and that he claimed within twenty years after he came of age, &c., for every plaintiff in ejectment must show a right of *possession*, as well as of property; and therefore the defendant need not plead the statute of limitations, as in other actions.]

Law Eject. 89; 1 Burr. 119. *β* Jackson v. Ives, 6 Cowen, 578, *acc.g*

Fine and non-claim, or a descent cast, which takes away the entry, are good pleas in this action in bar of the plaintiff's right of entry.

Accord is a good plea in ejectment, as is also ancient (*a*) demesne.

9 Co. 77, Petoe's case. (*a*) But this cannot be pleaded without leave of the court, || which must be applied for within the four first days of term upon an affidavit, that the lands are holden of a manor which is ancient demesne, that there is a court of ancient demesne regularly holden, and that the claimant has a freehold interest. Hatch v. Cannon, 3 Wils. 51; Doe v. Roe, 2 Burr. 1046; Denn v. Fenn, 8 T. R. 474. Where the application was made on the last of the four first days of the term, the court directed the defendant to plead *instantler*, and granted him a rule calling on the plaintiff to show cause why the plea should not be allowed. Doe v. Roe, 10 East, 523. To this plea the plaintiff may reply, that the lands are pleadable at common law, and traverse that the manor is ancient demesne. But the court will not reject the plea, upon a counter affidavit, that great part of the lands are copyhold. *Ibid.*||

||When the party appearing has entered into the consent rule and pleaded, he may move for a rule to reply, before the lessor of the plaintiff has joined in the consent rule, and the plaintiff may be non-prossed thereby; but, as the plaintiff is only a fictitious person, the defendant will not be entitled to costs.

Goodright v. Badtittle, 2 Bl. Rep. 763.|| *β*A person who made affidavit "that he this deponent claims as tenant in common; and that he is advised by counsel, and believes, that he is tenant in common with the lessors of the plaintiff," was held to be entitled to enter into the consent rule. Jackson v. Stiles, 6 Cowen, 391. See 2 Cowen, 442; 6 Cowen, 587.*g*

## (F) Of the Verdict and Judgment in Ejectment.

§ Three defendants in an action of ejectment appear at different times; the first pleads, and, as to him, issue is joined; the second is admitted a defendant, but does not plead; the third pleads, but no issue is joined: in this state the cause is tried and verdict is given for plaintiff; this is not error, notwithstanding there was no plea for the second defendant, nor issue for the third; for their rights remain untouched, and may be tried when the issues are made up as to them.

Hambleton v. Wells, 4 Call, 213.

## (F) Of the Verdict and Judgment in Ejectment.

As the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of: but a variance between the verdict and judgment, occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought. As, where the plaintiff had judgment *quod recuperet terminum* of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land; here, though the judgment was larger than the verdict, yet, because it appeared to be the misprision of the clerk, who had not pursued the verdict, which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to suffer for such misprision, since the statute of 8 H. 6, c. 12, gives the judges, in affirmance of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

Mason v. Fox, Cro. Ja. 631.

|| Where two demises were laid by different lessors of the same premises for the same term, both as to commencement and duration, and the judgment was, that the plaintiff recover his *terms* in the premises; and it was objected that both lessors could not have a title to demise the whole; and that therefore there was an inconsistency in the judgment, and that it did not appear which of the lessors' rights was established; the court affirmed the judgment; because after a verdict a bare possibility of title consistent with the judgment is sufficient, and the two lessors might have been joint-tenants, and yet refuse to join in a lease.

Morris v. Barry, 2 Str. 1180; 1 Wils. 1, S. C.

So, where the declaration contained two distinct demises by two different lessors of two distinct undivided thirds, and judgment was given, that the plaintiff "*do recover his said terms*," and on error it appeared (from the facts stated in a bill of exceptions to the judge's directions on a point of law) that the ejectment respected only one undivided third, the judgment was holden well enough, when the point was raised only on a bill of exceptions; and it seems that it would have been well enough even on a special verdict.

Rowe v. Power, 2 N. R. 1.

So, where in an ejectment on two several demises of two separate parcels of lands, the judgment was entered, that the plaintiff do recover his term, and it was objected, that it should have been, that plaintiff do recover his *terms*, the court said, that they would extend the word *term* to his *term* in A and his *term* in B, and affirmed the judgment.

Worral v. Bent, 2 Str. 835; Fitzg. 83, S. C. § When there are two demises in an action of ejectment, one in the name of the grantor, and the other in the name of the



(F) Of the Verdict and Judgment in Ejectment.

grantee of the premises, and at the time of the conveyance to the grantee the premises are held adversely, so as to render the conveyance inoperative, the recovery may be had in the name of the grantor. *Jackson v. Legget*, 7 Wend. 377.¶

So, where the ejectment was upon two demises by different lessors, and the second demise was "of the *aforesaid* premises," and judgment was entered for the plaintiff as to the first demise, and for the defendant as to the other; and it was objected, that by not stating the second demise to be of "*other premises*," the judgments were contradictory to each other, inasmuch as the defendant was put without day as to the same premises for which the plaintiff recovered; the court affirmed the judgment, and construed the *aforesaid premises which the second lessor demised* to mean the term in the premises.

*Fisher v. Hughes*, 2 Str. 908; 1 Barnardist. 464, and 3 Barnardist. 10, S. C.

So, where the plaintiff declared upon two demises of several lands by several parties, but laid only one *habendum*, namely, *habendum tenementa prædicta* so demised by the *aforesaid* several parties for seven years, and it was assigned for error, that the declaration was ill for the want of another *habendum*; for that the verdict was general, and it was uncertain to which demise the single *habendum* related; the court held, that *reddendo singula singulis* it was well enough.

*Slabourn v. Bengo*, 1 Ld. Raym. 561; *Moore v. Fursdon*, 2 Vent. 214; *Carth.* 224, S. C.; *Comb.* 190, S. C.

So, where the declaration was for lands and common of pasture generally, without stating it to be appendant or appurtenant, it was intended after verdict, on a writ of error, to be that common for which an ejectment would lie.

*Newman v. Holdmyfast*, 1 Str. 54.

So, where the ejectment was for one messuage or tenement and four acres of land to the same belonging, the words "to the same belonging" were held to be void, for land cannot properly belong to a house; and then it is a declaration for a messuage or tenement and four acres of land, which, though it be void for the tenement, is good for the land, for which the plaintiff, upon releasing the damages, had judgment.

*Wood v. Payne*, Cro. Eliz. 186.¶

If the plaintiff hath a verdict for all, the entry of the judgment is, that the plaintiff *recuperet terminum versus def. de et in tenementis prædict. et (a) quod def. capiatur*.

*F. N. B.* 220; *Cro. Eliz.* 144. (a) But it seems, that since the statute 5 & 6 W. & M. c. 12, which takes away the *capias pro fine*, no judgment of *capiatur* shall be entered against the defendant, nor any thing in lieu thereof, but the clause shall be totally left out of the judgment; but then the plaintiff is to pay the officer, in lieu of the fine, six shillings and eight pence, which is to be allowed the plaintiff in his costs. *Linsey v. Sir Talbot Olerk*, *Carth.* 390; 5 Mod. 285, S. C.; 1 Salk. 54, S. C.

But, if the judgment in ejectment be entered *quod recuperet possessionem termini prædict.*, this is as well as if it had been *recuperet terminum præd.*, because both signify the same thing, the possession itself being to be recovered on the *habere faciás possessionem*.

Law Ejectm.

And hence it is, that if the term expires pending the suit, the plaintiff cannot recover the possession, because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record, that his title to it is determined; yet he (b) shall have his judgment for damages, because the trespass still remained.

*Sav.* 28. (b) *Co. Litt.* 285.

## (G) Of the Writ of Execution.

In ejectment against baron and feme, the husband was acquitted and the wife found guilty; the judgment was *quod capiantur*; and held good, because that is only for the fine, which the husband must pay, for the wife cannot.

Mayo v. Cogshill, Cro. Car. 406.

If the defendant be acquitted of part, and judgment be entered *quod def. sit quietus quoad* that part whereof he is acquitted; this is error, because the judgment in this action is not final, as in the writs of right, and doth not protect the defendant from any further suit, but only acquit him against the title set up by the plaintiff in the action. But since it appears that the plaintiff's demand was groundless as to that part whereof the defendant was acquitted, the judgment as to that part must be set down to be *quod def. eat inde sine die*; the plaintiff as to that having no farther cause to detain him longer in court.

Cro. Eliz. 673.

If one of the defendants die after a verdict, the plaintiff shall have judgment against the survivors, on his suggesting the death on the roll, but then the judgment must be entered as to the person deceased *quod quer. nil capiat, &c.* (a)

(a) [This latter part of the judgment hath been holden to be unnecessary; because on suggesting the death, it is awarded by the court, "that further proceedings shall stay against the person deceased." 1 Burr. 363.]

|| It seems, that if the defendants make a joint defence for the whole land demanded, and one of them die, execution may be given of the whole, because the whole interest comes by survivorship to the others, and therefore the plaintiff hath still persons before the court to defend the whole; but that where each of the defendants defends for part only, the plaintiff, upon the death of one of them, must not take out execution for the part in his possession, because they are in the nature of distinct defendants, and, consequently, as to that part which was defended by the person deceased, there is no person in court against whom judgment can be given, or execution taken out.

Gilb. Eject. 98.]

If an ejectment be brought against baron and feme, and the plaintiff have a verdict against both, and before judgment the husband die, the plaintiff may on the suggestion have judgment against the wife, not only because this is a trespass committed by the wife, and that therefore she is punishable for her own act, which is injurious to another; but because where the wife is found guilty of the ejectment, she must have obtained that unlawful possession, either jointly with her husband, and then it survives, or, she had the whole possession in her own right; and in either case the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband.

Lee v. Rowkeley, Ro. Rep. 14; Rigley v. Lea, Cro. Ja. 356.

## (G) Of the Writ of Execution: And herein,

## 1. Of the Time when the Writ is to be sued.

ALTHOUGH after judgment the plaintiff is entitled to, and may sue out the writ of *habere facias possessionem*; yet if he neglect to sue out execution within a year after the judgment, he must bring (b) a *scire facias*, (c) as on all other judgments, otherwise the court will award a writ of restitution *quia erronee emanavit*.

Vide tit. *Sci. Facias*. (b) Where the defendant in ejectment dying, a *scire facias*

(G) Of the Writ of Execution.

went out against the terretenants of the lands, the writ was demurred unto; for that the heir was not named, nor was it alleged that any strangers had intruded; but the court ruled it well, for the heir may come in as a terretenant. Sid. 317; 2 Keb. 143. But for this vide *Eyres v. Taunton*, Cro. Car. 295, 312; Cro. Ja. 506; 2 Brownl. 145. —Where in ejectment there was judgment against the testator, and a *scire facias* against the executor, without naming him terretenant; it was objected, that in ejectment the defendant is supposed to be a disseisor, and that the lands descend to his heir at law; the plaintiff took out a new *scire facias* and amended the fault. Carth. 2. —Where judgment in ejectment was for two messuages, and after a year a *scire facias* upon it recited a judgment of one messuage only, to which *mul tiel record* being pleaded, it was moved to amend it, but denied, for there may be such a judgment; and this does not appear to be erroneous on the face of it. 6 Mod. 310. (b) It seems to have been doubted, whether a *scire facias* lay to revive a judgment in ejectment after the year, because by the common law it lay only in real actions; and at the time of Westm. 2, c. 45, which extends it to personal actions, the term or possession was not recovered in this action; but it seems now agreed, that a *scire facias* lies to revive the judgment in this action after the year, as well as in any other. Okey v. Viccars, Sid. 351. || Clerk v. Withers, 1 Salk. 258; 2 Ld. Raym. 806, S. C. As the lessor of the plaintiff is not a party to the judgment, it would seem not to be necessary, in case of his death before execution, to revive the judgment by *scire facias*, although the case of *Doe v. Roe*, 4 Burr. 1970, has left this point somewhat doubtful. Adams's Eject. 274.||

[But, if execution be taken out within, and continued beyond, the year, there is no necessity for a *scire facias*. No presumption can then arise, that the plaintiff hath released the execution; because, having been duly taken out, it may be owing to the neglect of the sheriff that it was not executed.

2 Inst. 471; 2 Leon. 77; Runningt. Eject. 429.

If the plaintiff die within the year and day, his executors cannot take out execution without a *scire facias*; for they are not parties to the judgment: though if execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the court, and not from the party. The writ of possession has relation to its *teste*; therefore, though it be not actually sued out till after the death of the lessor of the plaintiff, yet, if it be *tested* before his death, it is regular.

Runningt. Ibid.; 14 H. 7, 16; *Doe v. Roe*, 4 Burr. 1970.]

But if the plaintiff hath a judgment, with a stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage and at his instance.

6 Mod. 288; Ro. Rep. 104.

But it seems this delay of execution, being only the compromise or agreement of the parties, is never entered on the roll; and therefore after the year the plaintiff ought to move the court for the *scire facias*, lest the execution should be suspended *quia erroneè emanavit* after the year without the *scire facias*.

Keb. 785; 6 Mod. 288, and the above authorities.

So, if the defendant brings a (a) writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed; the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment above. Besides, while the cause is depending on the writ

## (G) Of the Writ of Execution.

of error, it is still *sub judice*, whether the plaintiff shall recover the land or not.

5 Co. 88 a; Cro. Eliz. 416; 2 Inst. 471; 6 Mod. 288. (a) But, if the party be tied up by an injunction out of Chancery for a year, he cannot take out execution after the year without a *scire facias*, because the courts of law do not take notice of Chancery injunctions as they do of writs of error; besides, it might be no breach of the injunction to take out execution within the year, and continue it down by *vic. non misit breve*, [which, it seems, cannot be done in the case of a writ of error, because that removes the record out of the court where judgment is given; and therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.] Salk. 322; 6 Mod. 388, S. C.; Stra. 301.—\*But now, according to the case of Michel v. Cue et Ux. in B. R., 32 Geo. 2, 2 Burr. 660; if a delay of execution for a year hath arisen from the defendants, by bills for injunctions, and by obtaining time for payment, execution may be sued out without a *scire facias*: and if a rule to show cause why it should not be set aside is obtained, the court will discharge it with costs. And this seems founded on reason; and *qu.* if this doctrine will not extend to cases in ejectment!—A *scire facias* lies upon a judgment in ejectment where a stranger enters after judgment. R. Lut. 1268; 3 Lev. 100; Clift. 676, 677.

If the sheriff sell a term under a *fi. fa.* which is afterwards set aside, and an order made to pay the produce of the sale over to the debtor, such debtor cannot maintain ejectment against the purchaser to recover the term.

Doe dem. Emmett v. Thorn, 1 Maule & S. 496.

Several crops having been taken under an *hab. fac. poss.* issued on an ejectment against a tenant for holding over, the Common Pleas refused a rule ordering the lessors of plaintiff to pay over the value after deducting rent: the tenant if he had a claim to the crops might take his legal remedy.

Doe v. Witherwick, 3 Bing. 11.

Where in ejectment, a landlord appears and defends, after verdict and judgment against the landlord, execution may issue without any further order of the court.

Doe dem. Lucy v. Bennett, 4 Barn. & C. 897.

Where A was admitted to defend as landlord, and died before the termination of the suit, having devised all his real estate to B, and the statute of limitations prevented the lessor from bringing a fresh action, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution unless the devisee would defend, it appearing that the lessor had not improperly delayed proceedings.

Doe v. Grubb, 5 Barn. & C. 457.

[Tenant for years had judgment in ejectment: the term incurred: then he brought a *scire facias quare executionem habere non debet of the land*, and his damages and costs. The defendant demurred. It was holden by the court, that though the defendant might have a *scire facias* for the damages and costs, yet this being for the term likewise, which was incurred, it was ill; and a new *scire facias* ought to issue. It was afterwards argued by Holt, that the *scire facias* was good for the damages; but the court thought otherwise, and a new *scire facias* was granted.

Sedgwick v. Gofon, Skin. 161.]

§ In ejectment, the execution for costs properly issues against the defendant, in the name of the nominal plaintiff.

Brown v. Demont, 9 Cowen, 263.

On disclaimer, the plaintiff may take out execution for the part disclaimed.

Squires v. Rigge, 2 Hayw. 150.

## (G) Of the Writ of Execution.

After a conveyance of land for which judgment had been obtained, by the lessor of the plaintiff to a third person, *habere facias possessionem* must issue in the name of the plaintiff.

*Lessee of Paine v. Kline*, 1 Pet. C. C. R. 446.*g*

### 2. How the Writ is to be executed.

[As execution should be issued according to the right and justice of what has been really recovered, the plaintiff must be careful not to take out execution for more than he had a right to recover. And that the sheriff may not labour under any difficulty in executing the writ of possession, the practice *now* is (different indeed from what it was formerly) for the plaintiff himself not only to point out to the sheriff that which, in execution of the writ, he is to deliver him possession of; but to take possession, at his peril, of only that which he has title to: for should he take possession of more than he has recovered and proved title to, the court will, in a summary way, interpose and set it right.] || They will also, if necessary, interfere before the execution of the writ, and restrain the lessor of the plaintiff from taking possession of more than he is entitled to. ||

1 Burr. 366; *Runnintg. Eject.* 439; 1 Burr. 629; 5 Burr. 2673; 3 Wils. 49; *Doe v. Wandlaas*, 7 T. R. 118, *in notis*; *Brookes v. Baldwyn*, Barnes, 468.  $\beta$  When there is a general verdict for the plaintiff in ejectment, the court will order him to take possession of so much of the premises as he has given evidence that he was entitled to. *Jackson v. Van Bergen*, 1 Johns. Ch. 101. And if he has taken more land than he recovered, the court will order a restitution. *Jackson v. Hasbrouck*, 5 Johns. 366. See *Jackson v. Rathbone*, 3 Cowen, 291.*g*

The words of the writ are, *quod habere facias possessionem*, so that there must be a full and actual possession given by the sheriff, and, consequently, all power necessary for this end must be given him. If, therefore, the recovery be of a house, the sheriff may justify breaking open the door, if he be denied entrance by the tenant, because the writ could not be otherwise executed.

5 Co. 91 b.

If the plaintiff recover several messuages in the possession of different persons, the sheriff must go to each house and deliver the possession thereof; and this is done by turning the tenants out of each of the houses: for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ, because the possession of one tenant is not the possession of the other, but each hath his several possession.

1 Ro. Abr. 886.

But it seems by Rolle that if all the messuages had been in possession of one tenant, it had been sufficient to give possession of one in the name of all; but without doubt the surest and best way is, for the sheriff to remove all the tenants entirely out of each house, and when the possession is quitted, to deliver it to the plaintiff.

Ro. Abr. 886.

If the sheriff turns out all persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession, and after the sheriff is gone there appear some persons to be lurking in the house; this is no good execution, and therefore the plaintiff shall have a new *habere facias possessionem*, because he never had execution.

*Leon. 145*, *Upton and Wells*. [*Qu.* Whether the courts would not now hold it to be a full execution of the writ.]

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## (G) Of the Writ of Execution.

Where the recovery was of land, and there was more demanded than recovered, as suppose the demand for 500 acres, and a verdict and judgment only for 100 acres, it seemed doubtful formerly how the sheriff was to give execution. (a) Rolle says, it is sufficient to give the plaintiff possession of two or three acres in the name of the whole. And this indeed seems the safest way for the sheriff, when he executed the writ at his peril; for if he gave possession of any land not recovered, and not in the *habere facias possessionem*, he was a trespasser, and punishable in an action of trespass. But, because the *habere facias* is to give the plaintiff the benefit of his judgment, and that cannot be done without an actual possession be given of the whole quantity, it hath been held by (b) others, that the sheriff does not discharge his duty by giving one acre in the name of all; but he ought in such case to set forth all the acres particularly, otherwise it would leave the execution uncertain, and, consequently, not give the plaintiff the full benefit and advantage of his judgment. But *note*, (c) at this day the practice is for the plaintiff to give the sheriff security to indemnify him from the defendant, and then the sheriff to give execution of what the plaintiff demands.

(a) Ro. Abr. 886. (b) Palm. 289. (c) [1 Burr. 629; 5 Burr. 2673.]

If the execution be for twenty acres, it seems the sheriff must give twenty acres, according to the common estimation of the county where the lands lie.

Ro. Rep. 410.

3. *How the Plaintiff is to be quieted, and what Relief he has when his Possession is disturbed.*

And here it is further observable, that this writ of execution is only returnable at the election of the plaintiff; and the court, at the instance of the defendant, will not direct the writ to be returned. This seems to be left to the choice of the plaintiff, that he may take what is most for his advantage, in order to have the full benefit of his judgment: the best way to effect that is, to suffer him to renew the execution at his pleasure till full execution be had. For the plaintiff cannot renew execution after one *habere facias* is returned and filed, because it then appears on record, that the plaintiff hath had the benefit of his suit; and then the new execution is but *actum agere*, and, consequently, superfluous; and therefore the court will not oblige the sheriff to make any return, but at the desire of the plaintiff.

Ro. Abr. 886; 2 Keb. 245; Ro. Rep. 353; Palm. 289; 2 Brownl. 253; 6 Mod. 27.

If the writ be returned by the sheriff, though not filed, it seems no new *habere facias* shall issue, because when the return is made, it becomes a record, which the court is entitled to.

2 Brownl. 216.

But, where the writ is neither returned nor filed, there is then no act of record, by which it appears to the court that the plaintiff hath had any benefit by his judgment; and there upon a suggestion, *vic. non misit breve*, the plaintiff is entitled to a new writ, because the omission of the officer shall not turn to the plaintiff's delay or prejudice. But the new writ cannot issue till the return of the first writ be out; because till the return be past, *non constat* to the court, but the sheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment; in which case there can be no occasion for a new *habere facias*.

Palm. 289.

## (G) Of the Writ of Execution.

If the officer be disturbed in the execution of the writ, on an affidavit the court will grant an attachment against the party, whether he be the defendant or a stranger: for the writ is the process of the court, and any disturbance given to the execution of it is a contempt of the authority of the court from whence it issues, and as such will be punished. The process is not understood to be executed, nor the execution complete, till the sheriff and his officers be gone, and the plaintiff left in quiet possession.

6 Mod. 27.

But after the possession given, either on the *habere facias possessionem*, or agreement of the parties, the law seems to make a difference where the plaintiff is turned out of possession by the defendant, and where by a stranger. When it is done by the defendant himself, the plaintiff may have either a new *habere facias* or an attachment, because the defendant himself shall never by his own act keep the possession which the plaintiff has recovered from him by due course of law. But, where a stranger turns the plaintiff out of possession after execution fully executed, the plaintiff is put to another action, or to an indictment for the forcible entry. For the title was never tried between the plaintiff and a stranger; and he may claim the land by title paramount to the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession which he may have a right to. If the law were otherwise, the plaintiff might by virtue of a new *habere facias* turn out even his own tenants, who came in after the execution executed; whereas the possession was given him only against the defendant in the action, and not against others not parties to the suit.

Radcliff and Tate, 1 Keb. 779. ¶ Where the lessor of the plaintiff had been put into possession by virtue of a writ of *habere facias possessionem* on the 22d day of February, 1806, which writ had never been returned, and on the 10th day of October, 1807, whilst he continued in possession, the person, against whom he had recovered the premises, entered into the house by force, and resisted with violence all his attempts to regain the possession; and upon these grounds a new writ of possession was moved for, and this case of Radcliffe v. Tate was cited; the court denied the authority of it, and held, that possession having been given under the first writ, the sheriff ought to have returned "that he had given possession," and that the plaintiff could not afterwards have had another writ; an *alias* cannot issue after a writ is executed. If it could, the plaintiff, by omitting to call upon the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which the same tenant might commit within twenty years next after the date of the judgment. The rule was refused. Doe v. Roe, 1 Taunt. 54.]

Thus in the case of (a) Fortune and Johnson, the court was moved for an attachment against Johnson, for ejecting one who had been put into possession by an *habere facias*: but because it appeared that Johnson claimed under an elder judgment, the court would not make any rule in it, because it was title against title, and therefore left them to take their course at law.

(a) Style, 318. β After judgment, a lessor in ejectment may enter peaceably without a writ of possession; the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass, as long as the effect of the judgment continues. Jackson d. Beekman v. Haviland, 13 Johns. 229. g

[But in the case of a tenant (who cannot be considered as a mere stranger) it is otherwise. As in Davis v. Doe, an attachment was granted, and that absolute in the first instance, against the tenant in possession, on an affidavit that he had been served with a rule of court (which had been made absolute) for delivering up the possession, and had refused so to do.

2 Bl. Rep. 892.

## (H) Of the Mesne Profits, and how to be recovered.

The plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for the residue of his term, and held it accordingly for some time, when the plaintiff took out an *habere facias* and executed it. The defendant moved the court for restitution on ground of the agreement; but the court would not grant it, but left the defendant to his action on the case on the agreement, for the judgment was entered absolutely. (a) But, if the judgment had been entered with a *cesset executio* for such a time, and the plaintiff had taken out execution within the time, the defendant might have had restitution, because the judgment was entered with this limitation, that the plaintiff should not have the fruit of it till such a time. But *quare*, how could that appear to the court? since it seems the *cesset executio* is not entered on the roll. The difference seems to have been between a judgment by confession and a judgment on verdict. Where the former is given with a *cesset executio*; if the execution be afterwards taken contrary to the agreement, the court will set it aside, and lay the attorney by the heels: but where judgment is given on verdict, there, the verdict is the foot and ground of the judgment, and the court will not take notice of the subsequent agreement of the parties, but leave them to their remedy. (b)

Style, 408; Law Ejectm. 113. (a) [This decision is not entitled to much, if to any attention. For in the case stated, nothing can be more evident than that the execution was issued contrary to *good faith*; and whenever that appears, the court, in the conscientious exercise of its summary jurisdiction, will interpose and correct it. Runningt. Ejectm. 437. (b) Yet according to the modern practice, if the truth be manifested to the court by affidavit, the party may obtain relief from its summary jurisdiction.

## (H) Of the Mesne Profits, and how to be recovered.

ALTHOUGH in ejectment the plaintiff, if he prevails, is to recover damages, yet the damages which he hath sustained by being kept out of the mesne profits are not (c) recoverable in this action; because it is never laid with a (d) *continuando*, and therefore comprehends only the damages sustained in the particular act of ouster complained of. [Indeed, the action of ejectment, as now conducted, is altogether a mere fiction, brought by a *nominal* plaintiff against a *nominal* defendant, for a *supposed* ouster, and of course for mere *nominal* damages. The object at this day proposed to be recovered by it is quite changed from what it was in its original state; for, as formerly, damages only were recoverable by it, and not the term; so now the term only is sought for by it, and not damages. For a satisfaction in damages therefore, a subsequent action is to be brought, which subsequent action is in *form* an action of trespass, *vi et armis*, but in *effect* to recover the rents and profits of the estate. It is in *form* an action of trespass, because it is consequent and, as it were, supplemental to the action of ejectment, and therefore must necessarily be of the same species with it. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; but in either shape it is equally *his* action; for it is not in any manner affected by the fiction in the ejectment. And it may be brought in the name of the nominal lessee as well where the judgment is by default, as where it is upon a verdict; for there is no distinction between a judgment by default, and upon verdict; in the one, the right of the plaintiff is tried and determined against the defendant; in the other, it is confessed.

Pract. Reg. C. P. 62. [3 Wils. 128; 2 Burr. 688; 3 T. R. 17, 547. {See 1 Johns. Ca. 281, Van Allen v. Rogers.} (c) It seems certain that the plaintiff may recover the whole mesne profits in the ejectment; and that is apparent from 16 & 17 Car. 2,



## (H) Of the Mesne Profits, and how to be recovered.

which enacts, that in case the judgment be affirmed on the writ of error, the court may award a writ of inquiry as well of the mesne profits as of the damages by any waste committed after the first judgment. Perhaps it may be answered, that the court will take notice that the proceedings in ejectment are merely fictitious, and only to enable the plaintiff to get possession, and that it is never usual to recover more than small damages for the ouster, without any consideration had of the mesne profits. And it is certain the courts do frequently take that into consideration; otherwise the lessor would not be entitled to recover at all for the time laid in the declaration, since, by his own showing, his lessee, and not himself, was entitled to the action. But if the plaintiff were, upon the judgment in the ejectment being affirmed in error, to have a writ of inquiry, it would probably, if rightly pleaded, prevent him from recovering any thing in a subsequent action of trespass; and therefore, if the demise were laid any time back, it would be advisable for the plaintiff in ejectment to take (as he may) judgment for his costs on the writ of error, without having any writ of inquiry. Bull. Ni. Pri. 88. In *Traherne v. Gressingham*, Barnes, 87, it is said by the court, that the actions for mesne profits (which are grown very fashionable) tend to create double expense: that the plaintiff should be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a second for mesne profits. (d) But it was formerly thought, that *antecedent* profits were not recoverable at law; and therefore it was usual for the plaintiff to go into equity for an account of the mesne profits. 1 Vern. 105; 3 Wils. 118; 2 Burr. 688; 3 T. R. 17, 547.] ¶ In Pennsylvania, the mesne profits may be recovered in the action of ejectment, down to the time of the verdict. *Dawson v. McGill*, 4 Whart. 230. But in such case the plaintiff must give reasonable notice of his intention to do so before the trial. *Cook v. Nicholas*, 2 Watts & Serg. 27. Vide 4 Dall. 138; 1 Pet. C. C. R. 452. In New York, the action for mesne profits is abolished. *Jackson v. Leonard*, 6 Wend. 534. See *Atkinson v. Burt*, 1 Aik. 329. g

If the action be in the name of the nominal plaintiff, the court, upon application, will stay the suit, till security be given for answering the costs; and if such a plaintiff release the action, his release will be set aside, as a contempt of court.

Runingt. Eject. 439; Skin. 247; Salk. 260.

It was formerly holden, that if the action for mesne profits were brought in the name of the lessor of the plaintiff, or after a judgment by default, the defendant in such action was at liberty to controvert the plaintiff's title; the lessor of the plaintiff in the one case, and the tenant, who had never appeared, in the other case, being no parties to the record, and therefore no estoppel arising either against or in favour of either of them. But it is now settled, that after a recovery in ejectment, the tenant is estopped from controverting the title in a subsequent action for mesne profits; provided the plaintiff proceed only for those profits from the time of the ouster complained of in the ejectment: but, if he proceed for *antecedent* profits, he must prove his title to the premises whence they arose, to show his right to receive them.

Lill. Pr. Reg. 499; 2 Str. 960; *Dacosta v. Atkins*, Hil. 4 G. 2; Bul. Ni. Pri. 87; 2 Burr. 688; Barnes, 472. ¶ See *Brown v. Galloway*, 1 Pet. C. C. R. 299; *Osbourne v. Osbourne*, 11 Serg. & R. 55; *McCredy v. Guardians*, 9 S. & R. 101; *Lloyd v. Nourse*, 2 Rawle, 49; *Jeffries v. Zane*, 1 Miles, 287; *Postens v. Postens*, 3 Watts & Serg. 182. g { 3 Johns. Rep. 481, *Baron v. Abeel*. See 1 Dall. 172, *Shotwell v. Behm*.—The recovery in ejectment is so conclusive as to the title, that though the defendant should recover back the land in another ejectment, that will not bar a recovery by the plaintiff in an action for the mesne profits. 2 Johns. Rep. 369, *Benson v. Matsdorf*. The plaintiff may recover, though he has conveyed the fee simple to the defendant after the judgment in the ejectment. 2 Dall. 126, *Duffield v. Stille*. }

Hence it should seem, that in order to prove the plaintiff's title in an action for the mesne profits, it is only necessary to produce the judgment in ejectment; and so is the practice, where the judgment is after verdict: but after judgment by default the practice is different: then, it is usual not only to produce the judgment, but also to prove a writ of possession executed. This latter proof, however, does not seem to be necessary; for if the tenant

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be concluded by the judgment in ejectment from controverting the plaintiff's title, he is, consequently, concluded from controverting his possession, because possession is part of his title. || If, however, the plaintiff have been let into possession by the defendant, it will not be necessary to prove the execution of the writ of possession. ||

Bull. Ni. Pri. 87; Runningt. Eject. 442; Aslin v. Parkin, 2 Burr. 667; Calvart v. Horsefall, 4 Esp. 67.

But, if this action be brought against a precedent occupier, the judgment in ejectment is no evidence against him; and therefore in such case, it is necessary for the plaintiff to prove his title, and also an actual entry; for trespass being a possessory action, cannot be maintained without it. But it may admit of doubt what proof of an actual entry will be sufficient. It has been said, that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore if a man make his will and die, the devisee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title accrued, so as to entitle him to recover the mesne profits from that time, and they rely on the case in 1 Sid. 239, which was trespass brought for the mesne profits *devant le lease*, and nothing said in the case about proving an actual entry antecedent to it. They say too, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to profits they would not otherwise be entitled to. However, supposing a subsequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years.

Bul. Ni. Pri. 87; Stanynough v. Cousins, Barnes, 456; 1 Ro. Abr. tit. *Trespass per Relation*.

In this action the plaintiff must prove the value of the mesne profits; for the judgment in ejectment does not prove any thing as to that. In estimating it, however, the jury are not confined to the mere rent of the premises; they may give *extra* damages, and the costs in ejectment are recoverable; whether the judgment be by default against the casual ejector, or upon a verdict against the tenant or landlord, and are therefore usually declared for as damages, in the action for mesne profits.

Goodtitle v. Tombs, 3 Wils. 121; Gulliver v. Drinkwater, 2 T. R. 261; Doe v. Davis, 1 Esp. 358; Utterson v. Vernon, 3 T. R. 547.

Bankruptcy is no plea in bar to this action. || And the action being for a tortious occupation, the defendant cannot pay money into court.

Goodtitle v. North, Dougl. 584; Holdfast v. Morris, 2 Wils. 115.

The defendant may plead the statute of limitations, namely, *not guilty within six years* before the commencement of the suit, and thereby protect himself for all but that time, should the plaintiff declare for a longer period.

B. N. P. 88.

If the plaintiff recover less than forty shillings, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages; and this is the case whether the action is brought in the name of the lessor of the plaintiff, or in that of the nominal lessee.

Doe v. Davies, 6 T. R. 593.

Upon the general issue in this action, not guilty, evidence that the plain-

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tiff had accepted the rent of the premises for the time in dispute, and had agreed to waive the costs of the ejectment, is not admissible.

*Doe v. Lee*, 4 Taunt. 459.

The defendant in this action must be the person in actual possession and trespassing; so that a tenant, whose undertenant retains the possession after the term, would seem not to be liable.

*Burne v. Richardson*, 4 Taunt. 730.

If in an ejectment there be a verdict for the plaintiff, and the defendant bring a writ of error, and enter into a recognisance to pay costs in case of nonsuit, &c., pursuant to 16 and 17 C. 2, c. 8, and he be nonsuited, &c., the defendant in error needs not bring a *scire facias*, or debt on recognisance, but may sue out an *elegit*, or writ of inquiry, to recover the mesne profits since the first judgment in ejectment.

*Short v. Heath*, 2 Crompt. Pr. 223.

As it is competent to the nominal plaintiff in ejectment to maintain the action for mesne profits, so it is also competent to him to sue for an escape of the defendant in execution for such mesne profits.

*Doe v. Jones*, 2 M. & S. 473.

A judgment recovered in ejectment against the wife cannot be given in evidence in this action against the husband and wife.

*Denn v. White*, 7 T. R. 112.

A plaintiff may, if he pleases, waive the trespass, and recover the mesne profits in an action for use and occupation. But in the action for use and occupation he cannot recover the profits any farther than to the time of the demise in the ejectment; for this action does not spring out of the ejectment, as the action of trespass does, but, when applied to the same thing, is totally inconsistent with it, this being founded on a contract, that on a tort; in the one, the plaintiff says the defendant is his tenant, and therefore must pay him rent; in the other, he says he is no longer his tenant, and therefore must deliver him up the possession.

*Birch v. Wright*, 1 T. R. 386.]

¶ No defence can be set up to an action for mesne profits, which would have been a bar in ejectment.

*Baron v. Abeel*, 3 Johns. 481; *Jackson v. Miller*, 3 Cowen, 36; *Benson v. Matsdorf*, 2 Johns. 369; *Jackson v. Randall*, 11 Johns. 405; *Langendyck v. Burhaus*, 11 Johns. 461. But see 2 C. M. & R. 361; 4 Dowl. 437.

In Pennsylvania, the mesne profits may be recovered in an action of ejectment,<sup>(a)</sup> but when the plaintiff intends to recover the mesne profits in such action, he must give the defendant notice of his intention to do so.<sup>(b)</sup>

<sup>(a)</sup> *Dawson v. McGill*, 4 Whart. 230. <sup>(b)</sup> *Cook v. Nicholas*, 2 Watts & Serg. 27.

The action for mesne profits is an equitable action, and will allow of every equitable defence.<sup>(c)</sup> The value of improvements made by the defendant may, therefore, be set off against the mesne profits; but profits before the demise laid should be first deducted from the value of the improvements.<sup>(d)</sup>

<sup>(c)</sup> *Murray v. Gouverneur*, 2 Johns. Ch. R. 428. <sup>(d)</sup> *Hylton v. Brown*, 2 Wash. C. R. 165. See *Harker v. Whitaker*, 5 Watts, 474; *Ewalt v. Gray*, 6 Watts, 437; *Maris v. Semple*, Addis. 215; *Cawdor v. Lewis*, 1 Y. & Coll. 427.

A recovery of nominal damages in ejectment is no bar to an action for mesne profits.

*Van Allen v. Rogers*, 1 Johns. Ch. R. 281; and see *Harvey v. Snow*, 1 Yeates, 159.

## (I) Of bringing a new or second Ejectment.

Trespass for mesne profits does not accrue until possession has been given after judgment in an action of ejectment.

Murphey v. Guion, 2 Murph. 238; S. C. 2 Hayw. 145, 162.

In an action for mesne profits, the verdict and judgment in ejectment are conclusive.

Crockett v. Lashbrook, 5 Monro, 538.g

## (I) Of bringing a new or second Ejectment.

ONE of the advantages attending this action is, that a man may have a remedy *toties quoties*, he being allowed to bring as many ejectments as he pleases.(a) But this has sometimes proved a very great mischief, and yet it seems to be without remedy: for though it has been attempted in Chancery, after three or four ejectments, by a bill of peace, to establish the prevailing party's title; yet it hath been always denied to alter the course of the law, for that every terror may have an ejectment, and every new ejectment supposes a new demise; and the costs in ejectment are a recompense for the trouble and charge to which the possessor is put. But, where the suit begins in Chancery for relief touching pretended encumbrances on the title of lands, and that court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, it hath ordered a perpetual injunction against the defendant; because there the suit was first attached in that court, and never began at law; and such precedent encumbrances appearing to be fraudulent and equitable against the possessor, it is within the compass of the court to relieve against them.(b)

(a) 10 Mod. 1. *White v. Kyle*, 1 S. & R. 515; *Richardson v. Stewart*, 2 S. & R. 87. After four trials and similar verdicts, the court said they would stay further proceedings. *Cherry v. Robinson*, 1 Yeates, 521. See *Blackmore v. Gregg*, 10 Watts, 222.g (b) It would not seem that the distinction here made as to the originating of the proceedings at law or in equity obtains at present; for the courts of equity will interfere alike in either case, and after repeated trials, and satisfactory determinations of questions, will grant perpetual injunctions to prevent further litigation, and thus in some degree put that restraint upon litigation which is the policy of the common law in the case of real actions. *Earl of Bath v. Shervin*, 1 Br. P. C. 217, 268, S. C.; *Gilb. Eq. Rep.* 2, S. C.; *Pr. Ch.* 261, S. C.; *Barefoot v. Fry*, Bunb. 158; *Leighton v. Leighton*, 1 P. Wms. 671; 1 Str. 404, S. C.; 2 Eq. Cas. Abr. 523, S. C.; 2 Br. P. C. 217, S. C.; *Goodright v. Harwood*, 3 Wils. 497; 2 Bl. Rep. 937, S. C.; *Cowp.* 87, S. C.; *Dom. Proc.* 9th May, 1775, S. C.; 2 Selw. N. P. 692, S. C.; *Mitf. Eq. Pl.* 116. But a court of equity has never, it would appear to be the result of all the cases, considered a right as determined with a view to a perpetual injunction by any one trial at law, unless upon an issue sent out by such court for the purpose. *Robinson v. Lord Byron*, 2 Cox's Rep. 4.

If a man has (c) a verdict in ejectment, and costs are taxed, and an attachment issues for non-payment of them, the defendant shall not have an ejectment against the plaintiff in the same court till he hath paid those costs; but he may proceed in ejectment in another court without costs paid: the reason is, because the same court will see an obedience paid to their rules before they will suffer the disobedient person to proceed in a cause of the same kind; but one court cannot take cognisance of the rules of another court. [But this distinction now no longer prevails; and the courts of Westminster Hall consider a former ejectment in *another* court in the same light as a former *ejectment* in the *same* court, and will in either case equally stay the proceedings in a new ejectment, till the costs of a former be paid.

Sid. 279. (c) So, if the plaintiff is nonsuit, he cannot bring a second ejectment, without paying the costs of the first. *Salk.* 255; *Comb.* 110. [1 *Salk.* 255; *Barnes*, 153.]

## (I) Of bringing a new or second Ejectment.

A former ejectment had been brought in the King's Bench, where the defendant, in Hilary term, 13 Geo. 3, obtained a rule for costs for not proceeding to trial, which were taxed at 85*l.* 8*d.*, after which the cause was tried in the same term by a special jury, and a verdict for the defendant; and his costs were taxed on the *postea* on the 11th June, 1777, at 273*l.* 10*s.*; total 358*l.* 10*s.* 8*d.*; no part of which was paid. It was moved in C. P. to stay the proceedings in this cause till the costs of the former were paid. For the plaintiff it was urged, that the application came too late. The declaration was delivered before the essoign day of Easter term, 1777. Notice of trial was given for the sittings after Trinity term, viz., the 19th of June, 1777. The plaintiff had been at the expense of preparing for trial, and bringing his witnesses to town; and the motion was not made till Friday, the 13th of June. In support of the motion it was alleged, that the cause was so clear at the last trial, and the parties had rested so long, that the defendant did not think them in earnest till notice of trial was given. He then proceeded to tax his costs in order to ground this application, which otherwise he would not have done, the lessor of the plaintiff being insolvent. The court, on considering all the circumstances, made the rule absolute.

*Doe v. Law*, 2 Bl. Rep. 1158.

|| Although the two ejectments be brought on different demises, against different defendants, for different premises, provided they are to try the same title; though the situation of the parties be reversed, the defendant in the first ejectment being the lessor of the plaintiff in the second, (circumstances these which have heretofore been considered as (a) material;) yet the courts will now stay the proceedings in the second till the costs of the first are paid.

*Doe v. Hatherly*, 2 Str. 1152; *Thrustout v. Holdfast*, 6 T. R. 223; *Keene v. Angel*, *Ibid.* 740. (a) *Doe v. Roe*, 8 T. R. 645; *Roberts v. Cook*, 4 Mod. 379; *Tredway v. Harcourt*, Comb. 106; *Dence v. Doble*, *Ibid.* 110. ||

[An ejectment brought by the *fraudulent* assignee of an insolvent was stayed, till the costs of former ejectments, which had been brought by the debtor himself, were paid.

*Doe v. Law*, 2 Bl. Rep. 1180.]

|| The length of time which elapses between the two actions is no bar to the rule; for many good reasons may exist for such delay; as the poverty of the other party, or a wish to end the controversy.

*Keene v. Angel*, *ubi supr.* ||

[Where there is manifest vexation and oppression, the court will stay the proceedings in a second ejectment, even though the lessor of the plaintiff did not enter into a consent rule in the former cause.

*Smith v. Barnardiston*, 2 Bl. Rep. 904.]

|| So, where the first ejectment was on the demise of the husband and wife, but the husband alone entered into the consent-rule, and judgment was given in C. P. for the defendant, which judgment was afterwards affirmed in K. B. and the House of Lords, and after the death of the husband the wife brought a second ejectment on her own demise; the court would not suffer her to proceed until the costs of the first ejectment were paid.

*Doe v. Hatherly*, 2 Str. 1152. ||

But, where the lessor of the plaintiff was in custody, under an attachment for non-payment of costs in a former ejectment, and brought a new eject-

## (I) Of bringing a new or second Ejectment

ment upon the same demise, the court refused to stay the proceedings therein, till the costs of the former should be paid.

*Benn v. Denn, Barnes, 180.*

[Though the principle of this rule be founded in a supposed vexation of the party, yet, where a *defendant* against whom there had been a verdict in a former ejectment, afterwards brought an ejectment against the former plaintiff, the court would not stay the proceedings in the latter till after the costs of the former ejectment were paid.

*Roberts v. Cook, 4 Mod. 379.* But *qu.* whether the courts would not now interpose, and consistently with the principle stay the proceedings; for though both actions be not commenced by the same person, yet, in truth, it is equally vexatious to proceed in the latter, till the costs of the former action be discharged? *Running. Eject. 420.* {Proceedings in ejectment will be stayed until payment of the costs of a former ejectment, if it is brought to try the *same title*, though the lands lie in a different county, and a defendant is added who was not a party to the first ejectment. 6 Term, 740, *Keene v. Angel.* So though the former ejectment was brought on the same title by the father of the lessor of the plaintiff against defendant's father. 8 Term, 645, *Doe ex dem. Feldon v. Roe.* And they will be stayed until the costs of a former ejectment, and *also of an action for the mesne profits* are paid. 4 East, 585, *Doe ex dem. Pinchard v. Roe.* If the *defendant* in a former ejectment, in which he was evicted, brings another ejectment, the proceedings will be stayed. The rule applies to cases in which a person improperly defends an ejectment, as well as to those in which he improperly brings one. 6 Term, 223, *Thrustout ex dem. Williams v. Holdfast*; 3 Bos. & Pul. 22, *Doe v. Stevenson.*}

But no new ejectment shall be brought by the defendant after recovery against him, till he has quitted the possession, or the tenants have attorned to the plaintiff; so that he be in possession, and the defendant out.

*Salk. 258, per Holt, C. J.*

|| Where the party against whom judgment has been obtained, brings a writ of error, and pending that writ, commences a new action, the court will stay the proceedings on the second ejectment, till the error is determined. So they will pending a special verdict. And it seems also, that if it do not appear to the court, that the writ of error was brought with some other view than to keep off the payment of costs, they will stay the proceedings until the costs of the first action be paid, notwithstanding such costs are suspended by the writ of error.

*Fenwick v. Grosvenor, 1 Salk. 259; Dormer v. Parkhurst, cited in Andr. 298; Grumble v. Rodilly, 1 Str. 554.*

And the court have ordered the proceedings in a second ejectment to be stayed until the costs of an action for mesne profits, (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error,) as well as the costs of the first ejectment, were paid.

*Doe v. Roe, 4 East, 585.*||

¶ The court stayed the proceedings in ejectment until the costs of a former ejectment should be paid.

*Beall v. Sheredine, 1 Har. & Johns. 206.g*

## ELECTION.

¶ This term, in its most usual acceptation, signifies the choice which several persons collectively make of a person to fill an office or place; in another sense, it means the choice which is made by a person having the right of selecting one of two alternative contracts or rights.

Bouv. L. D. h. t.

Elections, then, are of persons, or of things. The latter only will be here considered, by examining

- (A) In what Cases an Election is given.
- (B) To what Person: And herein of him that is to do the first Act.
- (C) Where it shall be said to continue, or be determined.
- (D) What shall be said a sufficient Election.
- ¶ (E) Where a Party shall be put to his Election, or not.¶

### (A) In what Cases an Election is given.

If a man grants twenty acres, parcel of his manor, without any other description of them; yet the grant is not void, for an acre is a thing (a) certain, and the situation may be reduced to a certainty by the election of the grantee.

Keilw. 84; 2 Co. 36. (a) But if a man sells 20l. worth of his land, parcel of a manor; this is void, it being neither certain in itself, nor reducible to a certainty; for no man is made judge of the value. 2 Co. 36; Keilw. 84. ¶ When a tract of land is sold as containing about a certain number of acres, more or less, at a certain price per acre, reserving to the purchaser an election to have the true quantity ascertained by a survey, the purchaser may lawfully make his election after discovering the quantity by an experimental survey. Nelson v. Carrington, 4 Munf. 332.g

So, if one being seised of a great waste (b) grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded; this may be reduced to a certainty by the election of the grantee: but it is otherwise in the case of the king's grant, for there can be no election in his case, and therefore the grant is void for uncertainty.

Leon. 30; Noy, 29; 1 Co. 86. (b) But if A seised in fee of 100 acres makes feoffment of eighteen, without any description of their situation, &c., it is void, and no election can reduce it to a certainty, because a feoffment with livery cannot operate *in futuro*. Ro. Abr. 725; N. Bendl. 148; And. 11; Hob. 174; Moore, 181, S. C., and vide tit. *Feoffment*.

So, if a man levies a fine *come ceo que il ad de son done* of a house and a hundred acres of land in D, where he hath there a house and 118 acres, (c) the conusee may elect which 100 acres he will have; (d) for the election is given to him (e) by the fine.

Ro. Abr. 725. (c) Moore, 84, 102, S. P.; N. Dyer, 280, margin, S. P. (d) That *cestui que use* shall have it. Moore, 102, pl. 247, 602, pl. 832, adjudged.—Where the devisee of two acres not ascertained shall have the election. N. Dyer, 280, margin.—Upon a covenant, in consideration of marriage, to stand seised of so much land as shall be of the yearly value of forty marks; it hath been a question, whether they to

## (A) In what Cases an Election is given.

whom the assurance was made, might enter into any part of the land of the value of forty marks, at their election, and hold the same in severalty; or if they should be only tenants in common with the other; and whether they may choose one acre in one place, and one acre in another; and so through the whole land where they please? 3 Leon. 27, and vide Keilw. 84; Dyer, 280; Ro. Rep. 187; Lit. Rep. 218. (c) But, if the conusee renders it back to the conusor for a certain number of years, the conusor hath the election given him, which hundred acres he will have, and he may elect. Ro. Abr. 725.

If a man grants 600 cords of wood out of a large wood, the grantee hath election to take them when and in what part of the wood he pleases, without any appointment of the grantor, and, consequently, may assign his interest in them to a third person, who shall have the like election.

5 Co. 24, Palmer's case: Cro. Eliz. 819, S. C.; Noy, 32, S. C.; Moore, 691, S. C.; Jon. 276, S. C., cited; Hob. 174, like point.

But, if one grants to me 1000 cords of wood, to be taken at my election, and the grantor or a stranger cuts down part of the wood, I can take no part of that which is cut down, but must supply myself out of the residue still remaining.

5 Co. 24, in Palmer's case.

But, if A covenants with B that he shall have twenty of the best trees in the wood of A, to be taken at the election of B within such a time; it is a breach of the covenant in A to cut down any trees within that time, because the latitude of election which B had is thereby abridged.

Vent. 271, Motteram and Jolly; 2 Lev. 142, S. C., by the report of which A granted twenty of his best trees, &c., and adjudged the grantor should not take any in the mean time, at least without request to the grantee to make his election; and so it was not like Palmer's case, for that being only of so many loads of wood, it was sufficient if so many were left for the grantee.

If rent be reserved payable at the church of S or D upon condition, &c., the lessee hath his election to pay it at either place; and therefore, to take advantage of the condition, the lessor must demand it in such places, where by his own agreement he has permitted the tenant to pay it.

2 Ro. Abr. 428; but for this vide head of *Rent*.

[Where money is agreed by articles to be laid out in land, the party, who would have the sole interest in the land, when bought, may elect to have the money paid to him, and that it shall not be laid out in land.

Benson v. Benson, 1 P. Wms. 129.]

{So, if a legacy is directed to be laid out in an annuity for the legatee for life, he may elect to have the principal, and that the annuity shall not be purchased.

3 Ves. J. 305, Barnes v. Rowley; 9 Ves. J. 11, Bayley v. Bishop.}

[So, if the party being adult, could by fine levied acquire the entire interest in the lands when settled, (as tenant in tail with the immediate remainder to himself in fee:) but otherwise, if a recovery would be necessary, as in case of a tenant in tail with remainder over.

Short v. Wood, 1 P. Wms. 471; Edwards v. Countess of Warwick, 2 P. Wms. 173; Oldham v. Hughes, 2 Atk. 453; Trafford v. Boehm, 3 Atk. 447; Cunningham v. Moody, 1 Ves. 176; Countess of Holderness v. Marquis of Caermarthon, 1 Br. Ch. Rep. 377.] {1 Ves. J. 512, Binford v. Bawden; 3 Ves. J. 583, Amler v. Amler. See st. 40 Geo. 3, c. 56; 6 Ves. J. 116, 576; 8 Ves. J. 609.} *Contra*, Eyre's case, 3 P. Wms. 13, and Mr. Onslow's case, mentioned in the note to Eyre's case.

[But this rule will not apply where an infant becomes so entitled; for an infant is incapable of making an election to vary the nature of his estate.

Earlom v. Saunders, Ambl. 242; Carr v. Ellison, 2 Br. Ch. Rep. 56.]



(B) To what Person: And herein of him that is to do the first Act.

It is laid down as a general rule, that in case an election is given of two several things, he who is the first agent, and ought to do the first act, shall have the election.

Co. Litt. 145; 2 Co. 37 a. [Dougl. 14, 15.] *β*7 Johns. 465; 2 Bibb, 171.*g*

As, if a man grants a rent of 20s. or a robe to one and his heirs, the grantor shall have the election, for he is the first agent by payment of one or delivery of the other.

Co. Litt. 145 a.

So, if a man makes a lease, rendering a rent or robe, the lessee shall have the election.

Co. Litt. 145 a.

But, if I contract with you to pay you a robe, or twenty shillings, at Easter, you may, after the feast, bring debt for the one or the other.

Co. Litt. 145 a.

So, if a man leases lands for years, reserving weekly nine quarters of wheat, or the value thereof, as it shall then be sold in the market of W, if the lessee pays neither of these at the time appointed, the lessor may have his action, at his election, for the wheat only; for though the lessee might have paid any of them at his election at the day, yet, after the day, the law gives the election to the lessor.

Roll. Abr. 725, Denny and Parnell.

If A gives one of his horses in his stable to B, B hath the election which horse to take, for he is the first agent by taking the horse.

Co. Litt. 145; Moor, 82; Dyer, 91.

If one grants to another twenty loads of maple to be taken in his wood of D, there, the grantee shall have the election, for he ought to do the first act, viz., fell and take the same.

Co. Litt. 145 a.

If one seised in fee of a manor aliens the manor, except one close called N, part of the manor, and there are two closes called N, which are part of the manor, and one contains nine acres, and the other but three acres, the alienee shall not choose which of the closes he will have; but the alienor shall have the election which of them shall pass.

Leon. 268, Sir Thomas Lee's case.

If I have three daughters, and I covenant that J S shall dispose of one of them in marriage, it is at my election of which, and after request, I am bound to deliver her to him.

Moore, 72, pl. 197; Dall. 73, S. C.

If an obligation be conditioned to pay B or his heirs annually 12*l.* at midsummer and Christmas, or to pay him or his heirs at either of the said feasts 150*l.*, the obligor hath election to pay the 12*l.* or the 150*l.*, but he ought to continue the payment of the 12*l.* annually, until he pays the 150*l.* Though he may at any time determine the payment of the 12*l.* by payment of the 150*l.*

Abbot v. Rookwood, Cro. Ja. 594.

If A covenants with B that A or his son C, or either of them, shall work with B, at the grinding and polishing of glass, B paying to each of them so much, &c., and B requests C to work with him, &c., if he doth not, the covenant is broken, for B had the election to require both or either of them to work with him.

Sir Paule Neel v. Reeve, 2 Sid. 107.

(C) Where it shall be said to continue.

In debt on an obligation, that if a ship put to sea, and either the goods or the obligor come safe, he should pay such a sum over and above the use allowed by the statute; the defendant pleaded, that the obligor died before he returned, and insisted, that he, as his executor, had an election to pay at which of the contingencies he pleased, and that therefore, the testator never returning, no action accrued: but it was resolved, that the payment should arise on either of the contingencies; and that this being agreeable to the intention of the parties, the law supplies the words, *which should first happen*.

Sayer v. Glean, 1 Lev. 54; 1 Sid. 27, S. C.

{A lease *habendum* for 7, 14, or 21 years, is determinable at either of those periods at the election of the lessee only, and not of the lessor. The words of a grant, when doubtful, are to be construed in favour of the grantee.

7 Ves. J. 231, Dann v. Spurrier; 3 Bos. & Pul. 399, 442, S. C.; 9 East, 15, Doe v. Dixon. See 2 Burr. 1032, and 3 Term, 463, Ferguson v. Cornish; 3 Term, 462, Goodright v. Richardson.}

(C) Where the Election shall be said to continue, or be determined.

WHERE the things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; otherwise, when to be performed *unicuique vice*.

Co. Litt. 145 a; 2 Co. 37; Moore, 85; Keilw. 78.

As, if I grant to another for life an annuity or robe at Easter, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive; for if he should bring it for the one only, and recover, this judgment would (a) determine the election forever; for he should never have a writ of annuity afterwards, but a *scire facias* upon the judgment; which reason Fitzherbert (b) in his *Natura Brevium* not observing, held an opinion to the contrary.

Co. Litt. 145 a. (a) Yet it seems that if a lessor reserve yearly a rent, or a pair of spurs, and the lessee fail of payment at the day, the lessor may distrain for either of them; for in this case the lessee loses his election only *pro hac vice*. Roll. Abr. 725; Co. Lit. 90 b. (b) Fol. 152, H.

§ A creditor entitled to prior payment out of an estate, selects and receives in payment a bond received on account of the sales of the estate, and subsequently assigns it to a third person; the other funds are then transferred to other just claimants. Held, that the election having been made out of a particular fund, and the remainder transferred to other creditors, they could not now be disturbed.

Reid v. Smith, 1 Desaus. 460. g

When nothing passes to the feoffee or grantee (c) before election to have the one thing or the other; there, the election ought to be made in the lifetime of the parties; and the (d) heir or executor cannot make the election.

Co. Litt. 145 a; 2 Co. 37 a. (c) When election creates the interest, nothing passes till {} election. Hob. 174.—As, if a man grants one of his horses in a stable, the election must be made in the time of the parties. Co. Lit. 145.—But, if a man gives one of his horses to A and B, and after A dies, yet B may elect, because this was a thing in interest in them, and no express election limited. Roll. Abr. 725.—But, if a man gives one of his horses to be elected by A and B, if A dies before election, B cannot elect. Roll. Abr. 725, 726. (d) For if he should, he should take as a purchaser, where named only by way of limitation. Leon. 254. {} Where there is a right to elect one of two things, actual ownership is not acquired in either until it be elected. 3 Cran. 352. A statute of the United States (2 Laws U. S. 157, 31st December, 1792) enacts that if a false oath be taken to procure a register for a vessel, “there shall be a

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forfeiture of the ship or vessel, or of the value thereof, to be recovered of the person by whom such oath shall have been made." The United States have an election to proceed against the ship as forfeited, or against the person who took the false oath for its value. But until they elect to pursue the former part of the alternative, the property in the ship is not vested in them. And consequently, if the person who took the oath become bankrupt, and his assignees sell the vessel before the election is made, the United States cannot recover the proceeds of the sale in an action for money had and received against the assignees. 3 Cran. 337, *The United States v. Grundy and Thornbergh.* }

But, where an estate or interest passes immediately to the feoffee, donee, or grantee; there the election may be made by him, or his heirs or executors.

Co. Litt. 145; 2 Co. 36 a, 37 a; Lutw. 803.

When one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this; there, the interest passeth immediately, and the party, his heirs or executors, may make election when they will.

Co. Litt. 145 a.

If A, being seised in fee of a manor, part in demesne, and part in lease for years rendering rent, and part in copyhold, in consideration of a sum of money, by indenture grants, bargains, and sells it to B, to hold for seventeen years from the death of A, and after A covenants to stand seised thereof to the use of himself and the heirs of his body, and dies, and B enters; (a) he may elect whether he will take by the common law, or by bargain and sale, for A had power to pass it either way; and if he should be obliged to take by demise at common law, then B would lose the rents reserved upon the lease for years for want of an attornment. It was also holden, that this election remained notwithstanding the alteration of the estate by the second indenture, and the death of the lessor.

2 Co. 35, *Sir Rowland Haywood's case*; 2 And. 202, S. C. adjudged; Poph. 95, S. C.; Hob. 159, S. C. cited. {3 Johns. Rep. 375, *Jackson v. Hudson.*} (a) A bargain and sale is enrolled *quind. pasc.*, and at the same time the bargainor levies a fine to the bargainee, he may elect to take by one or the other. 4 Co. 72 a; and for this vide 3 Leon. 16; 2 And. 161.

If a man levies a fine *come ceo, &c.*, of a house and 100 acres of land in D, (and he hath there 118 acres,) and the conusee renders to the conusor for 100 years, and after the conusor dies, his executor may elect which of the 100 acres he will have, because this was a thing in interest in the testator.

Ro. Abr. 725.

[A died indebted by one bond to B, and by another bond to C, and left B and J S executors. B intermeddled with the goods, and died before probate, and before any election made to retain. It was insisted, but the point was afterwards waived, that as B might have retained the goods in his hands, his executors had now the same power. However, in a preceding case, where A lent money on bond to B, who dying intestate, C took out administration to him, after which C dying, A took out administration *de bonis non, &c.*, to B, it was determined (*inter al.*) that A might, out of the assets of B, retain for such bond debt contracted before he took out administration, and though A happened to die before he had made any election in what particular effects he would have the property altered; yet the court said, it must be presumed he would elect to have his own debt paid first, and this being presumed, there would be no difficulty as to altering the property; for as the executors of A were to account for the assets of B,

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they must, on that account, deduct the amount of the money lent by B to A.

*Croft v. Pyke*, 3 P. Wms. 183; *Weeks v. Gore*, Mich 1720, cited *ibid.*]

There was a composition between the prebendary of A and the abbot and convent of B, that the prebendary of A and his successors, for all time to come, should have their election yearly, either to receive tithes in kind of corn or grain arising within certain lands of the abbey, or else to receive five marks to be paid by the said abbot and convent in lieu thereof; so as such election was notified to the abbot, or any of the monks or porter of the abbey, &c. The lands came the king by the 31st of H. 8, and from him to the defendant, and the prebend came to the king by the first of Edw. 6, of chanteries, &c., and from him to the plaintiff. Upon admitting the composition good, it was adjudged that the power of election was gone, because it cannot now be made according to the composition: but in this case it was said by Hale, Ch. Baron, that in (a) one Southwell's case, in 44 Eliz., where an abbot had a quantity of wood, to be taken yearly in such a wood, or a sum of money at his election; it was held, the election was transferred to the king by the statute of dissolution of monasteries.

Sir William Ingolsby and Wivel, Hardr. 381. (a) Which vide in Poph. 91.

If one enfeoffs another of two acres, to hold the one for life, and the other in tail, and he before election makes a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the feoffee, by this wrongful act, hath lost his election.

Co. Litt. 145 a; 2 Co. 37 a, S. P.

[By settlement previous to the marriage of the plaintiffs Samuel Tyssen and Sarah his wife, bearing date 24th September, 1779, Francis John Tyssen deceased, the plaintiff's father, agreed to convey lands and other estates, and it being, among other parcels, recited, that certain farms, &c., at Foulden in Norfolk, were of the rent of 550*l.*, he covenanted, before the end of twenty-four calendar months, to purchase lands in the county of Norfolk, sufficient to make up, with the farms at Foulden, the sum of 500*l.* a year, and to convey the same to uses, or to convey other farms, &c., at Hackney in Middlesex, of sufficient value to make good so much as the farms, &c., in Norfolk, should be deficient of 500*l.* a year. By an endorsement on the deed, (before the execution thereof,) it was agreed by the parties, that it should be at the option of Francis John Tyssen, within twenty-four calendar months after the marriage, either to convey the lands according to the covenant, or to pay the trustees 12,000*l.* to be laid out in the purchase of other lands to be settled to the like uses; and in the mean time to be placed out at interest, and the interest to be received by the persons entitled, according to their respective interests. The marriage took place, and there was no issue, except a daughter, who was one of the plaintiffs. Francis John Tyssen died 9th September, 1781, having made his will, bearing date the day of his death, whereby he gave annuities charged upon his estates in Middlesex, Essex, Norfolk, and elsewhere, and gave and devised all his manors, &c., to trustees for payment of debts and legacies, and for other purposes, and to allow the plaintiff Samuel such sum of money yearly during his life, as they should think proper, the remainder to accumulate during his life, and after his death to be laid out to certain uses therein declared. The conveyance, covenanted to be made by the settlement, having never been made, nor the money paid, the plaintiffs filed their bill, praying that Francis

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John might be declared to have made his election to pay the 12,000*l.*, or that an election might now be made: and if the persons interested should elect to pay the 12,000*l.*, it should now be raised; and if the election should not be considered as having been made, and should not be now made, that a proper part of the testator's estate in Norfolk should be conveyed upon the trusts in the marriage articles. The plaintiffs, by the bill, insisted that Francis John Tyssen, by the devise of the premises covenanted to be conveyed, (included in the general devise,) had made his election to pay the 12,000*l.*, and if not so, that the defendants by letters and acts stated in the bill, had made such election. The heir at law and executors submitted the question of election, and said that the testator's debts having exceeded his personal estate, they had no fund out of which to pay the 12,000*l.* but the real estate. Lord Chancellor said, that although the testator had covenanted to convey in twenty-four months, and, therefore, after that time he had lost his election; yet, after that time, as it lay in recompenses, the court would have permitted it to be made good, and, after his decease, he having given both his real and his personal estate to the same person, that person might perform either part of the covenant, and the court would not hold the devisee bound by the testator's not having made his election within twenty-four months: but in the events which had happened, his lordship decreed the estate at Foulden to be conveyed to the uses of the settlement, and to be made equal to 500*l. per annum*, by the conveyance of other parts of the estates.

*Tyssen v. Benyon*, 2 Br. Ch. Rep. 5.

If a testator is bound to settle within four months after his marriage lands of 100*l. per annum* upon his wife, or to leave her 2000*l.*, and die within the four months, and the four months elapse without any election being made by the executors; yet, under such circumstances, a court of equity will enlarge the time, and release against the lapse.

*Eastwood v. Vinke*, 2 P. Wms. 617.]

|| If lessee for years assign over his term, the lessor may refuse to accept the assignee to be tenant at one time, and yet accept him at any time after he pleases; and for rent arrear after the assignment it is in his election, notwithstanding he so refused to accept the assignee, to sue the assignee or the lessee.

*Devereux v. Barlow*, 2 Saund. 182.¶

¶ A widow having a right to dower or to a third of the estate of her deceased husband in fee, under the statute, having claimed her dower, and it is partitioned off to her by legal process, and enjoying it for several years, has made her election.

*Quarles v. Garret*, 4 Desaus. 146.

But where the widow makes her election, it is not binding on her, if made under a mistake.

*Snelgrove v. Snelgrove*, 4 Desaus. 274.

By his will testator directs the sale of land for which he holds a bond for a conveyance; it is a determination of his election, and controls his representatives to require a specific performance.

*Dawson v. Clay's Heirs*, 1 J. J. Marsh. 165.g

|| A person, who is indebted to another on two several accounts, may, on paying him money, ascribe it to which account he pleases, except where the debt is payable out of a different fund; and his election may be either ex-

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pressed or inferred from circumstances. But, if he do not pay specifically on one account, the receiver may afterwards apply the payment to the discharge of either of the accounts he pleases; and if he sue on each account, it seems, that he thereby declares his election, and the defendant cannot, by a subsequent notice of set-off, elect to which account he will ascribe the payment.

*Peters v. Anderson*, 5 Taunt. 596; *Newmarsh v. Clay*, 14 East, 339; *Anon., Cro. El.* 68; *Hawkshaw v. Rawlins*, 1 Str. 24; *Goddard v. Cox*, 2 Str. 1194; *Meggott v. Mills*, 1 Ld. Raym. 286. § When neither party avails himself of his power to make an appropriation, in consequence of which it devolves on the court, such an equitable appropriation will be made as will extinguish those debts first for which the security is the most precarious. *Field v. Holland*, 6 Cranch, 8, 28. See as to appropriations, 6 Cranch, 253, 264; 7 Cranch, 573, 575; *Postmaster-General v. Norvell*, 1 Gilp. R. 106; *King of Spain v. Oliviers*, 1 Pet. C. C. R. 276; *Martin v. Daaher*, 5 Watts, 544; *Seymour v. Sexton*, 10 Watts, 255; *Dickinson College v. Church*, 1 Watts & Serg. 462; *Moorhead v. West Branch Bank*, 3 Watts & Serg. 550; *Harker v. Conrad*, 12 Serg. & R. 305; *United States v. Wardwell*, 5 Mason, 82; *Baker v. Stackpoole*, 9 Cowen, 420; *United States v. Kirkpatrick*, 9 Wheat. 720; *Bacon v. Brown*, 1 Bibb, 334; *Cary v. Macon*, 4 Call, 605; *Scott v. Fisher*, 4 Monroe, 387; *Blanton v. Rice*, 5 Monroe, 253; *Barks v. Albert*, 4 J. J. Marsh. 97; *Backhouse v. Patton*, 5 Pet. 160; *Taylor v. Talbot*, 2 J. J. Marsh. 49. §

(D) What shall be said a sufficient Election.

If a man gives two acres to another, to hold the one for life and the other in fee, and the donee after makes a feoffment of one acre; (a) this is an election to have the fee in that acre.

*Plow. 6*; *Ro. Abr.* 726. (a) That when one who is both executor and devisee enters generally, without claim or demonstration of election, he shall have the thing devised, as executor, which is his first and general authority. 10 Co. 47 b, and vide *Plow.* 520; *Cro. Eliz.* 223; 2 Co. 37 b.

If a man leases two acres for life, the remainder of one acre in fee, and after licenses the lessee to cut trees in one acre; this is an election that he shall have the fee in the other acre.

*Plow. 6*; *Ro. Abr.* 726.

When the election is given to several persons, there, (b) the first election made by any of the persons shall stand.

*Co. Litt.* 145 a; 2 Co. 37 a, same rule. (b) Where an election made by tenant for life shall bind him in remainder. *Moore*, 102.

As, if a man leases two acres to A for life, the remainder of one acre to B, and of the other acre to C, B or C may elect which of the acres they will have, and the first election by one binds the other.

2 Co. 36 b.

§ A slave was bequeathed to a son, who claimed the same slave by gift prior to the will, but he had taken other property under the will: held that he had made his election.

*Field v. Eaton*, 1 Dev. Eq. 283. See *Bell v. Culpepper*, 2 Dev. & Bat. 18; *Wilson v. Army*, 1 Dev. & Bat. Eq. 376.

An election once made is conclusive and irrevocable.

*Waters v. Travis*, 9 Johns. 464; *Lawrence v. The Ocean Ins. Co.*, 11 Johns. 241. §

¶(E) Where a Party shall be put to his Election, or not.¶

THE doctrine of election, as far as it may be considered under this head, is grounded upon this broad principle, that no man shall claim in repugnant rights; a principle of more frequent application, perhaps, in courts of equity, but yet equally recognised in courts of law. A court of law will not allow a tenant to set up a title against his landlord; it will not allow a man to affirm an act as to one part, and disaffirm it as to other part; to treat

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the same act as lawful, and as injurious. If a man, either in a court of law or equity, claims under a deed, he must claim under the *whole* deed; it shall not be permitted to him to take one clause and reject the rest; he must confirm the whole, or abandon the whole. The principle indeed is universal: it prevails in the laws of all countries; is applicable to all interests; to the interests of married women, and of infants; to interests immediate, remote, contingent, of value and of no value; to copyhold as well as freehold estates, (a) and to deeds as well as to wills. (b) He who will take the benefit, shall not dispute the title. If a testator devises an estate the property of Titius, and by another clause of his will gives Titius a legacy, Titius shall not hold the estate, and claim the legacy. He shall not take the benefit under the will, unless he suffers the whole instrument to take effect. It is immaterial whether the testator (c) thought he had a right to dispose of the estate of Titius, or whether he meant by an arbitrary exertion of power to exceed the extent of his authority,—if Titius will avail himself of the testator's bounty, he shall not disturb his will. If he chooses to keep his own estate, the disappointed devisee shall have compensation out of the other.

2 Ves. jun. 370, 560, 696; 3 Ves. 385; 2 Ves. 13; Ambl. 330; 3 Br. Ch. Rep. 287. β6 Dowl. P. C. 179; 13 Ves. 174; 15 Ves. 390; 1 Bro. C. C. 492; 3 Bro. C. C. 255; 1 B. & B. 1; M'Clel. 424, 439, 541; 1 Swanst. 394; 3 Leigh, 389. γ (a) Rumbold v. Rumbold, 3 Ves. 65; Wilson v. Mount, Ibid. 191; Pettward v. Prescott, 7 Ves. 541. (b) Moore v. Butler, 2 Scho. & Lef. 249. (c) At one period it was holden, that where a person supposes he has lawful power to dispose of an interest, and this appears on the face of the will, it is not a case of election; as it could not be proved that he meant to dispose of the estate if he had known that he had no power to dispose of it. Cull v. Showell, Ambl. 727. But this construction has been very properly overruled, upon the ground of the danger of speculating upon what the testator would have done had he known the fact. Whistler v. Webster, 2 Ves. jun. 367, and see Wright v. Rutter, Ibid. 673; Rutter v. M'Lean, 4 Ves. 531, and Doe v. Lord George Cavendish, 4 T. R. 731, note. βSee Edwards v. Morgan, 13 Price, 782, S. C.; 1 Bligh, N. S. 401; 1 M'Clel. 541; Piggott v. Bagley, M. & Y. 569; Dillon v. Parker, 1 Clark & Fin. 303; S. C., Jacob, 505; Cogdell's Ex'rs v. Widow of Cogdell, 3 Desaus. 346, 388; Deveaux v. Barnwell, 1 Desaus. 497. γ

In pursuance of this principle an heir shall not be put to his election, where the estate is devised to him, although by the rule of law the devise is inoperative, and he takes by descent; as, if a man being seised of some lands in tail, and also of others in fee, devise the entailed lands to his youngest son, and the fee simple estate to his eldest, who is issue in tail, though the devise to the eldest is void, and he takes by descent, yet he shall be put to his election.

Noys v. Mordaunt, 2 Vern. 581; Anon., Gilb. Eq. Rep. 15; Welby v. Welby, 2 Ves. & Beam. 187. See Rich v. Cockell, 9 Ves. 374, and White v. White, 2 Dick. 522; Reg. Lib. B. 1775, fol. 650—655. In the discussion of Thellusson v. Woodford, Romilly put it as a doubtful point, whether the heir must elect where a legacy is given to him, and an estate to a stranger, and after the will a recovery is suffered by the testator, whereby the will is revoked, and the estate descends to the heir; and he thought, that the heir could not be put to his election; but Alexander, who was on the other side, thought it was a case of election, as was, he said, every case in which you can look at the will. The point, however, as Mr. Sugden observes, seems very doubtful, for notwithstanding that the testator intended the estate to go to the devisee, yet *the will being revoked as to the devise*, although by contruction of law, there seems to be no equity attaching on the conscience of the heir. Independently on the question of election, equity could not relieve the devisee against the revocation of the will. Sugd. on Powers, 375, 376, 2d edit. βTestator directed his executors to sell whatever estate he might die possessed of, by his will gave some benefits to his heir at law, and after its date acquired other lands; held that the heir was not bound to elect. Back v. Kett, Jacob, 534. An heir is not put to his election between an estate and benefits given by

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the will, by force of mere general expression. *Johnson v. Tilford*, R. & M. 244. See *Thellusson v. Woodford*, 13 Ves. 209; 1 Dow, 249; *Churchman v. Ireland*, R. & M. 250.

But this doctrine of election can never be applied, but where, if an election is made contrary to the instrument, the interest, that would pass by the instrument, can be laid hold of to compensate for what is taken away. In all cases therefore there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. If under a power to A to appoint to two, he appoints to one only, and gives a legacy to the other, this is a case of election. But (a) where, under a power to appoint to children, the father appoints improperly, any child may set it aside, although a specific part is appointed to him; for there being no other fund than that appointed, there is nothing whereout compensation can be made.

*Wollen v. Tanner*, 5 Ves. 218. See *Vane v. Lord Dungannon*, 2 Scho. & Lefr. 118. (a) *Bristow v. Warde*, 2 Ves. jun. 336.

To raise a question of election, a clear intention to pass the particular estate must appear, (b) and it must appear on the face of the instrument; it cannot be compelled on any thing *dehors*. (c) Still, extrinsic evidence has been allowed to show what the testator considered as his estate, and, consequently, to determine what passed under a general devise, so as to put a party to his election. (d)

*Sugd. Pow.* 377. (b) *Dashwood v. Peyton*, 18 Ves. 27; *Read v. Crop*, 1 Br. Ch. Rep. 492. (c) *Stratton v. Best*, 1 Ves. jun. 285; *Finch v. Finch*, *Ibid.* 635; *Judd v. Pratt*, 13 Ves. 168. (d) *Pulteney v. Lord Darlington*, 1 Br. Ch. Rep. 223; *Pole v. Lord Somers*, 6 Ves. 309; *Druce v. Denison*, *Ibid.* 385; *Wright v. Rutter*, 2 Ves. jun. 673; *Rutter v. M'Lean*, 4 Ves. 531; *Monck v. Lord Monck*, 1 Ball & Beatty, 298; *But see Forrester v. Cotton*, *Ambli.* 389.

Nice distinctions have been made as to the legal capacity of the devisor, and the validity of the instrument to pass the interest in case he had actually been entitled to it in his own right. Where an infant having personal estate, of which she had ability to dispose, and a power over real estate, to which she was entitled in default of appointment, bequeathed the personalty to her only child, and appointed the estate to strangers; Lord Hardwicke held the appointment to be void, and that this was not a case of election, because the will was void as to the real estate, on account (as he observed in the case of *Boughton v. Boughton*, 2 Ves. 14) of her infancy; as it would if she had been a feme sole. He said, it was like the case where a man executes a will in the presence of two witnesses only, and devises his estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet, for want of being executed according to the statute of frauds, is bad as to the real estate; and he said he should in that case be of opinion, that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate before he could entitle himself to his personal legacy, because here was no will of real estate for want of the proper forms and ceremonies required by the statute. This doctrine has been recognised, and acted upon by Lord Kenyon, (e) Lord Alvanley, (g) and Lord Eldon; (h) for although the will cannot be read without the devise in it, yet, as Lord Alvanley correctly expressed it, a judge can say, for the statute of frauds enables him, and he is bound to say, that if a man by a will unattested gives both real and personal estate, he never meant to give the real estate at all. (i)

*Sugd. Pow.* 378; *Hearle v. Greenbank*, 3 Atk. 695; 1 Ves. 298, S. C. See *Rich v. Cockell*, 9 Ves. 369. (e) *Carey v. Askew*, 8 Ves. 492, cited by Romilly; 1 Cox's Rep. 241, S. C. (g) *Ex parte the Earl of Ilchester*, 7 Ves. 372. (h) *Shedden v. Goodrich*, 8 Ves. 481. (i) *Buckeridge v. Ingram*, 2 Ves. jun. 666.



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Lord Hardwicke, however, determined, that where an *express* condition is annexed to the personal legacy, the heir at law must make good the devise of the realty, or give up his legacy; a distinction which, (a) though constantly disapproved, has always been acted upon, and cannot now be disturbed.

Boughton v. Boughton, 2 Ves. 12. (a) Carey v. Askew, and Sheddon v. Goodrich, *ubi supr.*; Thellusson v. Woodford, 13 Ves. 209; Sugd. Pow. 380; 1 Dow, 249.]

Questions of election often arise in cases of dower, where a dowress claims also a benefit under her husband's will. The rights, however, under which the dowress claims in this case are not of themselves obviously inconsistent: a *particular* intent in the testator, therefore, that his wife should not have both, must be made out, either from the words used by the testator in his will, or the striking inconsistency of her claims with the dispositions of it, before she can be put to her election; such intent, it seems, cannot be inferred from a testator's making a general disposition of *all* his property, because the estate is not *his* to give exempt from the claim of dower, the tenancy in dower being an estate in the land different from that of the husband and equally firm.

4 Br. Ch. Rep. 31; 2 Ves. jun. 572. *See* Cauffman v. Cauffman, 17 S. & R. 16; Heron v. Hoffman, 3 Rawle, 393.*g*

The putting a devisee under a will to his election is said to be a strong operation of a court of equity: the calling upon him to elect is an argument addressed to his conscience in favour of a devisee whom he would otherwise disappoint: it is evident therefore that the obligation to elect can only be enforced at the instance of a person claiming a specific interest under the same will. Neither can it be enforced without a clear knowledge of the extent and amount of each of the funds between which the party is to elect.

4 Br. Ch. Rep. 24; 2 Ves. jun. 562; Ambl. 727; 3 Wooddes, Append. 1; 2 Ves. jun. 371. *See* Edwards v. Morgan, 13 Price, 782; S. C. 1 Bligh, N. S. 401; 1 McClell. 541; Dillon v. Parker, 1 Clark & Fin. 303; S. C., Jacob, 505; 1 Russ. & My. 244; Reynolds v. Torin, 1 Russ. 129. To raise an election, there must be a form of a gift as to the property which the donor had no power to dispose of. Attorney-General v. The Earl of Lonsdale, 1 Sim. 105.*g*

And in order to enable him to make the election to advantage, he may file a bill to have the state of the fund ascertained. Where the state of the fund is free, and he has acquiesced a long time, he will be holden to have elected, although he may not have expressly done so; but, (b) where the fund is embarrassed, even a long acquiescence has been determined not to bind him, and *a fortiori*, (c) not the mere receipt of gifts under the will for a short period. Where a widow released her dower, and elected to take under her husband's will, and the provision for her was afterwards claimed by his creditors, she was allowed to resort to her dower, (d) notwithstanding her election.

Butrick v. Broadhurst, 1 Ves. jun. 171. (b) Beaulieu v. Lord Cardigan, Ambl. 533; 6 Br. P. C. 232. *See* 1 Ves. jun. 172, 336; Yate v. Mosely, 5 Ves. 483, 484. (c) Wake v. Wake, 1 Ves. jun. 335; Rumbold v. Rumbold, 3 Ves. 65. (d) Kidney v. Consmaker, 12 Ves. 136. *See* When a party complaining has a right to elect, the court will allow him a reasonable time to make his election, and if he fail, his bill will be dismissed. Bracken v. Martin, 3 Yerg. 55.*g*

If the party has mortgaged the interest he takes in his own right, and then is suffered to elect to take under the will; the mortgage must be satisfied out of the interest provided for him by the will.

Rumbold v. Rumbold, *ubi supr.*

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Where the claimant is an infant, or feme covert, it is usually referred to the master to see whether it will be more for their benefit to take under or against the will, unless the interest given by the will be manifestly the better.

*Wilson v. Lord John Townshend*, 2 Ves. jun. 693.

Where interests are given to a person and to his children after him, the claim of the parent in opposition to the will, will not bind the children, who may elect for themselves.

*Ward v. Baugh*, 4 Ves. 623; *Long v. Long*, 5 Ves. 445. In one case it seems to have been thought that an election could not be raised upon an estate settled with several limitations, on account of the confusion which would ensue, as the devise would sometimes be good, at other times not, just as the devisee in remainder submitted to the will or not: but this objection is not now attended to. *Forrester v. Cotton*, Ambl. 388; Sugd. Pow. 376.

Where a party elects to take in opposition to the will, the estate he so takes vests in him with all the legal consequences attached to it. Thus, where a tenant in tail devised away the estate, and gave the issue in tail, who was a married woman, and also her husband, other benefits by his will, and she elected to take her estate tail in opposition to the will, but her husband of course took under the will, and afterwards, upon her death, entered as tenant by the curtesy; it was contended, that as he took under the will, he could not claim in opposition to it; but it was ruled, that his wife took the estate with all its legal incidents, and that, consequently, he was entitled to be tenant by the curtesy in right of *her* seisin, although he claimed under the will in his own right.

*Lady Cavan v. Pulteney*, 2 Ves. jun. 544; 3 Ves. 384; *Brodie v. Barry*, 2 Ves. & Beam. 127.

♣ Testator bequeathed, inter alia, to his next of kin certain personal property, and afterwards acquired real estate; the next of kin received the legacy, and in an action respecting the after acquired real estate, it was holden that the next of kin was not required to make his election.

*City of Philadelphia v. Davis*, 1 Whart. 490.*g*

A plaintiff suing in equity and in a foreign court of law shall be put to his election, and so also of proceeding at law and in equity.

*Pieters v. Thompson*, Coop. 294; and see 1 Ves. & B. 331; 3 Ves. & B. 9; 19 Ves. 277.

Where a testator by his will gave various legacies to his heir at law, and afterwards contracted for the purchase of several freehold estates which, by a clause in his will, it appeared he clearly intended should go to his executors for the purposes of his will, and not to his heir; it was held, that the heir should elect, and not be permitted to take the estates and the benefits under the will also.

*Rendlesham v. Woodford*, 1 Dow. P. C. 249; 18 Ves. 209.

Where by settlement on the marriage of G with the plaintiff, certain estates to which G was entitled as tenant in tail in remainder were settled, as to part, to the use of G for life, remainder to the plaintiff for life, remainder to the first and other sons of the marriage; and as to part to G for life, remainder to the first and other sons in tail; and other estates to which plaintiff, the wife, was entitled in fee simple were by the same settlement conveyed to similar uses, and upon the death of G, the defendant (his only son and heir) entered on the estates to which he was entitled as tenant in tail under the settlement, and brought ejectment to recover those to which

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his father was entitled as tenant in tail at the time of the settlement, and into which the plaintiff had entered on his death as tenant for life under the settlement, as not having been conveyed by fine and recovery to the uses of the settlement; it was held, that the defendant was bound to make his election, and could not take the estate limited to him under the settlement, and at the same time proceed to eject the plaintiff claiming a life interest under the same instrument. *Qu.* Whether a party electing between two beneficial interests is bound to give up one absolutely, or only to make compensation for what he deprives another party of?

*Green v. Green*, 2 Meriv. R. 86; and see *Gretton v. Hayward*, 1 Swanst. 409.

The question has arisen and has given rise to much doubt and discussion, whether a party electing to retain his property against a will forfeits all the benefit of a devise in his favour under the will, or whether he only gives up so much as to compensate devisees disappointed by his election; and it has been stated as the result of the cases, 1. That in the event of election to take against the instrument, courts of equity assume a jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. 2. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right. It seems, however, that the more correct rule to be drawn from the authorities is, that the party electing against a will or instrument in all cases forfeits *in toto* the whole benefit which is given to him by that will or instrument, as infringing the implied condition of the devise or disposition in his favour, and that, instead of the property thus forfeited going as undisposed of to the heir at law, equity sequesters it for the compensation of the parties disappointed by the election. If (as of course commonly happens) the property forfeited is less than the property taken against the will, the whole forfeited by the one party goes partially to compensate the other; but if (as can seldom, if ever, happen) the property given up exceeds the other, then it would seem on principle the surplus would go to the heir at law, and could not be taken by the party electing as a partial benefit under the will, to which he has refused to give full effect.

1 Swanst. R. 442, note. See *Cowper v. Scott*, 3 P. Will. 119; *Cooke v. Hellier*, 1 Ves. 335; *Morris v. Burroughs*, 1 Atk. 404; *Pugh v. Smith*, 2 Atk. 43; *Wilson v. Mount*, 3 Ves. 194; *Wilson v. Townsend*, 2 Ves. 697; *Broome v. Monck*, 10 Ves. 609; *Webster v. Mitford*, 2 Eq. Ca. Ab. 363; *Streatfield v. Streatfield*, Ca. temp. Talbot, 176.

Where, however, the party making the election is also the heir at law to whom the excess, if any, of the property given up would devolve, it seems that he takes the surplus as heir at law after compensation to the disappointed devisee has been made; and this instance does not break in upon the principle of absolute forfeiture ensuing from an election against the will, since the party here takes the forfeited estate in another character—that of heir.

*Bor v. Bor*, 3 Bro. P. C., 167; *Ardesoife v. Bennett*, 2 Dick. 463; *Lewis v. King*, 2 Bro. C. C. 600; *Pulteney v. Darlington*, 2 Ves. jun. 566; *Vane v. Dunganon*, 2 Scho. & Lef. 118; *Welby v. Welby*, 2 Ves. & B. 190, 191; *Green v. Green*, 2 Meriv. 86; *Gretton v. Haward*, 1 Swanst. R. 409; *Rich v. Cockell*, 9 Ves. 369; and see Mr. Swanston's learned note, 1 Swanst. 442, and Mr. Jacob's luminous annotation, 1 Roper, Hus. and Wife, 566.

A will unduly executed to pass real estate will not put the heir to his election.

*Gardner v. Fell*, 1 Jac. & W. 22; and see *Stalman on Elect.* 229.

## Error.

Where a widow took a specific legacy under her husband's will, in which will he intended to include a Scotch heritable bond, which, however, did not pass by the will according to the Scotch law, and which was real property liable to the widow's terce; it was held, that the widow could not take the legacies under the will without bringing in her terce in the heritable bond to increase the general residue.

*Reynolds v. Torin*, 1 Russ. R. 199; and see *Chalmers v. Storil*, 2 Ves. & B. 292; *Dickson v. Robinson*, Jac. R. 503.

A testator having directed his executor to sell whatever real estate he might die possessed of, and having given benefits to his heir at law, afterwards acquires other lands, the heir held not bound to elect.

*Back v. Kett*, Jacob's R. 534.

Where parties having a right to elect between two titles, under one of which they were tenants for life, and under the other tenants in fee simple, had continued in possession forty-three years, and executed deeds, acknowledging that they held under the former title, their heir at law was precluded from claiming the fee under the latter.

*Dillon v. Parker*, Jac. R. 505; 1 Swanst. R. 359.

A testator after bequeathing to his wife an annuity charged on his estate at S, with power of entry and distress if it should be in arrear for thirty days, and giving other legacies and annuities which he charged on his lands at S in aid of his personal estate, gave and devised all his real and personal property to trustees upon certain trusts; and he directed them to occupy and manage, during the minority of his son, a farm constituting the greater part of his estate at S, and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates: it was held that the widow must be put to elect between her dower and the benefits given her by the will.

*Roadley v. Dixon*, 3 Russ. 192. See *Coleman v. Jones*, Ibid. 312.

To raise a case of election, there must be a form of a gift as to the property which the donor had no power to dispose of.

*Attorney-General v. Ld. Lonsdale*, 1 Sim. R. 105.

Where it was not apparent on the face of the will, that a general devise in trust to sell was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of the estate was held not put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate.

*Blommart v. Player*, 2 Sim. & Stu. 597.

## ERROR.

A writ of error is (a) a commission to judges of a superior court, by which they are authorized to examine the record upon which a judgment was given in an inferior court, and on such examination to affirm or reverse the same, according to law.

(a) Therefore differs from another writ or action. *Jenk. Rep.* 25; 2 *Inst.* 40; *Yelv.* 209.

## Error.

§ Cohens v. The State of Virginia, 6 Wheat. 264. §—But yet, if by the writ of error the plaintiff therein may recover, or be restored to any thing, it may be released by the name of an action. Co. Litt. 288 b.—In a writ of error to reverse a fine as cousin and heir of the conusor, it need not be shown in the writ of error how he is cousin; for it is but a commission to examine errors, and needs not such certainty as other writs. Cro. Ja. 160.

This writ lies where a man is grieved by an error in the foundation, proceeding, judgment, or execution of a suit.

Co. Litt. 289 b. § The object of this writ is not to try the question between the parties, it is rather to try the judgment of the court below, to ascertain whether it has been given in conformity to, or against the law. The writ of error is a new and original suit, and not a continuance of the original cause. Lessee of Taylor v. Boyd, 3 Ohio, 354.

[Writs of error or false judgment are of a higher nature than other kinds of civil suits. They are *quasi casus reservati* to the king's special cognisance. And therefore by the statute of Marlbridge, c. 20, *nullus excepto domino rege teneat placitum in curia tenentium suorum, quia hujusmodi placita specialiter pertinent ad coronam et dignitatem domini regis.*

Hale's Lords' Jurisdiction, c. 23, 25.

And hence it is, that even in the greatest courts of ordinary jurisdiction, the King's Bench or Common Pleas, those courts cannot, barely by virtue of their ordinary jurisdiction, without the king's writ under the great seal, hold plea to reverse a judgment given in an inferior court of record; no, not so much as a judgment in a court baron, or hundred court, though no courts of record. And the reasons are these two principally; 1st, In respect of the king—all jurisdiction is mediately or immediately derived from him; and the courts of all kinds are his courts, and have that style, (unless in counties palatine where the lord hath *jura regalia*, and yet even that is derived from the crown,) and, consequently, judgments there given are virtually given by the king; and therefore it is not reasonable to have them examined but by the king's writ or commission derived from him specially. 2d. In respect of the subject—who having run his course to obtain or defend his right in the ordinary courts of justice, it is not reasonable, after his long expectation and expense, to turn all about again, without the solemnity of the king's special writ or commission.]

(A) In what Cases a Writ of Error will lie: And herein,

1. *In what Cases a Writ of Error is the proper Remedy to be relieved against an erroneous Judgment.*
2. *On what Judgments a Writ of Error will lie.*
3. *In what Court the Judgment must be given on which a Writ of Error will lie.*

(B) Who may bring a Writ of Error, and against whom: And herein of the Persons necessary to be made Parties thereto.

(C) Of the Time of bringing a Writ of Error.

(D) Of the Manner of bringing it: And herein,

1. *Of the Form of the Writ, and where the Record shall be said to be removed.*
2. *What is necessary to be removed; and herein of removing the Record, or a Transcript.*

(E) Of alleging Diminution and granting a *Certiorari*.

(F) Of the *Scire Facias*.

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

(H) How far the Writ of Error is a *Supersedeas*.

(I) To what Court a Writ of Error lies: And herein,

1. *Of Writs of Error into Parliament.*
2. *Of Writs of Error into the Exchequer Chamber.*

(A) In what Cases a Writ of Error will lie.

3. *Of reversing Judgments in the Court of Exchequer.*
4. *Of Writs of Error into the King's Bench.*
5. *Of Writs of Error in the Common Pleas and other Inferior Courts.*
6. *Where a Writ of Error lies in the same Court in which the Record is.*
- β7. *Of Writs of Error into the Supreme Court of the United States.*

(K) Of assigning Errors: And herein,

1. *Of the Manner of assigning Errors.*
2. *Of assigning Errors in Fact and in Law.*
3. *Of assigning that for Error which appears contrary to the Record.*
4. *Of assigning that for Error which is for the Party's Advantage.*
5. *Where the Matter assigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time.*
6. *Where Matters which might be assigned for Error are aided by a Release, and the Consent of Parties.*

(L) What Defence the Defendant in Error may make: And herein of pleading a Release.

(M) Of the Judgment to be given on the Writ of Error: And herein,

1. *Where on a Writ of Error, Part only, or the whole Judgment shall be reversed.*
2. *What Judgment shall be given on the Reversal of the first.*
3. *To what the Parties shall be restored on the Reversal of the first Judgment.*

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(A) In what Cases a Writ of Error will lie: And herein,

1. *In what Cases a Writ of Error is the proper Remedy to be relieved against an erroneous Judgment.*

REGULARLY, an erroneous judgment given in a court of record can (a) only be reversed by writ of error.

(a) β Gordon v. Frazier, 2 Wash. 130; Wrenn v. Thompson, 4 Munf. 377. When a statute is erroneously acknowledged, as, before one that has no authority, or, if a statute merchant has but one seal, &c., an *audita querela* lies, and not a writ of error; but, if a statute is well acknowledged, and the execution erroneous, a writ of error lies. Cro. Eliz. 232, 810; Owen, 142; Dyer, 85; Leon. 233.—A judgment in a copyhold court reversed upon petition to the lord, and the party restored to his damages by *audita querela*. 4 Co. 30 b.—Where the fact assigned for error is in the suggestion of the writ itself, and not in any of the proceedings in the cause, no writ of error lies, but the party must bring an *audita querela*. Carth. 282; 4 Mod. 314; Salk. 262; but for this vide tit. *Audita Querela*.

Therefore, if the tenant in a *cui in vita* dies seised (b) pending the writ, and after judgment is given against him, which is erroneous, and after the recoverer sues execution against the heir, and he brings an assize; he shall not avoid this judgment against his father, by saying, that his father died pending the writ; for the judgment is not void, but only voidable.

28 Ass. 17; Ro. Abr. 742, S. C.; 2 Buls. 242, S. P. (b) So, if in ejectment the defendant had died after verdict and before judgment, his heir could not avoid the judgment but by writ of error. Ro. Abr. 742.—Note, that this is aided by 16 & 17 Car. 2, c. 8, and cannot be taken advantage of on a writ of error; for which vide tit. *Amendment and Jeofail*.

In an action upon the case, if the plaintiff be nonsuit, and after it be entered that he *reliquit actionem suam, et fatetur se nolle ulterius prosequi*, upon which costs are assessed; though it be admitted, that this judgment is erroneous, because this is not any nonsuit, as it is entered; yet in an action of debt for the costs, the defendant shall not avoid it by plea without a writ of error; for it is a judgment *de facto* not void, but only voidable by writ of error.

Ro. Abr. 742, Cole and Lawe, adjudged.

(A) In what Cases a Writ of Error will lie.

¶ If a mandamus be directed to an inferior court to give judgment on an indictment, and the return to it state an erroneous judgment; the return will not therefore be quashed, but a writ of error must be brought to reverse the judgment.

R. v. Justices of Yorkshire, 7 T. R. 467.¶

If a man recovers against the principal, and sues a *scire facias* against the bail, they cannot say the principal died before the judgment, and (a) so avoid the judgment by plea, for it is against the record.

Ro. Abr. 742; Cro. Eliz. 119, S. C.; Leon. 101, S. C. (a) But it is a good plea by way of excuse for not bringing in the body, but not to avoid the judgment, being a record, which must be avoided by writ of error. 2 Mod. 308, and vide Godb. 377, and tit. *Bail in Civil Causes*. [But by stat. 17. Car. 2, c. 8, the death of either party between verdict and judgment shall not be alleged for error, so as the judgment be entered within two terms after the verdict.]

If a fine is levied without an original, or of more than is contained in the original, it is not void, but only voidable by writ of error.

2 Inst. 513; but for reversing erroneous fines and recoveries, vide head of *Fines and Recoveries*.

If an infant suffers a common recovery, in which he comes in as vouchee in his proper person, and not by attorney or guardian; though this shall not bind him, but that he may in a writ of error avoid it, because it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reversed it in a writ of error; because he himself is privy to the judgment, and may reverse it by such means; for judgment ought not to be subverted by matter *in pais*, without matter of record, as a recognisance or fine by an infant where he appears by attorney, and not by guardian.

Ro. Abr. 742, 743; Style, 246, S. C. For this vide head of *Infancy and Age*.

If A levies a fine to B, who grants and renders to A and his wife, and the heirs of the body of A, this is not void as to the wife, though she is no party to the original, but only voidable by writ of error.

3 Co. 5 a.

By the practice of the court of (b) Common Pleas, a defendant coming in by *capias utlagatum* the same term in which an exigent is returnable, may avoid the outlawry without writ of error, by showing that he purchased a *supersedeas* out of the same court, and delivered it to the sheriff before the *quanto exactus*, &c., or by showing any other matter apparent on record, which makes the outlawry erroneous; as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c., or a return by a person appearing not to be sheriff, or a variance between the original and exigent, or other process, or the want of such addition as required by 1 H. 5, c. 5.

2 Hawk. P. C. c. 50, § 1; Ro. Abr. 742, 743. (b) But, whether an outlawry on the crown side of the King's Bench can be reversed in the same or a different term with a writ of error, vide 2 Hawk. P. C. Ibid., and tit. *Outlawry*.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of error; for the judgment being *quod suspendatur*, &c., which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence. But, if judgment of acquittal is given upon such indictment, the king need bring no writ of error; but the offender may be newly indicted, for the judgment being *quod eat*

(A) In what Cases a Writ of Error will lie.

*sine die*, &c., may be given as well for the insufficiency of the indictment as for the party's innocence.

3 Inst. 214.

And any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified by showing the special matter, without writ of error, because it is (a) void; as, where a commission authorizes to proceed on an indictment taken before A, B, C, and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only.

3 Inst. 231; Hawk. P. C. c. 50, § 3. (a) A judgment in the Marshalsea, where none of the parties were of the king's hostel, was void, and being *coram non iudice*, might be avoided by plea. 10 Co. 77 a; Brownl. 24; and vide Lev. 23, 204, 234. Yet a writ of error also lies to reverse such judgment. Cro. Eliz. 502; 6 Co. 20; Ro. Abr. 744; Sav. 36; 2 Jon. 209.

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he shall be discharged; (b) for he hath no remedy by writ of error, or otherwise, to reverse the attainder.

6 Co. 5 a. (b) So, if a fine imposed in a leet be unreasonable or against law, as joint, where it should be several, it may be avoided by plea and judgment of the court in which the suit is depending; for there is no other remedy. 11 Co. 44, Godfrey's case resolved. Ro. Rep. 75, S. C.

In debt upon a bond against an administrator, if he pleads a judgment recovered against the intestate, and that he hath not assets *ultra*, &c., the plaintiff may reply that an action was brought against the intestate, and that he died before the judgment; and that after his death, judgment was given; for being a stranger to the judgment, he can neither bring error nor deceit, and has no way to avoid it but by plea.\*

2 Mod. 308, Randal's case, and vide Vaugh. 94; Gilb. Eq. Rep. 308. \*Qu. If this could be done now, since the statute of 8 & 9 W. 3, c. 11, § 6, if there was an interlocutory judgment against the intestate in his lifetime, and final judgment after?

If a man is found guilty upon an indictment of felony, and prays his clergy, and it is allowed him, and he is burnt in the hand; he cannot avoid this by writ of error, because he is convicted only, and not attainted. But the record being removed by *certiorari* into the crown office, if there be a fault in the indictment, it may be discharged, and restitution awarded to the party of his goods seized for that cause.

Cro. Eliz. 489.

If a man had been indicted upon the statute of 3 Ja. 1, c. 4, for absenting from his parish church, and thereupon proclamations had been made, that he should render his body, &c., which not being done, he had been convicted according to that statute; yet no writ of error would have lain thereupon; for by the statute, after proclamations made and the default recorded, the same was a conviction of the offence; as, if the statute gave process for the forfeiture; and if there was a fault in the record, the party's remedy was in the Exchequer to quash it there.

Raym. 433, Phorbes's case.

By the common law, *in favorem vite*, an outlawry of treason or felony might be avoided by plea, that the defendant was in prison, or in the king's service beyond the sea, &c., at the time of the outlawry pronounced against him. But it seems that no outlawry for any other crime against a party rightly described can be avoided by the plea of any matter of fact whatsoever.

Co. Litt. 259; 2 Hawk. P. C. c. 50, § 6.



(A) In what Cases a Writ of Error will lie.

One who purchases land of a person who afterwards is outlawed of felony, or condemned upon his own confession, may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence: but where a man is found guilty by verdict, a purchaser cannot falsify any more than the party, as to the point of the offence, but only as to the time.

2 Hawk. P. C. c. 50, § 2.

If a defendant under terms to give judgment of the term bring a writ of error, the court will quash it.

Cave v. Masey, 3 Barn. & C. 735.

Where a plaintiff brought a writ of error on a nonsuit, the court refused to stay execution, at least unless some real error was pointed out.

Evans v. Sweete, 2 Bing. R. 326.

Error does not lie on an interlocutory judgment.

Samuel v. Judin, 6 East, R. 333.

Where judgment is given in an action *against* an infant, it may be reversed on error if the infant appeared by attorney, but *aliter* where the judgment is given in favour of the infant.

Bird v. Pegg, 5 Barn. & A. 418.

On error assigned of a misnomer of the Christian name of one of the plaintiffs below, in the warrants of attorney, it was held immaterial.

De Tastet v. Buckner, 3 Bro. & B. 65; 6 Moo. 135.

It is no error to entitle the declaration generally of Michaelmas term, though the cause of action is stated to have accrued on the 18th November.

Ruston v. Owston, 2 Bing. R. 469; and see Lee v. Clarke, 2 East, R. 333.

## 2. On (a) what Judgments a Writ of Error will lie.

No writ of error can be brought but on a final judgment, or an award in nature of a judgment, for the words of the writ are, *si judicium redditum sit*, &c.

Co. Litt. 289 b; Samuel v. Judin, 6 East, 333. *β* Logan v. Jennings, 4 Watts, 355; 1 Penna. 135; Robinson v. Whiteside, 16 S. & R. 320; Ellmaker v. Buckley, 16 S. & R. 72; Philad. Library Co. v. Ingham, 1 Whart. 72; Wallace v. Cooper, 2 Watts, 108; Roberts v. Austin, 5 Wharton, 513; Caldwell v. Remington, 2 Whart. 132; Nice v. Bowman, 6 Watts, 26; Erie Bank v. Brawley, 8 Watts, 530; Postens v. Postena, 3 Watts & Serg. 182; Magill v. Lyman, 6 Conn. 59; Lewis v. Hawley, 1 Conn. 49; White v. Trinity Church, 5 Conn. 187; Granger v. Bissel, 2 Day, 364; Donne v. Cummings, 11 Conn. 152; Trice v. Smith, 6 Yerg. 319; Donnelly v. Wright, 4 Yerg. 475; 3 Yerg. 417; Welch v. Marshall, 6 Yerg. 455. *γ* (a) Whether it lies on a judgment given on a *habeas corpus*. Salk. 504. *β* Error lies on a judgment of the Supreme Court on a *habeas corpus*. Yates v. The People, 6 Johns. 337. *γ* {A judgment was obtained by F on an award of referees for a certain sum; and it was afterwards awarded by the court that the defendant should be discharged on payment of a smaller sum. It was determined that a writ of error would lie on this award or decretal order; for though not in form and expression a judgment, it has all the effect of one: it is in the nature of a judgment, being decisive of the rights of the parties. Decretal order reversed, and first judgment affirmed. 2 Dall. 215, 216, Fitzgerald v. Caldwell; Addis, 119, S. C. Error will not lie where the proceedings are not according to the course of the common law, 3 Mass. T. Rep. 187, 305, nor on a decision on a motion for summary relief, 1 Binn. 292, Shortz v. Quigley; 4 Cran. 324, Mountz v. Hodgson; 2 Mass. T. Rep. 488: nor for granting or refusing the continuance of a cause after it is at issue, 4 Cran. 237, Woods and Bemis v. Young; 1 Bin. 226. See 1 Hen. & Mun. 375, Garland v. Bugg: or a new trial, though the reasons appear on the record. 2 Bin. 80, Burd v. Lessee of Dansdale; Ibid. 93, Wright v. Lessee of Small.}

If the plaintiff be (b) nonsuit at the *nisi prius*, upon which costs are taxed

## (A) In what Cases a Writ of Error will lie.

by the same jury, by the statutes 23 H. 8, c. 15; 4 Ja. 1, c. 3, and judgment given for them against the plaintiff, the plaintiff may have a writ of error upon (c) this judgment.

Ro. Abr. 744. [Newell v. Pidgeon, 1 Str. 235; Box v. Bennett, 1 H. Bl. 2432; Kepland v. Macauley, 4 T. R. 436.] {2 Johns. Rep. 8, Monnell v. Weller; Ibid. 9, Smith v. Suttis.} (b) A man may assign errors in law or fact, upon a judgment given against him by default. 19 Ass. 8; Ro. Abr. 675, S. C. (c) How upon a bill of exceptions, vide 2 Inst. 427, and tit. *Bills of Exception*.

If a man brings a writ of false judgment in the Common Pleas upon a judgment given in ancient demesne, and reverses the judgment there, a writ of error lies upon this judgment, for this is a matter of record.

Ro. Abr. 744.

If a man is indicted for felony, and thereupon a *capias* and *exigent* is awarded, but he dies before any attainder; his administrators may have error upon this award of the *exigent*, because by the award of the *exigent*, his goods were forfeited; and this is *ad grave damnum*, &c., though the principal judgment can never be given.

11 Co. 41 b, cited from the 18 H. 7, Rot. 3; Eaton's case, Cro. Ja. 359; Ro. Rep. 85, S. C. cited.

If one be outlawed upon an indictment of treason, felony, or trespass, but the process and order prescribed by the statutes of 6 H. 8, c. 4, and 8 H. 6, c. 10, are not observed, the outlawry may be reversed by writ of error, which (a) *ex merito justitiæ* ought to be granted.

3 Inst. 31. (a) Upon a case stated and referred to all the judges, it was holden by ten of them, that writs of error were *ex debito justitiæ*, and not *ex mera gratiâ*, except in treason and felony; but Price and Smith held, that the subject could not of right demand them in any criminal case. 2 Salk. 504; but for this vide Ro. Rep. 175; 3 Bulst. 71; 2 Leon. 194; Sid. 69.—And note, that as the law is now settled, a person attainted of treason or felony, before he can have a writ of error to reverse his attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 Hawk. P. C. c. 50, § 11.—Also, no writ of error for the reversal of an attainder of treason or felony is to be allowed without an express warrant from the king or the consent of the attorney-general. 3 Mod. 42; Sid. 69; 2 Hawk. P. C. c. 50, § 12; Ld. Raym. 154; Vern. 170, 175. β A writ of error in criminal cases is *ex gratiâ*, and will not lie until final judgment be rendered. Miles v. Rempubliam, 4 Yeates, 319. In New York, in capital cases writs of error are considered as writs of grace; Lavett v. The People, 7 Cowen, 339; but in criminal cases not capital, they are in that state statute writs of right. Ibid. In criminal cases writs of error require a special *allocatur*. Shaffer v. Rempubliam, 3 Yeates, 39; 7 Cowen, 339; Comm. v. Myers, 2 S. & R. 453; Comm. v. Proffit, 4 Binn. 424.g

A writ of error lies to reverse an attainder of high treason, though some have held the contrary, by reason of 33 H. 8, c. 20, that every attainder of treason by the common law should be as effectual as if by authority of parliament; for the statute is to be intended of law attainders by due course of law, and not of erroneous or void attainders; and so it was held in a parliament held the 28 Eliz., when it was enacted, that no attainder of high treason, where the party was executed for the same, should be avoided by plea or error: but this act extended only to attainders before that time, where the party had been executed, not to attainders after.

3 Inst. 215; and vide 3 Bulst. 71; Raym. 1, 2.

If one be convicted upon an indictment of recusancy for absenting from church for one month, upon which judgment is given that he shall forfeit 20*l.*, but it is not *ideo capiatur*; this omission being apparently to the prejudice of the king, it was held a writ of error would lie notwithstanding the words of 3 Ja. c. 4, that no such indictment shall be avoided, discharged, or

(A) In what Cases a Writ of Error will lie.

reversed, for want of form or other defect whatsoever, other than by direct traverse to the point of not coming to church.

Cro. Car. 504, Marquis of Winchester's case, adjudged, and upon such error the judgment reversed accordingly, the king by his attorney having signified his pleasure that it should be reversed, if erroneous. Jon. 407, S. C., by which report, the writ of error was brought by the king; and there held, that a writ of error lay for the king; for he was not concluded by the words of the statute of 3 Ja. c. 4.

If it be entered in an inferior court, that the plaintiff *recuperare debeat*, whereas it ought to be *recuperet*; this is (a) no judgment; so (b) no writ of error lies thereupon, for the words of the writ are, *si judicium redditum sit*.

Style, 265. (a) That it is but an award, vide Ro. Abr. 751. (b) Where the judgment was, that he should recover *super recuperationem*, where it should have been *super recognitionem*. Yelv. 157.

In an assize of darrein presentment, if the parties demur upon the title, and it is adjudged for the plaintiff, and that he shall have a writ to the bishop: a writ of error lies upon this judgment before the damages inquired of, because there were no damages at the common law, and then the writ would lie presently; and the addition of damages given by the statute, to be inquired of by the sheriff, shall not stay the writ of error; and if it be affirmed, it may be inquired of the damages where it is affirmed.

17 E. 3, 5 b, 19 b; Ro. Abr. 749, S. C.

If a man recovers by default in a writ of *cosenage* or *aiel*, a writ of error lies upon this before the damages are inquired of, because the damages are but an addition to the common law given by the statute; and so the judgment for the principal continues as it was at common law.

17 E. 3, 21, 33; Ro. Abr. 749, 750, S. C.

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ be directed to the sheriff to make partition, no writ of error lies hereupon; for the judgment is not complete till the sheriff's return, and the second judgment, which the law requires herein, viz., *quod partitio præd. foret firma et stabilis in perpetuum*; for before that, the plaintiff may be nonsuit; or he may, upon the return of the sheriff, suggest to the court, that the partition is not equal, and so have a new partition, and may also release before the last judgment.

Ro. Abr. 750, Lord Barkley and Countess of Warwick; Cro. Eliz. 635; Moore, 643; Noy, 71, S. C. adjudged; Cro. J. 324; 2 Bulst. 104, like case adjudged, and vide 2 Ro. Rep. 125; 2 Bulst. 119.

So, if in an action of account, judgment is given *quod computet*, and thereupon the defendant brings a writ of error; yet the record shall not be removed till the entire matter of the account be determined, *ne curia domini regis deficeret in justitiâ exhibendâ*.

11 Co. Rep. 39 b; Cro. Eliz. 636; 2 Leon. 68; 2 Bulst. 119, 120; 3 Bulst. 233; Cro. Ja. 224; 2 Ro. Rep. 125; Style, 290; Cro. Ja. 356; Ro. Rep. 85; Godb. 258.

But, if a woman recovers in a writ of dower, a writ of error lies before the writ of inquiry of damages awarded, and before the third part assigned by metes and bounds; for the judgment is perfect as to the realty, and the damages are given by the statute by way of addition.

Ro. Abr. 750, but for this vide Brownl. 127; 11 Co. 40; Ro. Abr. 760; Style, 290; March, 88.

So, if the plaintiff recovers in an *ejectione firmæ* by confession, *nihil dicit, non sum informatus*, or demurrer, a writ of error lies before a writ of inquiry of damages executed; (a) (b) for the judgment, *quod recuperet possessionem*,

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is perfect, and the plaintiff may presently have execution thereupon; and therefore, if the defendant were to be hindered from bringing a writ of error before a writ of inquiry executed, it might be in the plaintiff's power, by refusing to bring or execute the writ of inquiry, to delay the plaintiff forever.

Ro. Abr. 751; Cro. Eliz. 235, 636; Leon. 309; Latch. 212; Noy, 95; Leon. 193; Dyer, 291; 3 Bulst. 233; Palm. 6; 2 Ro. Rep. 126; Latch, 133; Style, 109; And. 145; March, 8; Keb. 327, and Carth. 205, S. P. *per* Holt, Ch. Just. (a) [If the defendant do not, at the trial, confess lease, entry, and ouster, according to the rule, he cannot have a writ of error; because, in such case, the judgment is against the casual ejector; and error cannot be sued in the name of the casual ejector; *Roe v. Doe*, Barnes, 181; *George v. Wisdom*, 2 Bur. 757: neither can it be sued, in such case, in the name of the defendant, for he has not made himself party to the record.] (b) So, in debt, but otherwise in trespass and case, where the damages are the principal. Cro. Eliz. 255.

So, if a man recovers in a *quare impedit* upon a demurrer, the defendant may have a writ of error before the writ of inquiry of damages returned; for such writ may be awarded out of the King's Bench, if the judgment be affirmed there.

Ro. Abr. 750, 751; vide March, 89; Noy, 66.

If a man recovers in a *quare impedit*, and after brings a writ *quare non admisit* against the bishop, a writ of error lies on the judgment in the *quare impedit*, and the record shall be removed, though the other writ of *quare non admisit* be not yet discussed.

Ro. Abr. 751; Godb. 439.

If a *quare impedit* be brought against two, and one plead to issue, and the other confess the action upon which judgment is given, he shall not have a writ of error till the matter is determined as to the other: for the writ of error must rehearse all that are parties to the original; and as to one, judgment is not given; and if the record is removed before the entire matter is determined, there would be a failure of right.

11 Co. 39 a.

If in a *formedon* the tenant has judgment for part, no writ of error lies until the entire matter in demand is determined; for the judgment is, *si judicium inde redditum sit*, which word *inde* goes to the entire demand.

11 Co. 39 b; Dyer, 291.

If debt be brought against divers by several *præcipes*, and judgment given against one, he may have error before determination of the matter as to the others; for there being several counts, the record of his count and the pleading shall be severed from the original, and removed in B. R., and yet the original shall remain in C. B., for otherwise the Court of Common Pleas could not proceed to determine the residue without the original. And my Lord Coke says, it seems to him that in this case, if there be error in the original upon a *certiorari*, the chief justice shall only certify the tenor of it.

11 Co. 41 a; 2 Ro. Rep. 125; Dyer, 291; March, 89.

If in a *quo warranto* judgment be given as to part of the liberties claimed, that they shall be seized, and that the defendants *captiantur pro fine*; and as to the other part, *curia advisari vult*; a writ of error lies before any judgment given for the other part.

Palm. 1, 2, adjudged upon a writ of error upon a judgment given in a *quo warranto* against the corporation of Dublin. 2 Ro. Rep. 113, S. C.

|| A writ of error will not lie on a mandamus.

R. v. Dean and Chapter of Dublin, 1 Str. 535; 8 Mod. 27, S. C.; 2 Br. P. C. 554; R. v. Hearle, 1 Str. 625; 3 Br. P. C. 178, S. C.]

(A) In what Cases a Writ of Error will lie.

3. In what Court the Judgment must be given on which a Writ of Error will lie.

No writ of error will lie of any judgment that is not given in a court of (a) record.

(a) Not of a judgment given in an inferior court, as the county court, &c. Co. Litt. 288 b. Nor of a decree or sentence in Chancery proceeding according to equity. 37 H. 6, 14; Bro. Error, 95; Ro. Abr. 744.  $\beta$  A writ of error lies in all cases in which a court of record has given a final judgment, or made an award in the nature of a judgment. Com. v. Judges, &c., 3 Binn. 273. See Beale v. Dougherty, 3 Binn. 432.  $\gamma$  —But of a judgment given in the limited Court of Chancery, called the petty bag, which proceeds according to the common law, and holds plea of *scire facias* for repeal of the king's letters patent, petitions, *monstrans de droit*, traverses of offices, *scire facias* upon recognisances, executions upon statutes, and pleas of all personal actions by or against an officer or minister of the court, a writ of error lies in B. R. Ro. Abr. 744; Dyer, 315; 4 Inst. 80; Plowd. 395; and vide Ro. Rep. 287; Moore, 570; Vern. 131.

The authority of the justices of Trailbaston was by act of parliament and by the general rule of law, and if they erred in judgment, a writ of error lay in B. R. to reverse their judgment.

2 Inst. 540; 4 Inst. 186.

If a man be convicted (b) upon the statute of 7 Ja. 1, c. 11, by two justices of the peace for killing partridges, upon proof or confession of the party, without indictment; this judgment may be reversed in B. R. being removed there by *certiorari*, without any writ of error. So, if the conviction had been on the (c) statute against shooting, or such like.

Ro. Abr. 743, 744, Berry's case; 2 Jon. 167, S. C., cited, and a conviction upon the statute of hunting in a park, being removed by *certiorari*, exceptions allowed to be taken thereto. (b) Vent. 33. Like point *per Cur.*, vide Raym. 389, where error was brought upon a conviction of a riot before justices of peace, and sheriff, upon the view, upon 13 H. 4, 7. (c) Vide Jon. 171.

But, if an erroneous judgment be given upon an indictment of barratry at the sessions of peace, and the party fined thereupon, and committed till he pays it, and he remove the indictment and proceedings by *certiorari*, and himself by *habeas corpus*, yet he cannot be relieved, unless he brings a writ of error.

Cro. Ja. 404, Rice's case adjudged.

But a record of force made by justices of peace upon the view, may be quashed upon motion, without a writ of error.

Lev. 113, agreed *per Cur.* in the case of The King and Chaloner. Sid. 156, S. C. and S. P. *per Cur.*, and said that a writ of error would not lie, because they were not a court.

Wherever a new jurisdiction is erected by act of parliament, and the court, or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the common law, a writ of error lies on its judgment: but, where they act in a summary method, or in a new course, different from the common law, there, a writ of error lies not, but a *certiorari*.

Salk. 263, pl. 5; Ld. Raym. 213, 252, 454.  $\beta$  Where upon a libel filed under an act of assembly in Pennsylvania, against a vessel for work and materials, an issue is joined, and judgment is given as on an issue at common law, a writ of error lies. Ship Portland v. Lewis, 2 S. & R. 197.  $\gamma$

$\beta$  There are many summary proceedings on which a writ of error cannot be maintained, as, for example, a judge or court discharging a defendant on common bail.

Miller v. Sprecher, 2 Yeates, 162. See Cozens v. Dewees, 2 S. & R. 112; Love v. Barton, 4 S. & R. 269; 1 S. & R. 430; 2 Binn. 234; 1 Rawle, 323.

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(B) Who may bring a Writ of Error, &c.

Error will not lie to remove proceedings in domestic attachment, (a) nor in cases of divorce, the jurisdiction being vested in the Common Pleas. (b)

(a) *Lewis v. Wallick*, 3 S. & R. 410. (b) *Miller v. Miller*, 3 Binn. 30.

Error lies to the order of the court below, ordering a judgment to be marked to the use of a surety.

*Burns v. Huntingdon Bank*, 1 Penna. 395.

Where the primary tribunal is a court of record, a writ of error is the proper process for the removal of the proceedings, when they were according to the course of the common law in the first instance, or have assumed a common law shape subsequently; but when they are summary, or the magistrate is not the judge of a court of record, the remedy is by *certiorari*.

*Commonwealth v. Beaumont*, 4 Rawle, 366. See *Cook v. Reinhart*, 1 Rawle, 317.

(B) Who may bring a Writ of Error, and against whom: And herein of the Persons necessary to be made Parties thereto.

No person can bring a writ of error to reverse a judgment, who was not (c) party or (d) privy to the record, or who was not (e) injured by the judgment, and therefore is to receive advantage by the reversal thereof.

Ro. Abr. 747; *Dyer*, 90. *Hylton v. Brown*, 1 Wash. C. C. R. 343; *Dale ex dem. v. Roosevelt*, 8 Cowen, 333. (c) Where in ejectment, error may be brought either by lessor or lessee. Sid. 317, and vide ante. *Vanhorn v. Frick*, 3 S. & R. 278; *Finney v. Crawford*, 2 Watts, 294. (d) As heirs and executors; but if an erroneous judgment be given against the person, the patron cannot have a writ of error. Godb. 377.—That error and attain always descend to such person to whom the land should descend, if no such recovery or false oath had been. Leon. 261. (e) Hence it is, that no man can have a writ of error to reverse a fine that took any estate by it. 5 Co. 39, *Tey's case*.—And for the same reason the conusor cannot assign any error in the grant and render, because by that the estate which passed from him by his conusance is restored to him; and therefore he shall not be admitted to defeat the estate which by his own agreement he accepted. 5 Co. 39 b.

§ A writ of error brought in the name A B and others, dismissed for irregularity.

*Deneale and Others v. Stump's Executors*, 8 Pet. 526.

So, a writ of error does not lie against any, but him who is party or privy to the first judgment, his (g) heirs, executors, or administrators.

9 H. 6, 46; *Bro. Error*, 9; Ro. Abr. 749, S. C. (g) F. N. B. 107.—If a man recovers land by judgment, and dies without heir, against whom the writ of error shall be brought, is left a *quære*. 9 H. 6, 49; Ro. Abr. 749. § The heir or privy in estate, who is injured by a judgment, may bring error to reverse it. *Greer v. Watkins*, 6 Wheat. 260.

§ The omission of the addition of *junior* to the name of the defendant in error, is no cause for quashing the writ, where there is any other *descriptio personæ* by which the real party can be ascertained.

*Fetor v. Heath*, 11 Wend. 477.

And therefore on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he hath nothing in the land, and not against the tenant: and on such writ the judgment may be reversed: but there must go (h) a *scire facias* against all the tertenants.

Ro. Abr. 749; Ro. Rep. 302. (h) That to reverse a fine or recovery, there must go a *scire facias* against all the tertenants. Carth. 112.

Upon this rule, that none shall have a writ of error to reverse a judgment, but he who is privy to it, and hath some prejudice thereby; it hath been resolved, that if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error.

Leon. 261; 2 Sid. 56, and vide *Owen*, 68; God. 377.

## (B) Who may bring a Writ of Error, &amp;c.

So the youngest son, when entitled to the land by the custom of borough-english, shall bring the writ of error, and not the heir at common law: for this remedy descends with the land.

Owen, 68; Leon. 261; 4 Leon. 5, adjudged; and vide Bridg. 79; Ro. Rep. 311.

So, if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring the writ of error.

Dyer, 90; Leon. 261; Ro. Abr. 747.

So, if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and J S brings a writ of error as cousin and collateral heir of the daughter, yet he shall never reverse the fine: for there could no right descend to him from the daughter, because she had but an estate tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir; wherefore J S shall not reverse the fine, *quia de non apparentibus et non existentibus eadem est ratio*; especially in a court of judicature, where the judges cannot take notice of any thing that does not come judicially before them, and appear in the pleading.

Dyer, 89 b.

If there be tenant in tail, the remainder in fee, and in a *præcipe* brought (a) against tenant in tail, an erroneous judgment be brought against him, and he after die without issue, the remainder may have a writ of error; for when the statute *de donis* gave liberty to limit a remainder after an estate tail, the law gave such actions to him in remainder as belonged to privies in estate.

3 Co. 3 b, agreed in the Marquis of Winchester's case. [Tenant in remainder may bring error of a common recovery where the tenant in tail, *vouchee*, dies before the judgment; and he need not set out a complete title, but only show the connection and privity between him and the person against whom the recovery was had. *Sheepshanks v. Lucas*, 1 Burr. 410. In such case *scire facias*, or any warning to the *heir*, is not necessary. *Ibid.*] (a) So, if tenant in tail levy a fine, and before proclamation passes, a *præcipe* be brought against the conusee, who vouches the tenant in tail, &c., for when the tenant in tail comes in as *vouchee*, it is as of his old estate; so that the privity between the tenant in tail and him in remainder continues. Bridg. 69; Ro. Rep. 311.

If tenant in tail male have issue a son and a daughter by one venter, and a son by another, and die, and the eldest son make a feoffment, and a common recovery be had against the feoffee, in which the eldest is vouched, and he vouch over the common *vouchee*, and after the eldest die; the youngest son may have a writ of error; for though the eldest should have rendered a fee simple to the feoffee, according to his loss, yet he should have recovered but an estate tail, viz., such an estate as he had when the warranty was made, which would have descended to the youngest, and, consequently, the writ of error shall be brought by him.

Henningham and Ham's case, Leon. 261; Owen, 68, S. C.; Godb. 377, S. C. cited.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity.

Ro. Abr. 747; Dyer, 89.

But, if tenant for life, and he in remainder in fee (being an infant) join in a fine, the infant alone may bring error; for the error is in respect of the person of the infant, which is the cause of the action for him, and for no other.

Leon. 317; Cro. Eliz. 115, 124, S. C., adjudged, and the fine reversed *quoad* the infant only.

(B) Who may bring a Writ of Error, &c.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as vouchee.

Ro. Abr. 748, 755.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may assign this for error; for he is party in interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it, by taking advantage of any error in it.

Ro. Abr. 755, 796.

If A be tenant in tail, the remainder to B, and A suffer an erroneous recovery, and the common vouchee release to the recoverer; yet if A die without issue, B may, notwithstanding the release, reverse it by writ of error; for the common vouchee is only called in for form; as he really has no interest in, or title to the land, so really neither does he make any recompense to the person that loses the land; and therefore it were unreasonable to carry the notion of the imaginary recompense so far as to suppose him a real sufferer, and thereby give him the privilege of setting aside a conveyance by which he is no way affected.

Cro. Eliz. 2; 3 Co. 4.

If he in the remainder be made privy to the record by *aid prier*, he shall have a writ of error during the life of the tenant for life: so, (a) if he be received by default of the tenant for life.

3 Co. 4. (a) 8 H. 4, 5; Bro. Error, 39.

So, if a feme be received by the default of her baron, and lose the land by judgment, the baron and feme shall have a writ of error thereupon.

49 E. 3, 21 b; Ro. Abr. 748.

If baron and feme levy a fine, they may, by error, reverse the fine, for nonage of the feme, during the life of the baron.

2 Co. 57, Beckwith's case; Cro. Eliz. 129; Leon. 114.

If the conusor of a statute aliens the land, and execution is sued against the alienee, he may have a writ of error upon the execution.

18 E. 3, 25 b; Dyer, 1, pl. 5. Ro. Abr. 748, this is made a *quære*, because, as there said, he is not privy thereto, for the execution goes of the land of the conusor; but Godb. 377, S. C. cited, and said, that otherwise there would be no remedy; for the conusor himself could not have error, because the lands were not extended in his hands.

If, pending a real action, the tenant aliens in fee, and after a recovery is had against him, he (b) himself may have a writ of error, though he hath nothing in the land, because he is privy to the judgment after his alienation and tenant in law.

Ro. Abr. 748; 1 Co. 111; Cro. Eliz. 294; Palm. 254, S. P. And when he is restored, the alienee shall enter upon him. (b) But the alienee cannot have a writ of error for want of privy. 2 Ass. 2; Ro. Abr. 749.

But, if a fine be levied of 120 acres of land, and he, that has right to a writ of error, make a feoffment of the whole, he shall never reverse the fine. But, if the feoffment had been made, or a release had been given of 20 acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because he has not transferred his right to those, and therefore may be reinstated, if the fine be erroneous.

Ro. Abr. 788; Cro. Eliz. 468; Moore, 413.

So, if tenant in tail levies a fine which happens to be erroneous, and after



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suffers a recovery of part of the land only, of which the fine was levied: if the issue in tail brings a writ of error to reverse the fine, the tenant may plead the recovery in bar for that part, because for so much the recovery is an alienation, and therefore the issue shall never have a writ of error for that part of the land which he cannot have or enjoy, should the fine be reversed.

Jon. 352; Roll. 789; Moore, 365.

(a) In a *præcipe quod reddat*, if the tenant disclaims, he shall never have a writ of error, (b) because by his disclaimer he has debarred himself of all right in the land.

Beecher's case, 8 Co. 61. (a) 3 Leon. 176, S. P. *per Cur. arguendo*. Ro. Rep. 302, S. P. *arguendo*. (b) Otherwise, where the tenant departs in despite of the court, or judgment is given upon his confession. 8 Co. 62 a; F. N. B. 21.—So, if upon his default. 2 Ro. Rep. 127; Palm. 56.

In a writ of annuity against an heir, upon an annuity granted by his ancestor in fee, upon *non est factum* pleaded, if a verdict be found for the plaintiff, and thereupon judgment be given, that the plaintiff shall recover his costs, damages, and arrears of the land descended from the same ancestor, and thereupon a writ of execution be awarded to levy it of the lands descended, but no return thereof appear upon their record, and after the heir dies intestate; his administrator cannot have a writ of error upon this judgment, inasmuch as he loses nothing thereby; for if it be levied, it is of the lands descended, the which, or the profits thereof, he cannot have, or be restored to, if he reverses the judgment.

Franke and Stukely, Ro. Abr. 749.

If J S binds himself and his heirs in a bond, and thereupon judgment is obtained against J S, and J S makes his will, and his heir at law executor, and dies, leaving lands, which descend to his heir, yet he shall not have a writ of error as heir, for he is not privy to the judgment;\* and when an extent is made upon him, it is as terretenant: but after the lands are taken in execution, he may have a writ of error.

White and Thomas, *per* Roll, Style, 38, 39. \**Qu.* and see *post*.

If in a common recovery four husbands and their wives are vouched, the voucher shall be intended to have been in, in the right of their wives, and the heir of any one of the wives may have a writ of error; for this charge in the realty did not survive, and the heir of every of them being chargeable, the heir of any of them, and not of the survivor only, may have error: adjudged, where error was brought as heir to one of the husbands; but the plaintiff relinquished that, and brought a new writ, and entitled himself as heir to one of the wives.

Gravenor and Massey, Leon. 291.

If in a *quare impedit* judgment be given against the bishop and incumbent, though the bishop claimed nothing but as ordinary, and so lost nothing; yet being privy to the record, he may for conformity join in error; for the plea of the bishop is not so strong as a disclaimer.

The Queen and Bishop of Gloucester, adjudged, 3 Leon. 176; Cro. Eliz. 65, S. C. adjudged; and Wray said, that the bishop had a loss, for that the writ shall be to the archbishop for admission and institution, so that the bishop having a loss may therefore join. Vide 3 Mod. 134.

If execution upon a judgment is sued by *elegit*, and land only extended, and after the defendant dies, his administrator may have a writ of error, for he is privy to the record, and may *in futuro* have loss by it.

Scroggs and Lord Mordant, adjudged, Moore, 686, pl. 949; Cro. Eliz. 294, S. C.

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adjudged, at the end of which a *nota* is added, that the execution of the land may be avoided, and then the administrator may be damnified.

If a man be outlawed for felony, and die, his executors may have a writ of error to reverse it, for they are (a) privy to the judgment, and possibly may have all the loss, as, if the testator had only goods; and the objection, that the testator was attainted, and so had no goods, nor could make an executor, was held not material in this suit, which is to reverse the outlawry, by which the disability arises.

Marsh's case, Cro. Eliz. 225; Owen, 147, S. C. debated, Leon. 325, adjudged, and the outlawry reversed accordingly; and by all the books it seems to be admitted, that the heir also might have had a writ of error in respect of the prejudice to him. 5 Co. 111, S. C., cited; Cro. Eliz. 558, S. C. cited. (a) A being seised in fee, B his eldest son is outlawed for felony, A dies, and B enters and devises to C, and dies, and C enfeoffs D, and whether D could have a writ of error to reverse this outlawry? Godb. 376, debated.

If a woman recovers her dower and damages, and the tenant brings a writ of error, pending which the woman dies, he may have a writ of error against her executor to avoid the judgment as to the damages; for that is a grievance to him as well as the loss of the land.

Cro. Eliz. 558; Noy, 126.

If in a real action the land and damages are recovered, and the tenant dies, and his heir, who in respect of the land ought to have a writ of error, releases all writs of error; yet the executor of the tenant may bring a writ of error to avoid the judgment as to the damages, for he that hath a loss must have a remedy to redress it.

Cro. Eliz. 558.

If a judgment be given against B, and the money of C attached by force of a foreign attachment in London, C shall not have a writ of error, because he comes in by garnishment by the custom, and is not party or privy.

Bro. Error, 187; Ro. 747.

If an action is brought against A as a feme sole, where she is a feme covert, and she pleads issue as a feme sole, and judgment is given against her, and she is taken in execution, she and her husband may bring a writ of error; for otherwise the husband may be prejudiced in the loss of the society and comfort of his wife, and of her care in his business and family; and he hath no (b) other means to help him.

Hayward and Williams, Ro. Abr. 748; Style, 254, 280, S. C. adjudged, though it was objected, that the husband was a stranger, for he had no other remedy to prevent the loss of the society of his wife, being taken in execution. Ro. Abr. 759, S. C.; 2 Ro. Rep. 53, S. C. *per Cur.*; but because, in the assignment of error, it did not appear that she was married when the original was sued out, the judgment was affirmed. (b) But it is otherwise in the case of a fine, for the husband may enter and avoid it. Ro. Abr. 748. Vide tit. *Fines and Recoveries*.

So, if an action be brought against a feme covert and others, they all with the husband may join in a writ of error.

Ro. Abr. 747.

If there be three defendants, and they all appear by attorney, whereas one of them is an infant, and judgment be given against all; they must all join in a writ of error, for the judgment is entire, and cannot be naught as to the infant and good as to the rest.

Style, 406. If an infant plaintiff, in ejectment, or any personal action, appear by attorney, and obtain a verdict, the judgment shall not be reversed because of such appearance by attorney. Stat. 21 Ja. 1, c. 13, § 2.—But, if an infant defendant appears by attorney, and judgment is given against him, error lies in the same court. Danver's Abr. 2 vol. tit. *Error*, fo. 12, pl. 13, and the cases there cited.

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So, if there be judgment against father and son, the son alone cannot bring a writ of error, for all the defendants ought to join in the writ, and if one of them refuse, he must be summoned and severed; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener.

Carth. 7, 8, Hacket and Herne; 3 Mod. 134, S. C.; Yelv. 208, 209, S. P. [Walter v. Stokoe, 1 Ld. Raym. 71; Burr v. Atwood, Ibid. 328; Rous v. Etherington, 2 Ld. Raym. 870; Ginger v. Cowper, Ibid. 1403; 1 Str. 606; Elkins v. Paine, 2 Ld. Raym. 1532; Ratcliffe v. Burton, Ca. temp. Hardw. 135; Vavasor v. Faux, 1 Wils. 88; Knox v. Costello, 3 Burr. 1792; Laroche v. Wassborough, 2 T. R. 738, all S. P.]

But if, in trespass against three, there is judgment against two of them by default, and the third justifies, and it is found for him, the two only may bring a writ of error; for he for whom the judgment is cannot say that the judgment was to his prejudice: also, in this case, the verdict and judgment for the third defendant will not help the want of an original.(a)

Lev. 210; Hob. 70, and vide Style, 190, S. P. *cont.* (a) It is the common practice of the Court of Chancery to grant an original after the want of an original has been assigned for error. 7 T. R. 475.

If there be judgment against the principal, as also judgment against the bail,(b) the principal cannot have error on the judgment against the bail, nor(c) the bail on the judgment against the principal, nor(d) can they join in a writ of error any more than tenant for life and he in remainder can join in such a writ; for these are several judgments, and affect distinct persons.

(b) Ro. Abr. 749; 2 Leon. 4; Cro. Car. 408, 481. (c) Ro. Abr. 749; Style, 39; Cro. Car. 408; Lev. 137. (d) Cro. Car. 300, 408; Jon. 360; Hob. 72; Cro. Ja. 384; Ro. Rep. 294; Cro. Car. 574, 561; Bulst. 125; Litt. Rep. 93; Lev. 137.

But in(e) Cro. Car. it is said, that if the writ of error, by the bail, had recited the first judgment (as of necessity it must) and the judgment in the *scire facias*, and alleged the error in the second judgment, it had been well enough; but in(g) Style it is said, that of late such writ ought to abate for the whole.\*

(e) Cro. Car. 481. (g) Style, 174. \*The doctrine in the preceding clause I conceive is the established law.

Where on a *scire facias* execution was awarded against the bail, who brought a writ of error, which was *tam in redditione judicii quam in adjudicatione executionis* against the bail, &c.; on motion to quash the writ the court agreed, that the bail was not entitled by law to a writ of error upon a judgment against the principal in the original action, and therefore quashed the writ of error *quoad* all that related to the judgment in the original action, and no more; and the writ was ruled to stand good *quoad* the judgment against the bail upon the *scire facias*.

Carth. 447, Burr and Atwood.

β On a judgment against several defendants, a writ of error cannot be maintained by one alone.

Fotteral v. Floyd, 6 S. & R. 315.

When the judgment in partition is against A and others unknown, any one of the defendants may bring error, as the question which one may present may be different from that which another would urge.

Clap v. Bromagham, 9 Cowen, 304.

A writ of error may be brought by one only of several respondents to a bill in Chancery against whom a decree has passed; but all must join.

Phelps v. Ellsworth, 3 Day, 114. See Hyde v. Tracy, 2 Day, 491.

## (C) Of the time of bringing a Writ of Error.

A successful party may bring error on a judgment in his favour, as when he recovers less than he was entitled to.

Salles v. Hyatt, 1 Cowen, 253.

A party cannot reverse a judgment in his favour for error of the court, unless such error be injurious to him.

Hughes v. Stickney, 13 Wend. 280.

When, on a joint judgment against several defendants, one only sues out the writ of error, without joining the others, the proceeding is irregular.

Williams v. Bank of U. S., 11 Wheat. 414. See Sharp v. Jones, 3 Murph. 306; Callaghan v. Carr, 1 Marsh. 22; Sappinton v. Phillips, 1 Yerg. 105; Puckett v. Ainsworth, 1 Yerg. 254.

In an action of debt for penalties, it was agreed that a verdict should be taken for one only; held, that the defendant could not bring a writ of error.

Apothecaries' Co. v. Harrison, 4 Perr. & D. 292.

A writ of error may be sustained in the name of the casual ejector, in ejectment.

Roe v. Bank of the U. S., 3 Ohio, 32. But see, *contra*, Stiles v. Jackson ex dem. Nelson, 1 Blackf. 214.

A writ of error cannot be sustained by an administrator *de bonis non* to reverse a judgment recovered by a former executor or administrator.

Grant, adm., v. Chamberlain, 4 Mass. 611

Where there are several persons privy to a judgment, each having a distinct and several interest, each is entitled to a separate writ of error.

Porter v. Rummery, 10 Mass. 64; Inhabitants of Shirley v. Inhabitants of Lunenburg, 11 Mass. 379.

On a judgment against the wife, husband and wife must join in error, to reverse it.

Haines v. Corliss, 4 Mass. 659.

When there is a judgment against several, and one of them alone brings error, without alleging the death of the others, the court will quash the writ on motion.

Andrews v. Bosworth, 3 Mass. 223.g

## (C) Of the time of bringing a Writ of Error.

It was (a) formerly holden, that a writ of error could not be brought before the judgment given; and if it bore *teste* before, it was no *supersedeas*, for the words of the writ are, *si judicium redditum sit, &c.*

(a) 22 H. 6, 7; Ro. Abr. 749.

But it seems now agreed, (b) that a writ of error that bears *teste* before the judgment is good; and this is the usual course for preventing and superseding execution; but (c) the judgment must be given before the return of it.

(b) March, 140; Vent. 255; Moore, 461; 1 T. R. 280. (c) 3 Keb. 308; Vent. 96; Latch. 133.—It may be returnable the same term judgment is given. Sid. 104.—The judgment, when entered, hath relation to the day in banc, so that a writ of error returnable after in the same term, will remove the record. Mod. 212.—Where judgment is not given, the special matter may be returned, viz., that no judgment was given. Sid. 466; Vent. 96, and vide Sid. 311.—[If the plaintiff defers signing judgment till the writ of error is spent, then signs it, and brings debt thereon, the court will order a new writ of error at the expense of plaintiff's attorney. Arden v. Lamley, Barnes, 250; Jaques v. Nixon, 1 T. R. 280.] β In Connecticut, a writ of error must, in all cases, be served on such of the defendants as reside within the state at least twelve days before the sitting of the court to which it is returnable. Gaylord v. Payne, 3 Conn. 258.g

## (D) Of the Manner of bringing it.

But a writ of error, that bears *teste* before any plaint entered, is not good. March, 140.

So, where the defendant, upon an indictment of barratry, brought (a) a writ of error bearing *teste* before the assizes, it was disallowed; because, if such practice should obtain, it would disappoint all proceedings there.

Vent. 255; 3 Keb. 308. (a) Yet when a *certiorari* is awarded before any indictment found, but one is found before the return, it should be removed; but for this vide tit. *Certiorari*.

By the 10 & 11 W. 3, c. 14, it is enacted, "That no fine or common recovery, nor any judgment in any real or personal action shall be reversed or avoided for any error or defect therein, unless the writ of error, or suit for the reversing such fine, recovery, or judgment, be commenced or brought, and prosecuted with effect, within twenty years after such fine levied, or such recovery suffered, or judgment signed or entered of record.

*Note*, this statute hath the usual savings as to infants, feme covert, persons *non-compotes*, in prison, or beyond sea.

## (D) Of the Manner of bringing it: And herein,

1. *Of the Form of the Writ, and where the Record shall be said to be removed.*

THE law does not seem to require the same exactness in writs of error as it does in other writs; therefore, it has been holden, that in a writ of error to reverse a fine as cousin and heir of the conusor, it need not be shown in the writ of error how he is cousin, for it is but a commission to examine the errors, and needs not such certainty.

Cro. Ja. 160.

Neither need the plaintiff in error show a title in a writ of error, unless it be in a special case, varying from the common course; as, where a special heir in tail brings error, or he in remainder, because he is to entitle himself to the writ.

Cro. Ja. 161. [1 Burr. 410.]

So, if a man brings a writ of error to reverse an outlawry, it need not be shown in what action it was.

Ro. Rep. 22.

But great certainty was formerly required in making the writ of error agree with the record; for as the writ was the sole authority by which the judges were empowered to examine, &c., they could proceed only on that record which the writ or commission authorized; nor could the defects herein, before the 5 G. 1, c. 13, be amended, because by the former statutes of amendment the judges were only enabled to amend in affirmance of judgment.

Vide tit. *Amendment and Jeofail*. Carth. 368.

Therefore, where a writ of error was brought upon a judgment *in quadam loquelâ* by writ of certain land and pasture, without showing in what action this plea was, it was held naught.

Watson and Bernard, 1 Ro. Rep. 22.

If an ejectment is brought against seven, and one dies, and judgment is given against the six, and laid *ad damnum* of the seven, the writ shall abate; though it might have been otherwise if the writ had concluded *ad damnum* of the six only.

2 Ro. Rep. 210; Palm. 152, adjudged; but, *per* Dodderidge, if the writ of error had

## (D) Of the Manner of bringing it.

mentioned the seven only, according to the record, and concluded *ad damnum* of the six, it had been well.—If one of the parties is dead, yet he ought to be named in the writ of error. 2 Mod. 285; 1 Ld. Raym. 71; Carth. 368; 5 Mod. 16, 69; 1 Str. 606; 2 Ld. Raym. 1403.

If in a *quare impedit* in C. B., George Shirley, baronet, recovers against Underhill, and he brings writ of error, reciting a record between George Shirley, knight and baronet, and Underhill, and thereupon the record and proceedings are sent in B. R., and a *mittitur* entered upon the roll, (a) yet the record is not removed.

Hob. 327; Hutt. 41; Cro. Ja. 633, S. C. (a) Style, 153, like point *per* Roll, C. J., who said the variance was material, for these additions are made part of the name; otherways where one is named Gent. in the record, and Yeoman in the writ.—Where a variance in the addition shall abate the writ. Sid. 104.—Where it was moved to quash a writ of error *inter* A and B *nuper de Kelsey in com. Warwici gent.*, and the record certified was, *inter* A and B *nuper de Kelsey in com. Lincoln gent.*, it was doubted whether this variance in the addition would vitiate the writ, for that the addition was not of necessity; and at one time it may be, he was of one Kelsey, and at another time of another. Sid. 193; Keb. 117.—But for variances between the writ and record, vide Cro. Eliz. 92, 172, 198; Ro. Rep. 16; 2 Bulst. 167, 174; Style, 193, 407, where the court by consent of parties made a rule to proceed in the writ of error, notwithstanding a variance for which it ought to have abated; of which the reporter makes a *quare*, the record not being well removed.

A writ of error was brought to remove a record *in curia manerii de Cuttingby*; where the record was, *in cur. custod. libertat. Angliæ autoritate parliamenti de Cuttingby*; and ruled by Roll, that there was no direct opposition between them, for that both may stand together; and though *de facto* it is the court of the lord of the manor, yet virtually, and in dignity, it is the king's court.

Style, 344.

If a writ of error be directed *majori et aldermannis civitatis suæ B ac majori et constabulario stapulæ B nec non vicecom. ejusdem ac ballivis majori et communitati ejusdem cur. tols. ac ballivis et communitati cur suæ pulverisat. et eorum cuilibet*, to certify the record of a judgment *loquelæ quæ fuit coram vobis in cur. nostra civitat. præd. sine brevi nostro, &c.*, and the record is certified thus, viz., *Placita in cur. dom. regis tols. civitat. præd. &c., coram A et B tam vicecomitibus com. civitat. præd. quam ballivis, majore et communitate ejusdem civitatis*; this is a good writ of error to remove this record; for though it is not said therein *coram vobis seu aliquibus vestrum*; yet it shall be taken *distributive*, viz., the judgment upon a plaint before all the said officers, or any of them.

Gay and Adams, 2 Saund. 291. ¶ In *Walker v. Stokoe*, 1 Ld. Raym. 152, note, Lord Holt expresses his disapprobation of this case, and afterwards, upon its being cited by counsel in *Reg. v. Baines*, 2 Ld. Raym. 1200, 1203, it was said by Powell, J., that in the case in *Saunders* the court went much upon the constant form of writs of error to that court, which had always gone that way; and he heard Chief Justice *Saunders* say so; to which Lord Holt said, it would be hard to maintain the judgment otherwise.¶

If a writ of error be (b) directed to Sir Edward Littleton (he being then Chief Justice *de Banco*) to certify a judgment *in querelâ quæ fuit coram vobis et sociis vestris*, where it was before Sir John Finch, then chief justice, the predecessor of Sir Edward Littleton, this writ shall abate.

Lewes and Webb, Ro. Abr. 752. (a) It must always be directed to them before whom the judgment is; *per* Godb. 44; Salk. 264, 265.—To him who hath the custody of the record wherein any judgment is given; as, of a judgment in the Common Pleas, to the chief justice only; so upon a judgment in the Exchequer, to the treasurer of the Exchequer and barons, to have the record before the chancellor and treasurer of England; though it happen the treasurer of England and of the Exchequer be the same person. 4 Inst. 105.

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So, if a writ of error be directed to Oliver St. John, he being Chief Justice *de Banco*, to certify a judgment *in querelâ quæ fuit coram vobis et sociis vestris*, where it was before Edmund Reeves *et sociis suis*, there not being then any chief justice; this is not good, but the writ shall abate.

Ro. Abr. 752.

But, if a writ of error be directed to Peter Pheasant, to certify a judgment *in loquellâ quæ fuit coram vobis et sociis vestris*, where it appears by the record that it was held *coram Edmundo Reeves et Petro Pheasant*; this is a good writ; for though in the return Edmund Reeves is first named, yet this is well enough, inasmuch as Peter Pheasant is also named; and it does not appear which of them was the eldest.

Clerk and Sprigg, Ro. Abr. 752.

If a writ of error be directed to the mayor, aldermen, and recorder of Launceston in *Cornubiâ*, and the record be certified by the mayor, aldermen, and deputy recorder, the court being held by letters patent; this is not well certified, inasmuch as this ought to be certified in the name of the judges of the court; and it does not appear that the recorder had power to make a deputy by the said letters patent.

Sprye and Mill, Ro. Abr. 752; Style, 191, 203, S. C. and S. P., adjudged.

If an assize is summoned before justices of assize, and they are afterwards removed, and the Chief Justice *de B.* and another justice are made justices of assize in the same county, and the assize is taken before them, *et propter difficultatem* adjourned in *B.*, and judgment there given for the plaintiff, and a writ of error is directed to the same chief justice before whom the assize passed, reciting the assize summoned before the justices of assize by name, *et postmodum capt.* before the chief justice, &c., but not reciting how the assize came in *B.*, viz., by adjournment, or otherwise; this writ of error is not good; for as it took notice of the change of the justices, *a fortiori* it ought to take notice of the adjournment, for by that both judges and court were changed.

Lord Cromwell and Andrews, Yelv. 3 b; Cro. Eliz. 891; Noy, 44, S. C. adjudged; Godb. 248; Ro. Rep. 15, S. C. cited.

But in the (a) 5 E. 6, where judgment in a *quare impedit* by the statute West. 2, was given by justices of *nisi prius*, and a writ of error thereof brought, without showing where the judgment was given; it was held good; for the record beginning and remaining in the Common Pleas, it was held not material where the judgment was given; (b) and Gawdy said, when the record begins in one place, and is finished in another, there, of necessity, in a writ of error the proceedings in both places ought to be mentioned.

(a) Dyer, 77. (b) Lord Cromwell v. Andrews, Cro. El. 891; Yelv. 3, S. C., and a diversity taken between the case of an assize and a *quare impedit*, for the assize must originally commence before justices of assize, and yet by presumption judgment shall be there given, and not in C. B., but the *quare impedit* must begin in C. B., and by intendment judgment shall be there given, though by the statute to avoid a lapse, judgment may be given before justices of assize. 2 Bulst. 171, S. C. and S. P. cited.

If a writ of error be directed to several justices, and returned by part of them only; yet, if it (c) truly recite the record, it is thereby removed, and a new writ of error lies *de recordo quod coram nobis residet*.

Yelv. 212; Cro. Ja. 254; Sid. 349. (c) If the record vary from the writ of error, yet the inferior court ought to remove it. Vent. 97.

[Although the return to a writ of error from the Common Pleas be not

## (D) Of the Manner of bringing it.

signed by the chief justice *propria manu*, yet this is no objection to proceeding on the writ of error.

Blackwood v. S. S. Company, Ca. temp. Hardw. 344; 2 Str. 1063, S. C.

If a writ of error be directed to W. W., chief justice, and the return be only by W. W., without adding "the chief justice within named," yet if there are the words, "*as to me within is commanded*," the return is good; for these words are enough to show him to be the same person to whom the writ is directed.

Sullivan v. Seagrave, 2 Str. 695.]

If a writ of error be brought upon a judgment in an assize *capit. coram J. Fleming nuper capitol. justiciar. ad placita et J. Dodderidge uno justiciar. ad placita coram nobis tenend. assignat. justiciar. nostris ad assisas*; this writ is naught, for there was no such record before *Fleming justiciar. ad placita*, the words *coram nobis tenend. assignat.* being omitted, and those after Dodderidge cannot refer to the first.

Cro. Ja. 342, adjudged; Dodderidge, dissent., who said the addition was surplusage; Godb. 248; Ro. Rep. 16; 2 Bulst. 164.

If a writ of error be brought in *recordo et processu assise, &c. inter A & B summonit.*, without showing which was plaintiff and which defendant, it is well enough, because the precedents are both ways.

Cro. Ja. 341.

And now by the 5 G. 1, c. 13, it is enacted, "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable."

[Collins v. Moxworthy, Ca. temp. Hard. 194.]

[A writ of error was not amendable at common law, nor by any of the statutes of amendments and jeofails, till the above statute of 5 G. 1, for all amendments are granted for the support of judgments; but the principal design of writs of error is to reverse them. A writ of error was not amendable at common law, because it has in its nature two things, viz., a *certiorari* to remove the record, and a commission to examine it: and no court was ever allowed to amend its own commission.

1 Ld. Raym. 71. *Per* Fortescue, J., 1 Str. 607.

An ejectment was brought against the Company and Mr. Edwards. After a verdict for the plaintiff, Mr. Edwards died, and a writ of error was brought, laying the judgment to be *ad grave damnum* of the Company, and of Mary Edwards the daughter and heir, and she and the Company jointly assign errors. It was moved to amend the writ and assignment by striking out her name. And upon consideration, the court were of opinion, that it was amendable by the above statute, not only as a variance from the original record, which is really no way to the damage of Mrs. Edwards, but also by virtue of the general words *other defects*.

Sword-blade Company v. Dempsey, 2 Str. 892; Fitzg. 201, S. C.; 1 Barnard. 405, 421, S. C. So where two were charged with a joint trespass, and judgment was given against one only, the other being found not guilty, &c., a writ of error was afterwards brought in both their names; on an affidavit that this happened by the mistake of the officer, the Court of B. R., upon the authority of the above case, ordered the writ to be amended by striking out the name of the person who was acquitted. Verelst v. Rafael, Cowp. 425. ¶ But in this case the recognisance of bail in error must also be amended. 2 Bl. Rep. 1067, S. C.]

There was a variance between the writ of error and the record; and as



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it stood in the paper, the court observed it, but neither party would move to amend it, for fear of paying costs; upon which the court said, the above statute would warrant their amending it, which they did without costs.

*Gardner v. Merrett*, 2 Str. 902; 2 Ld. Raym. 1587, S. C.; *Fitzg.* 268, S. C.; 1 Barnard. 462. It appears from some of the reports of this case, that no costs are payable upon amendments pursuant to the statute, though at the prayer of the party; but, if the prayer be also to amend the assignment of errors, the rule is with costs, because then the party comes for a favour of the court.]

¶ Where in suing out the writ of error a mistake had been made in the name of the defendant in error, who thereupon issued execution; the Court of King's Bench granted a rule to show cause why the sheriff should not pay the money levied on the execution into court, and enlarged that rule in order to allow the plaintiff in error to amend his writ.

*Barnard v. Guy*, 2 Smith, 259.¶

[A writ of error was returnable before any judgment given, and on consideration, it was holden to be such a fault as is not amendable by this statute.

*Wright v. Canning*, 2 Str. 807; 2 Ld. Raym. 1531, S. C.; 1 Barnard. 62, 65, S. C.; *Rejindoz v. Randolph*, 2 Str. 834, S. P.; *Vice v. Burrow*, *Ibid.* 891, S. P.; *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179. However, in almost all cases, the writ is sued out before judgment signed, because otherwise execution would issue instantly. *Per Buller, J.*, *Jaques v. Nixon*, 1 T. R. 280.] ¶ And it is now settled, that it may be made returnable before the day on which the judgment is actually signed, provided it be of the same term with the judgment; *Somerville v. White*, 5 East, 145; *Hill v. Tebb*, 1 N. R. 298, and that, whether the judgment be final or interlocutory. *Emanuel v. Martin*, 2 M. & S. 334.¶

2. *What is necessary to be removed, and herein of removing the Record or a Transcript.*

On a writ of error of a judgment in the Common Pleas, or other inferior court, in every adverse suit the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases.

22 E. 3, 6; 40 Ass. 29; *Ro. Abr.* 753; 2 Str. 837. ¶ It is the duty of the plaintiff in error, and not of the clerk of the court below, to transmit the record to the Supreme Court. *Porter's Lessee v. Cocke*, *Mart. & Yerg.* 264.¶

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgment or contract of the parties, and therefore no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of B. R. may send for the fine itself, and reverse it, or may send a writ to the treasurer and chamberlain to take it off the file. Besides, should the record itself be removed and affirmed, it could not be engrossed for want of a chirographer in B. R.

*Bendl.* 51; *Ro. Abr.* 752; *Dyer*, 89; *Godb.* 248; 2 *Ro. Rep.* 233; *F. N. B.* 20. ¶ In law the record itself is considered as removed to the Supreme Court from the Common Pleas, though in fact a transcript only is sent up. *Brown v. Clark*, 3 *Johns.* 554.¶

Also, if a writ of error be brought in parliament of a judgment in B. R., the chief justice must go in person into the house with the record itself, and a transcript, which is to be examined and left there, and then the record to be brought back again in B. R.; and if the judgment be affirmed, the court of B. R. may proceed on the record to grant execution; and therefore if the record itself should be removed, and judgment affirmed, and the parliament dissolved, there could not be any proceedings thereupon to have execution.

4 *Inst.* 21; *Cro. Ja.* 341; *Bulst.* 166; *Ro. Abr.* 753; *Godb.* 249; in which last book it is said to be at the pleasure of the parliament, to have either the record or transcript.

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[According to the course of parliament as settled in the time of Hen. IV. in error from the King's Bench, when the chief justice was commanded either by petition of error or writ of error to bring the record into parliament either *indilale* or on a day certain, he brought up the roll and a transcript of the record, and left the transcript and roll with the clerk of the parliament to be examined, and then the same day, or some short time after, the rolls themselves were carried back into the treasury. And this hath obtained to this day. In the parliament of 18 Ja., when the Chief Justice of the King's Bench was made Speaker of the House of Lords by commission on the suspension of the lord keeper, yet it was resolved 14 *Mai* 1621, in that parliament, that upon a writ of error he should bring in the record as chief justice.

Hale's Lord's Jurisd. c. 26.

If a writ of error be brought in parliament upon a judgment in the King's Bench, if the writ abate by death, a record is made of it in the Lords' House, and by judgment the writ is there abated, and the judgment of abatement is entered upon the transcript left in the Lords' House, and the same is remanded into the King's Bench to proceed according to law, H. 22, Car. 1, B. R. *rot.* 696. Trowl and Methurst.

Hale's Lords' Jurisd. c. 28.

So, if the judgment be affirmed by the Lords, the judgment of affirmation is entered upon the transcript, and *remittitur* entered thereupon, and the record delivered back to the King's Bench to proceed with execution. T. 26 Car. 2, *rot.* 807.

Hale's Lords' Jurisd. c. 28.

And so, if the judgment be reversed by the Lords, the judgment of reversal is entered upon the transcript with a *remittitur* in this form: *Et superinde recordum et processus per curiam parliamenti curie domini regis coram dicto domino rege ubicunque, &c., remittuntur, et in eadem curia coram dicto domino rege jam resident.* M. 24 Car. 2, B. R. *rot.* 237. Streter's case.

Hale's Lords' Jurisd. c. 28.

And it seems that, although as to some purposes the record was removed from the King's Bench into parliament; yet really the record remains as to many purposes in the King's Bench; and after such a *remittitur* the Court of King's Bench proceed upon the original record before them, and enter the reversal and *remittitur* upon that record. Therefore, if the parliament be dissolved before any judgment of affirmance or reversal, upon a suggestion thereof upon the roll in the King's Bench, the Court of King's Bench shall proceed upon the record before them, though there be no *remittitur* of the transcript out of the parliament into the King's Bench.

Hale's Lords' Jurisd. c. 28.

If a writ of error be brought in B. R. here, of a judgment in B. R. in Ireland, the record itself is not sent, but a transcript only, by reason of the danger of the seas; but when it is come safe and entered in the rolls here, then it ceases to be a record in Ireland, and is a perfect record here; yet if the judgment be affirmed, the King's Bench in England shall not award execution, but shall send a special mandate to the chief justice in Ireland to do it.

[It is the very record which comes here out of Ireland, and not the transcript of it. And it is no objection that it should be the transcript, for fear of the peril of the sea; for one might object in the same manner, that upon error in the Common Pleas, the transcript only is removed hither, for fear it should be burnt or lost before it comes into the King's Bench. But in fact, when the record in both cases arrives here, then it is

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the true record, and not before; and that which is in Ireland, or the Common Pleas, ceased to be the record. *Per Holt, C. J., in Coot v. Linch, 1 Ld. Raym. 427.]*

If a writ of error be brought in B. R. to reverse a judgment given in C. B., the (a) original shall not be removed, if it be not by special matter, as, if error assigned in the original.

24 E. 3, 24; Ro. Ab. 753. (a) Though the command of the writ is to certify *recordum et processum*, yet the course is only to certify the declaration and pleas, omitting the writs. *Bridg. 57.*—All is certified which is with the chief justice; but the original and judicial writs remain with the *custos brevium* and other officers, and are never certified, but where error is assigned for want of them. *Cro. Eliz. 84; vide Leon. 22; Cro. Ja. 379; Ro. Abr. 790, pl. 6.*—The writ is directed to the chief justice, who only certifies the body of the record, which remains with his clerk.

If a writ of error be brought in B. R. upon a judgment in an inferior court against the plaintiff, there the court may reverse the judgment, though the original be not removed, no error being assigned in the original; for this is removed but to sue here upon the same original.

37 Ass. 5; Ro. Abr. 753.

[By the words of the statute of 27 El. c. 8, which first gave the writ of error from the Court of King's Bench to the Exchequer Chamber, the chief justice is to cause the record to be brought before the judges in the Exchequer Chamber; yet the practice hath always been to send only a transcript, the original record remaining in B. R. In the pleadings in *Westby's case*, (3 Co. 67 a, 70 b,) the entry of the proceedings in error runs thus: "Afterwards, &c., the transcript of the record and proceedings, &c., by a certain writ of the lady the queen of correcting errors, &c., was brought to the justices, &c., in the chamber of the Exchequer aforesaid, according to the form, &c." Yet the subsequent part of the same entry says, "and thereupon the record aforesaid, &c., was sent back, &c." However, as to all legal effects, (b) the record itself is considered to be removed.

*Dougl. 352, n. 3; Rutter v. Redstone, 2 Str. 837; Tully v. Sparkes, Ibid. 869; 2 Ld. Raym. 1571.]* ¶ On all writs of error returnable in the King's Bench, as well as in the Exchequer Chamber, or House of Lords, the practice is to send only a transcript of the record, and not the record itself. 2 *Tidd's Pr. 1123.* (b) *Roche v. Wasbrough, 2 T. R. 737; Sampayo v. De Payba, 5 Taunt. 85.]*

In an action of waste brought in the *hustings* in London, there was a verdict for the plaintiff, which was after quashed for the insufficiency, and a new *venire* awarded, whereupon a verdict was given for the defendant, and judgment for him, and a writ of error being thereupon brought before special commissioners, it was resolved, that the first verdict should be certified in the record, because it was not set aside for that the jurors had found against evidence, or for any undue practice or misfeasance of the parties, but only for the insufficiency thereof in point of law, which the court had adjudged upon the verdict appearing before them upon record.\*

*Green and Cole, 2 Saund. 254; Lev. 309, S. C.* \* So, where a defendant pleads in abatement, a demurrer, &c., and judgment of *respondens ouster*; the whole of these proceedings must be entered on record and certified.

If a writ of error be brought in B. R. upon a fine levied in the *hustings* of Oxford, the record (c) itself shall be removed.

50 Ass. 9; Ro. Abr. 753. (c) Where upon a writ of error to reverse an outlawry upon an indictment of felony, the record itself, or a transcript only, shall be removed. *Bulst. 181.*

If there be several records between the same parties with which the description in the writ of error agrees, the inferior court may remove which of the records they please.

*Vent. 96; Sid. 466; Raym. 189; 2 Keb. 684.*

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[If the writ is "*between A, late of Westminster in the county of Middlesex,*" and the record only "*late of Westminster,*" if Middlesex is in the margin, it is well enough.

Ingoldsby v. Martin, 1 Str. 316.

A defendant cannot have leave to transcribe the record (though plaintiff has not done it) in order to *non-pros* the writ, and have the benefit of the recognisance. But, (a) if the plaintiff in error is dilatory, the defendant must give a rule to transcribe, and then if he will not, the defendant may *non-pros* the writ of error.

Anon., 1 Wils. 35. (a) Goodright v. Hugoson, Ca. temp. Hardw. 351.]

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If the judges of the Common Pleas, or other judges, upon a writ of error, will not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record.

F. N. B. 25 a. β The plaintiff in error may assign common errors and allege diminution at the same time. Bribin v. M. Laughlin, 4 Cowen, 533.g

But diminution cannot be alleged upon a writ of error brought upon a judgment (b) in any inferior court.

Sid. 40; Sayer v. Curtis, Ca. temp. Hardw. 367. (b) As Ely, Sid. 147.—The sessions of peace. Sid. 364.—But may in error upon a judgment in Wales and counties palatine. Sid. 147, 364.—So, it may in error upon a judgment before justices of *Oyer and Terminer*. Sid. 40. β A party cannot allege diminution after joinder in error, and have a *certiorari*. Rew v. Barker, 2 Cowen, 408.g

And therefore where in a borough court a plaint was entered as the plaint of A and B, and the declaration was by A B, executor of J S, and on a writ of error in B. R. this variance was assigned for error: The court held, 1. That want of a plaint in an inferior court is the same as want of an original in the Court of Common Pleas, and that this could not be a plaint in this action. 2. If such variance had been in a record of the Common Pleas, diminution might have been alleged, and a good writ certified; but in records out of inferior courts, no diminution can be alleged, and the court must take them as they find them.

Hale v. Clare, Salk. 266.

A man cannot allege diminution (c) contrary to the record which is certified.

Ro. Abr. 764. β Pelletreau v. Jackson, 7 Wend. 480. Joinder in error admits the return to be perfect. Rew v. Barber, 2 Cowen, 408. See Rowan v. Lytle, 4 Cowen, 91.g (c) In error to reverse an outlawry upon an indictment for murder, it being assigned for error, that the *exactus* was *ad comitalum*, without saying *meum*, the court, upon the prayer of the attorney-general, showing the king had seized his lands, &c., awarded a *certiorari* to the coroners to certify where the *exact.* was, in order to amend the return. Latch. 210.—Upon a writ of error upon a bill of exceptions, diminution cannot be alleged, for the party must hold himself to the matter in the bill sealed; and if it is not there, it was his folly to omit it. 2 Inst. 427.—Where the record is not rightly certified upon a writ of error upon an outlawry upon an indictment for felony. Bulst. 181; but for this vide Godb. 267; 2 Ro. Rep. 353; Cro. Ja. 369.

As, if in a writ of error it be certified that the judgment was *quod defend. sit in misericordia*, the defendant in the writ of error cannot allege diminution: ss. That the record is *quod capiatur*, because this is contrary to the record certified.

Ro. Abr. 764.

||So, where a writ of error was brought in parliament on a judgment of

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the Court of Exchequer in Ireland, affirmed in the Exchequer Chamber there, the House of Lords held, that diminution could not be alleged in the body of the record, contrary to the *transcript*; and refused to issue a *certiorari* for verifying it.

Rowe v. Power, in Error, Dom. Proc. Die Martis, 8 Mar. 1803; 2 Tidd's Pr. 1134; but see 1 Bulst. 181; 1 Salk. 49.]]

If upon a writ of error the record be certified, that a challenge was to the sheriff for cosenage, and after thereupon a *venire facias* was awarded to the coroner upon diminution; it cannot be certified that the challenge was after the return of the *venire facias*, because this is contrary to the record before certified, for nothing can be certified but that which stands with the first record.

Floyd v. Bethell, Ro. Abr. 764; 1 Ro. Rep. 200, S. C.

In a writ of error brought in B. R., upon a judgment in the Common Pleas, the want of a warrant of attorney being assigned for error, the plaintiff prayed one *certiorari* to the chief justice, and another to the *custos brevium*, both of whom returned *non inveni aliquod warrant.*, and the defendant dying, the plaintiff by journeys accounts brought a new writ of error against the son and heir of the defendant, who appearing alleged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *custos brevium*; and it was urged, the return was not *quod non habetur aliquod warrant.*, but (a) *quod non inveni*, &c., so that if upon the second a warrant should be returned, it would not be repugnant: but it seemed to Wray, Chief Justice, that it would be hard to grant a new *certiorari* in this case; but, if any variance could be alleged, it would be otherwise, as adjudged in the case of one Lassels, where it was certified there was no warrant of attorney; and afterwards it was moved for another *certiorari* as it is here; and because the original was *inter Lassels executor testamenti*, &c., where he was not named executor in the first *certiorari*, upon that matter a new *certiorari* was granted.

Leon. 22; Dayrell and Thinn. (a) Vide Cro. Ja. 277; Bulst. 21, where upon the first *certiorari* it was returned, there was no warrant of attorney in that term wherein the action was commenced, and another *certiorari* was awarded.

After *in nullo est erratum*, the court, to inform their consciences, may award a *certiorari* to (b) amend the record.

Ro. Abr. 764; Style, 352; 2 Ro. Rep. 471. (b) So, they may award a *certiorari* to reverse the judgment. Ro. Abr. 764; Cro. Eliz. 155, 281, 836; 2 Leon. 3; Cro. Ja. 6, 141, 445.

If after *in nullo est erratum* pleaded, another part of the record is brought in by *certiorari*, and made of record there, the court ought to reverse the judgment, if the matter so requires.

5 Co. 37; Ro. Abr. 764.

After *in nullo est erratum* pleaded, if one party allege upon record, a diminution of the record to reverse it, and pray a *certiorari* to certify it, and thereupon a writ of *certiorari* be sued out, and the record be certified; but before it is entered of record, the court be informed of this matter, this shall not be received, because it comes in by the prayer of the party after *in nullo est erratum* pleaded, which is not to be allowed: but upon information to the court, the court may grant it. [Michaelmas, 2 Car., between Weaver and Felton, B. R., adjudged, and such certificate disallowed, and a new writ of *certiorari* granted by the court, which is entered Hil. 1 Car. Rot. 647, and then the record of Bishop's case was shown to the court, where the

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defendant did not plead *in nullo est erratum*, as the book is 5 Co. 37 a, but it passed against the defendant by *nil dicit*, and after diminution alleged, as it is in the book.]

Ro. Abr. 764, 765; Jon. 139, S. C.; [resolved that the *certiorari* was not well awarded; for after *in nullo est erratum* pleaded, neither the plaintiff nor defendant can allege diminution; for by the joinder they allow the record; and a note is there added, that Bishop's case in 5 Co. does not agree with the record; for there the defendant had not joined *in nullo est erratum*, but did not say any thing, *ideo remanet inde indefensus*. Noy, 83, S. C., held accordingly, but yet the court *ex officio* may award a *certiorari ad informandam conscientiam*, and that which is certified shall be annexed to the record, and is called a rider roll, and says, see 22 E. 4, 46 a; 28 H. 6; 10 Dy. 32 b; 9 E. 4, 32 b; Franklin v. Reeves, Ca. temp. Hardw. 118. And note in Chapman's case, the difference is, if diminution be alleged in a thing collateral, as warrant of attorney, or any mesne process that is not of the body of the record, it may be alleged after *in nullo est erratum*; but otherwise, if it be of the substance and parts of the record itself; as, if returned in the detinue only, where the first action was in the *debet* and *detinet*, for which see 1 H. 7, 21, which reconciles many differences.]

In trespass in B. R. judgment was given for the plaintiff by default, and a writ of error brought *in camera scaccarii*, and there assigned for error, that there was not any writ of inquiry of damages filed; and upon a writ of *certiorari* it was certified, that there was not any such writ. However, afterwards another *certiorari* was granted, and upon this the writ of inquiry was certified,\* upon which the judgment was affirmed.

Rorer and Escort, Ro. Abr. 765. \* And probably filed after the first, and before the second *certiorari*. || It appears from a late case, that after an award of a writ of inquiry of damages, if final judgment be given for a certain sum with the plaintiff's assent, it is no cause of error, although the record contain no entry of any inquisition executed. Gould v. Hammersley, 4 Taunt. 148.||

So, where in a writ of right in B. R. after judgment, a writ of error was brought *in camera scaccarii*, and the want of continuances assigned for error; and upon a *certiorari*, the want of continuances certified; yet after upon another *certiorari*, the continuances were certified, and upon this the judgment affirmed.

Travis and Scott, Ro. Abr. 765.

If error be assigned in the original, and upon a *certiorari* granted an erroneous original be returned; and upon this *in nullo est erratum* be pleaded, and after the court *ad informandam conscientiam* grant another *certiorari* for another original; and upon this a good original be certified; the court ought to intend that this is the original, upon which the judgment was given in favour of judgments, which ought to be intended to be good.

Ro. Abr. 765; Godb. 407, adjorn.; 2 Ro. Rep. 352, S. C., but no judgment; Cro. Car. 91; Style, 176.

In a writ of error, upon a fine, an error was assigned in the proclamations, upon which a *certiorari* went to the *custos brevium*, and upon his certificate it appeared, that two of the proclamations were made in one day; but it appeared in the chirograph office that the proclamations were duly made; and the chirographer making and being the principal officer as to them, and the *custos brevium* having only an abstract thereof; upon the prayer of the defendant a new *certiorari* was directed to the chirographer, who having certified the proclamations duly made, after examination of the clerks of the Common Pleas by the justices in B. R., they awarded that the proclamations with the *custos brevium* should be amended according to those in the custody of the chirographer.

Rag and Bowley, 3 Leon. 106.

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If a writ of error is brought upon a judgment in B. R. in Ireland in a writ of false judgment, upon a judgment in the Toulse, (which is the court of the mayor and aldermen of Dublin;) and it is assigned for error, that there was no plaint entered in the Toulse, and that these words *per quod actio accrevit* were omitted in the conclusion of the declaration; if the defendant alleges diminution, yet he shall not have a *certiorari* to the chief justice *de B. R.* in Ireland, to certify the residue of the record, &c., and that if any part of the record be not before him, that he should write to the mayor and aldermen to certify it, and that he should certify it to this court; for by this plea of *in nullo est erratum* in B. R. in Ireland, he hath admitted the record well certified by the mayor and aldermen; and this court hath no authority to require the court of B. R. in Ireland to write to the mayor, &c., and the judgment *de B. R.* in Ireland only is here in question; and such writ being issued, a *supersedeas* was granted to the whole, though it was prayed that the *supersedeas* should be as to the inferior court only. But at another day it being moved, that there might be a *certiorari* as to the words *per quod*, &c., it was granted.

Banister and Kennedy, Palm. 285.

In a writ of error in the Exchequer Chamber upon a judgment in B. R. it was assigned for error, that in the bill, the plaintiff declared on a lease for three years; but in the plea roll, upon which the issue was joined, and the record of *nisi prius*, it was upon a lease for five years, so that the bill and declaration vary; and diminution being alleged by the plaintiff, a bill was certified, in which it was only for three years: upon which the defendant had another *certiorari*, and thereupon a bill was certified, wherein he declared upon a lease of five years, which warranted the declaration upon the roll, and the *nisi prius*; and it was held by all the justices and barons, that the second certificate, upon diminution alleged by the defendant, should be received; for that warranting the roll and the record of *nisi prius*, shall be intended the true bill, and the other a fictitious one.

Cro. Car. 91; between Howell John and Thomas.

A writ of error was brought upon a judgment in debt by confession in C. B., and the want of an original was assigned for error; the defendant, before a *certiorari* returned, came in *gratis*, and pleaded a release in bar, to which there was a demurrer; and it being agreed that the plea was ill for want of a *venue*, the question was, whether the court *ex officio* might award a *certiorari*. And it was held by three judges, that though the party (a) had concluded himself by relying on his release, yet the court was not bound thereby, but may award a *certiorari*; and if upon the return thereof it appeared that all the proceedings were right, they were obliged to give judgment on the whole record, according to conscience and right: but Holt, Chief Justice, held, that the court in this case could not award a *certiorari*, because the question was not, whether error or not, but whether barred or not by the release? Which being the point referred to their judgment, they were not at liberty to depart from it.

Carlton v. Mortagh, 1 Salk. 268; 6 Mod. 113, 206, S. C.; 2 Ld. Raym. 1005, S. C. (a) Where the defendant had concluded himself by pleading *in nullo est erratum*, yet the court granted a *certiorari* to remove the whole record, a line being omitted in the transcript, on affidavit that the record below was right. Salk. 270, upon a writ of error of a judgment in ejectment in the grand sessions in Wales. [But this the court will do only in order to affirm a judgment, Berkley v. Howard. 2 Str. 907, not to reverse it. Merryfield v. Berrey, Ibid. 765; Bowers v. Mann, Ibid. 819.]

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'[A writ of error was brought of a judgment in the Common Pleas after a verdict. The plaintiff in error assigned for error want of an original, but did not take out a *certiorari*, as the course is, to get the want of the original certified; the defendant in error pleaded *in nullo est erratum*. It was objected, that there ought to have been a *certiorari* taken out, and a certificate made of the error; for it might be that there was an original, and if that were returned, the plaintiff in error might take advantage of it, and that would not be helped by the verdict, though the want of the original were. *Per Holt, C. J.* If the want of an original be assigned for error, and the plaintiff in error do not take out a *certiorari* and get a return to it, and the want of an original certified; the course is for the defendant in error to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari*; (a) and if he do not get it done, as is ordered by the rule, the assignment for error stands for nothing. But, if the defendant in error will come in *gratis*, and confess the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad original, &c., that is another sort of error; and when the want of an original is assigned for error, the court will never intend, that there is a bad original. And the judgment was affirmed.

*Smith v. Stoneard*, 2 Ld. Raym. 1156; 1 Salk. 267, S. C. (a) Error for want of an original is not completely assigned, until the certificate is returned. *Sterling v. Tanner*, Com. Rep. 115.

If upon error, diminution be alleged for want of original, warrant of attorney, &c., and a *certiorari* be sued out, upon which a record is returned contrary to what is before returned, it cannot be received.

*Tyson v. Hilyard*, 2 Ld. Raym. 1122; 1 Salk. 269, S. C.

Where the want of an original is assigned for error, and it appears that all the proceedings are of the same term wherein the original is returnable, such an original warrants those proceedings, let it be of any return in that term. But an original of the term wherein final judgment is given, will not warrant the proceedings, if by the record it appears that there have been proceedings in the cause in a term or terms before. The case of original writs differs from that of warrants of attorney; for it is sufficient if a warrant of attorney be filed at any time pending the suit, let it be in which term it will; the stat. of H. 8 only requires a warrant of attorney to be filed in the cause; and the stat. of 4 Ann. requires it to be filed according to the course of the court; and that is to have it filed at any time pending the cause; and it is no matter when, so that it be in the same suit. But as to an original writ, it is otherwise; for if there be proceedings in the action in a term preceding the return thereof, the original will not support them.

*Dismo v. Shirley*, Yelv. 108; *Booth v. Beard*, 1 Keb. 327; *Dyke v. Sweeting*, 1 Wils. 181.

The plaintiff in error assigned for error the want of an original, and had a *certiorari* upon which it was certified that there was no original; afterwards the defendant applied to the Court of Chancery, and upon affidavit that instructions were given to the cursitor for an original, but that they were lost, that court allowed the original to be supplied. Upon this the defendant in error prayed another *certiorari*, and an original was certified of the same term in which the default of an original was certified before. It was insisted, that this was irregular, for before the second *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; and the master informed the court that the course was so, when



(F) Of the *Scire Facias*.

the second original certified was of another term; but it being in the same term, the motion was not allowed.

Levin v. —, Com. Rep. 118; 1 Ld. Raym. 695, S. C.]

(F) Of the *Scire Facias*.

AFTER the record is (a) removed, and the plaintiff in error (b) has assigned his errors, which (c) may be either errors in fact or in law, he shall have a *scire facias ad audiendum errores* against the defendant, who thereupon may plead *in nullo est erratum*, a release, &c.

F. N. B. 20. (a) Must assign his errors, and sue out a *scire facias ad audiendum errores* the same term, or the term next after the record is removed; otherwise the whole matter is discontinued, and he will be obliged to sue a new writ upon the record directed to the justices before whom the record is removed, to proceed upon the record *quod coram vobis residet*. F. N. B. 20 G. But such discontinuance is saved by the defendant's appearing, which he may do *gratis*. Sid. 173; Keb. 642. (b) Must assign his errors before he can have a *scire facias*, &c. F. N. B. 20 E. Vide Ro. Abr. 762. (c) If the matters which are assigned for error appear to the court to be no error, nor colour of error, it will not grant any *scire facias*. 18 H. 6, 18; Ro. Abr. 763.—The usual practice is, that the defendant in the writ of error by consent doth voluntarily take notice of the assignment of errors; and this consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*. Carth. 41.—If he does not, there must be a *scire facias*. {See 1 John. Ca. 169, Sheldon v. M'Evers; 2 Bin. 257, Commonwealth v. Emery.}

The Exchequer Chamber not having the record before them, but only a transcript, do not award a *scire facias ad audiendum errores*, but notice is given to the parties concerned.

Vent. 34; Palm. 186.

[The ordinary return of the *scire facias* in a writ of error in parliament was *ad proximum parliamentum*; for the sessions were short and uncertain; and if it had been returnable at a day certain (as it must) in the same session, the session might end before the return of the writ. But in cases where no *scire facias* was to issue, as, where the king was party, the errors were oftentimes examined the same parliament wherein the petition of error was exhibited. But in Charles the First's parliaments the ancient course was altered: for they made writs of error returnable *in præsens parliamentum*, and gave notice by orders from day to day to the defendant. And this course holds now in use, the old way of *scire facias* returnable the next parliament being laid aside, yet without any law at all to warrant it; for the record cannot be reversed or affirmed without making the defendant a party by writ, unless he appear *gratis* without a *scire facias*, and plead to the errors. This is now the common course, and the defendant commonly appears upon orders of the House without any *scire facias*, and pleads to the errors *gratis*; which therefore being done *gratis*, supplies the defect of a regular process, which yet the defendant may insist upon, if he will.

Hale's Lords' Jurisdict. c. 26. This is done upon a motion by a peer, that, on assigning errors, the defendant may appear and make his defence. 2 Tidd's Pr. 1143.]

If after a writ of error brought the defendant dies, yet the plaintiff in error may sue out a *scire facias*, &c., against (d) the executor.

Vent. 34, said by the Secondary to be so ruled in the case of Sir H. Thyn. and Corie.—But in Ro. Abr. 763, taken from the Year-book of 9 H. 4, 3, it is said, that if a man be outlawed upon a process at the suit of A, who dies, and he brings error to reverse the outlawry, he shall not sue a *scire facias* against the executor, because he cannot proceed upon this original, which is abated by the death of the testator. Bro. Error, 44, S. C. (d) May be against an administrator generally, or by his particular name. Ro. Rep. 23; 2 Bulst. 231.

(F) Of the *Scire Facias*.

[If the original plaintiff dies, pending error, his executor may have a *scire facias quare executio non* out of C. B. before the record is transcribed; but afterwards out of B. R. And the plaintiff in error may have a *scire facias ad audiend.* out of B. R. against the executor of defendant in error.

Wright v. Treweske, Barnes, 432.]

If a man condemned in an assize be outlawed for the fine of the king, and he bring a writ of error to reverse the outlawry only, there shall not be any *scire facias* against the recoverer, because the outlawry is at the suit of the king (a) only.

7 H. 4, 40; Ro. Abr. 763. (a) But if the writ of error had been brought of the judgment and outlawry also, it had been otherwise. 7 H. 4, 4; Ro. Abr. 763.

The attainder of felony of a person who had any land shall never be reversed by writ of error (b) without a *scire facias* against all the tertenants and lords mediate and immediate. But it is (c) settled, that such *scire facias* is not necessary in the case of high treason. It is (d) said too, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the attorney-general confesses it.

(b) Dyer, 34, pl. 20; Keb. 121; Sid. 316; Hardw. 164. (c) 2 Hawk. P. C. c. 50, § 13. (d) 2 Salk. 495; Ld. Raym. 154; 12 Mod. 545, 668.

Upon a writ of error against the heir of him that recovers, a *scire facias* lies (e) against the heir and tertenants.

8 H. 4, 17; 2 Ro. Abr. 763. (e) Anciently the writ against the tertenants was special, naming them; but of late the course hath been to word the writ generally. Bridgm. 72.—The *scire facias* against the tertenants is not *ad audiend. errores*, but *ad audiend. processum et record.* Lev. 72, *per Cur.*, Keb. 352.—An attain lies against him who recovered, and against the tertenant. 2 Bulst. 244; Ro. Rep. 37, 302; Bridgm. 72. And the judgment may be reversed against the parties to the judgment and their heirs, though they have nothing in the land.

(g) If a writ of error is brought to reverse a common recovery, the court (h) before the reversal thereof, ought to award a *scire facias* against the tertenants; and this is not merely discretionary, but *ex necessitate juris*; for they may have matter to plead in bar, as a release, &c. Hil. 2 & 3 Ja. 2, between Kingston and Herbert, 3 Mod. 119, *per Cur.*, but *adjournatur*.—[Sir B. Shower, in his report of this case, 2 Show. 490, says, that the court were of opinion, that the awarding of a *scire facias* to the tertenants was not *ex necessitate*, but discretionary. And the same is said in argument in Comberbach's Report.]

(g) Leon. 290. Like point in a writ of disceit to annul a fine of ancient demesne lands, and that the tertenant is not bound thereby till, &c. (h) It is the best way to award a *scire facias* against the tertenant, before the court proceeds to the examination of the errors, for he may have something to plead in bar, and so save the court the trouble of examining the errors; and if the judgment should be reversed against the party and privy, yet the plaintiff could not have restitution till a *scire facias*, &c. Dyer, 321.—That such *scire facias* may be granted before or after, at discretion. Hardw. 163.

But this matter was fully debated in the case of (i) Wynn and Lloyd, where in a writ of error to reverse a judgment given in a common recovery against the vouchee after *in nullo est errat.* pleaded, the court awarded a *scire facias* (upon a surmise of the defendant, that there were tertenants) to the tertenants; the sheriff returned, that A is tertenant, and a *scire feci*, and A comes in and says that there are other tertenants, and prayed a *scire facias* to them, and had it; the sheriff returned that B is tertenant, and *scire feci*, and B coming in, says there are other tertenants, and prayed a *scire facias* to them. It was insisted, that the tertenant was not a party concerned in the reversal

(F) Of the *Scire Facias*.

of the judgment, but only as to his possession, and therefore could not otherwise plead than as concerning his possession; that by this means the delay might be infinite, for he that comes in upon this *scire facias* might as well plead that there is another tertenant, and so the plaintiff might be staved off from ever having the benefit of his writ of error: besides, this surmise is contrary to the return of the sheriff. On the other side it was urged, 1. That the *scire facias* ought to go out against the tertenants, and had in all cases, where it ever was controverted, been awarded, as appears by the (k) books cited in the margin. 2. That it ought to go out against them all, because any one of them may have a release to plead, which may discharge or advantage the other. 3. That if it cannot be pleaded by the tertenant, yet it may be suggested to the court as *amicus curiæ*, and awarded *ex officio*; for it may be, that he who is not summoned, can plead in bar of the writ of error what will go to the whole, and ease the court of examining errors; and in that respect it may be awarded, and the proceedings stay. But the court held, that the awarding of a *scire facias* to the tertenants was not *ex necessitate juris*; and therefore when it is once out, and the tertenants are warned, there is no reason to grant it a third time; that here the delay was apparent; but if he could make it out, that he that is not warned had a release of errors to plead, it being in their breasts and discretion, it should be granted; otherwise not.

(i) Lev. 72, 130, 146; Sid. 213; Keb. 54, 351, 388, 459, 717, 748; Raym. 16, 55, 70, 96, S. C., upon a judgment had in the grand sessions in Wales. (k) Dyer, 321; Cro. Ja. 392; Owen, 157; Bridg. 69, 70; 21 E. 3, 56; Cro. Car. 295, 313; Moore, 524; Cro. Eliz. 739; Co. Ent. 233.

But, where a writ of error was brought to reverse a common recovery, and a *scire facias* sued out against him that was the nominal demandant in the writ of entry, and a *scire facias* was moved for to the tertenants, but opposed, because the tertenant was an infant, and therefore the parol may demur during her nonage, which would greatly delay the plaintiff; and further, that if the infant should die, the lands may remain to another; notwithstanding this, the court awarded a *scire facias*; and it was held by Holt, C. J., that though the granting of a *scire facias* in such cases against the tertenants is discretionary, and not *stricti juris*, yet it hath been the constant course of this court to grant it; therefore he was of opinion not to depart from that which had been the usual course of the court.

Earl of Pembroke's case, Carth. 111; Skin. 273, S. C. The like law in error to reverse a fine. Co. Entr. 233 b.

[And upon the authority of those two last cases Lord Mansfield said, that by the established mode of proceeding there must be a *scire facias* against the tertenants, otherwise it is an irregularity, but no more. But a *scire facias* to the heir is clearly not necessary.

Hall v. Woodcock, 1 Burr. 359; Sheepshanks v. Lucas, Ibid. 410.

In an information *qui tam*, &c., upon 5 El., for using a trade *contra formam statuti*, there was judgment for the plaintiff, on which a writ of error was brought. *Per Cur.* In the case of indictments, there needs no *scire facias* for the party to assign his errors, but a rule is sufficient, because the queen is always in court by her attorney-general. But a rule in this case being moved for, the court said, they had ordered precedents to be searched for, but could find none; and therefore the defendant in error must proceed as he could by law.

The Queen v. Ford, Tr. 8 Ann. B. R.; Vin. Abr. Error, (H. a.) p. 9.

(G) Of the Proceedings after the Record removed.

If a plaintiff below brings error to reverse his own judgment, and does not proceed, the court will make a rule to assign errors in a limited time, or his writ to be non-prossed, for a *scire facias* would here be improper.

Johnson v. Jebb, 3 Burr. 1772.

Where, in error from Ireland, the King's Bench affirmed the judgment on a collateral point, it was holden, that the plaintiff could not, on the defendant in error's coming of age, take out a *scire facias ad audiend. errores* in B. R. in England; for upon the affirmance of the judgment, the record must be remitted to Ireland.

Fortescue Alland v. Mason, 2 Str. 1258.

On *scire feci* returned, if the defendant do not appear and join in error, the plaintiff may put it in the paper without taking out a rule to join in error.

Thatcher v. Stephenson, 1 Str. 144.]

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

If the plaintiff in error assigns an error in fact, if the defendant will put in issue the truth of the fact, he ought to rejoin by denial of the fact, and so join issue thereupon, and shall not say (a) *In nullo est erratum*, for by this he acknowledges the fact alleged to be true.

Ro. Ab. 763; Bro. Error, 93. [1 Burr. 410.] (a) This is in nature of a demurrer. Cro. Ja. 29; Cro. Car. 53; Lev. 311.—It is a confession of an error in fact well assigned, Raym. 231; Lev. 294; but not of a matter assigned contrary to the record, Cro. Ja. 12, 521; Raym. 231. But see Edmonds v. Probert, Carth. 338; Davie v. Franklin, H. 26 G. 3, K. B.; 2 Tidd's Pr. 1144. β Bliss v. Rice, 9 Johns. 159; Harvey v. Rickett, 15 Johns. 87. But when the fact assigned was not assignable, as that the court was not sitting on the day the judgment purports to have been given, because that contradicts the record, the plea of *in nullo est erratum* does not admit the fact. Moody v. Vreeland, 7 Wend. 55.g

But, when an error in fact is assigned, if the defendant will acknowledge the fact to be so as alleged, and yet that by law this is not error, he ought to rejoin *in nullo est erratum*, for by this he acknowledges the fact, and yet that by law it is not error.

Ro. Abr. 763.

Also, if a man who is outlawed brings a writ of error to reverse the outlawry, and assigns his errors, the king's attorney shall not plead *in nullo est erratum*, which amounts to a demurrer, as is done between common persons; but upon the assignment of the error, the court shall give a day to the king's counsel to maintain the outlawry; and it is entered *curia advisari vult* till the outlawry is reversed or affirmed.

Ro. Abr. 763.

If error be alleged in the body of the record, *in nullo est erratum* is a good rejoinder, for this shall put the matter in the judgment of the court, the record being agreed to be so.

Ro. Abr. 763. [Upon error in the record, as, want of *capias*, or the like, there, he may say, *in nullo est erratum*; and there, though the defendant confess the error, the court ought not to reverse the judgment, till they be assured of the error. Br. Error, pl. 165, cites 7 E. 4, 16.]

So, if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as *quod non habetur aliquod recordum* of resummons, *in nullo est erratum* is a good rejoinder; for if the plaintiff in the writ of error does not pray diminution, and thereupon procure a certificate from the inferior court, that there is not any resummons before the

(G) Of the Proceedings after the Record removed.

rejoinder entered, this assignment is of no effect, but void, inasmuch as this is to be tried by the record itself, and no diminution can be alleged after rejoinder entered; for if the defendant will confess the error, yet the court ought not to reverse the judgment, till they are ascertained of the error by the record itself.

Ro. Abr. 764; Leon. 22.

If a writ of error abates or discontinues by the act and default of (a) the party, a second writ of error shall be no *supersedeas*: otherwise, if it abates or discontinues by (b) the act of God or the law.

Keb. 658. (a) As if a plaintiff in error be nonsuit, he shall not have a writ of error again. Salk. 263, pl. 4; Ld. Raym. 91; 5 Mod. 228; Comb. 393; 12 Mod. 105; Comb. 19, S. P. (b) A writ of error abated by the death of the Lord Chief Justice Foster, and a second writ was sued out and allowed; and it was held a *supersedeas*. Keb. 658, 686.—A writ of error does not abate by the death of the defendant in error; but a *scire facias ad audiendum errores* may be taken out against his executor. Vent. 34; Salk. 264. *Secus*, if the plaintiff in error dies. Yelv. 208; but for this vide Moore, 701; Sid. 419; Carth. 236, and Godb. 68. A diversity where a writ of error shall abate in a real action, though not in a personal action.—Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable to join. Palm. 151. [For if they do not all join, the writ will be quashed. 1 Ld. Raym. But though the writ in such case be quashed, yet the record is removed by it. 2 Ld. Raym. 1403; 1 Str. 606. Where two join in a writ of error, and one will not assign errors, the court will give the other time to summon and sever. 2 Str. 783. But, if one of two persons against whom judgment hath been given, dies after judgment, error may be brought by the survivor without the executor of the deceased. 1 Str. 234.]

|| It was formerly holden that a writ of error in the House of Lords abated by the dissolution of parliament, (c) or by a prorogation of it; (d) but afterwards the Lords declared, that a writ of error should not determine by the prorogation (e) of parliament; and at length it was ordered, that upon a dissolution, all appeals and writs of error should continue, and be proceeded on *in statu quo*, as they stood at the dissolution (g) of the last parliament.

(c) Heyden v. Godsalue, Cro. Ja. 342; 2 Bulst. 163, S. C.; Dethick v. Bradbourne, Sir T. Raym. 5. (d) Wortley v. Holt, 1 Vent. 31; 1 Sid. 413, S. C. (e) Goston v. Sedgwick, 2 Lev. 93; 1 Mod. 106; Prichard's case, 1 Lev. 165; 1 Sid. 245, S. C.; Wortley v. Holt, *ubi sup.* (g) Sir T. Raym. 383. Com. Dig. tit. *Parliament*, (P. 2.) Yet, Comyns adds, that by a dissolution a writ of error is suspended; and therefore a defendant in execution shall not be bailed upon the recognisance given upon the writ of error in parliament; for, if there should be a dissolution before judgment affirmed, the party would be at large. *R. by all the judges*, 1 H. 7, 20 a. And the writ itself is determined; for there shall be another writ of error at the next parliament. Heyden v. Godsalue, *ubi sup.* It is also laid down by Mr. Crompton, that if the parliament is dissolved, the writ of error is abated. 2 Cr. Pr. 333, 1st edit.

Bankruptcy is no abatement of a writ of error: therefore, where the defendant in error becomes bankrupt, his assignees cannot sue out a *scire facias* in their own name to compel an assignment of errors, but should proceed in the bankrupt's name till judgment.

Kretchman v. Beyer, 1 T. R. 463.

But the writ abates by the marriage of a female plaintiff in error.

Buller v. Lusitano de Pina, 2 Str. 879; 1 Barnardist. K. B. 403; Jenkins v. Bates, 2 Str. 1015.

Where to a *scire facias quare executionem non* the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment and before the issuing of the *scire facias*, the defendant moved to quash her own writ, which was granted without costs.

Pocklington v. Peck, 1 Str. 638.||

(H) How far the Writ of Error is a *Supersedeas*.

AFTER a writ of error shown, the plaintiff ought not to take out execution, but the defendant shall have four days' time to get it (a) allowed, and four days' time more to put in bail, if the case require it; and if he (b) passes that time, the writ of error shall be no farther a *supersedeas*.

2 Keb. 129. (a) By the clerk by endorsing a *recepti* thereon. Vent. 255; Mod. 112, S. P., and that he must not keep the writ in his pocket. (b) That the very sealing of the writ of error is a *supersedeas* to the execution. Mod. 28, *per Kelynge*. [A writ of error is said to be a *supersedeas* from the allowance; provided bail be put in and perfected in due time. Meriton v. Stephens, Willes, 271; Barnes, 205, S. C.; Hannot v. Farettes, Ibid. 376; Jaques v. Nixon, 1 Tr. 279; Hawkins v. Innes, 5 Taunt. 204. *β* Blanchard v. Myers, 9 Johns. 66. If the party sue out execution within the four days allowed for bringing error, it is at the peril of a *supersedeas* of execution and restitution of property, if error is brought and perfected within that time. The People v. The Judges of New York, 1 Wend. 81. A writ of error on a judgment for forcible entry and detainer is, in general, a *supersedeas* of process under that judgment. Dutton v. Tracy, 4 Conn. 365. See Phelps v. Landon, 2 Day, 370. A writ of error operates as a *supersedeas* so far as to stay proceedings till the errors are disposed of; but the *supersedeas* does not vacate a levy of execution on real estate, so as to render the levy a nullity. Arnold v. Fuller's Heirs, 1 Ohio, 463. *γ* But as it is the practice to sue out the writ of error before judgment is signed, the courts have said, it shall not operate as an allowance till the judgment is actually signed, and the party shall be allowed four days after the signing of the judgment to put in bail; for before the judgment no bail can possibly justify. As to the service of the allowance, *that* is only material to bring the party into contempt, if he proceeds to sue out execution afterwards. Jaques v. Nixon, 1 T. R. 279; Doe v. Bracebridge, Ibid.] {1 Bos. & Pul. 478, Gravall v. Stimpson; 2 Bos. & Pul. 137, Payne v. Whaley.} || If the defendant, before the allowance, have notice of the writ of error being sued out and delivered to the clerk of the errors, it is a *supersedeas* from the time of that notice. Perkins v. Woolaston, 1 Salk. 321; 6 Mod. 130, S. C. And a writ of error is so absolutely a *supersedeas*, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum* against the principal, and get it returned *non est inventus*, in order to proceed against the bail; Sweetapple v. Goodfellow, 2 Str. 867; Fitzg. 175, S. C.; 1 Barnardist. K. B. 334, S. C.; 2 Ld. Raym. 1567, S. C.; Derisley v. Deland, Barnes, 83; Bayley v. Tucker, 2 N. R. 458. Nor, if the *capias ad satisfaciendum* be sued out before, can the plaintiff call for a return of it after the allowance of the writ of error, Smith v. Nicholson, 2 Str. 1186; 1 Wils. 16, S. C.; Miller v. Newbald, 1 East, 662, even though it has previously lain four days in the office: Perry v. Campbell, 3 T. R. 390; but in such case the *capias ad satisfaciendum* may be returned, so as to fix the bail after the writ of error is determined. Simmonds v. Middleton, 1 Wils. 269; but see Derisley v. Deland, *ubi supra*, *contr.*]

Where judgment in a *formedon* was pronounced 16 Novemb. and a writ of error brought by the tenant bearing teste 27 Novemb. and then allowed, and *in majorem cautelam* a *supersedeas* made out against executions, and the demandant obtained a writ of seisin, bearing teste 9 Octob. before, by warrant of the judgment, which was afterwards entered but as of *Octav. Mich.* being the last continuance; this being made appear to the court, and they being satisfied that the judgment was pronounced 16 Novemb., before which time the defendant could not have a writ of seisin, nor the plaintiff a writ of error, they held this such a trick as would defeat any writ of error: and therefore a new *supersedeas* was awarded against that writ of execution, *quia erronee*.

Clanrickard v. Lisle, Hob. 329, and vide 3 Lev. 312.

If a writ of error is taken out to remove a record between such and such persons, and some of the parties are omitted; so that in strictness the writ does not agree with the record, yet it is notwithstanding a *supersedeas*, and no execution can be taken out, for the court below (c) cannot judge of the fitness of it, though it may be quashed in the court of which it issues.

Mod. 28, Hughes and Underwood. [See *acc.* Iaroche v. Wassbrough, 2 T. R. 737.]

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(c) That if the record vary from the writ of error, yet the inferior court ought to remove it. Vent. 97.

If A recovers in debt or damages against B, and sues out a *capias ad satisfaciendum* against B, which is returned *non est inventus*, upon which a *scire facias* is awarded against the bail and returned, and after a second *scire facias* awarded, but not returned; B brings a writ of error on the principal judgment; this is no *supersedeas* as to the proceedings against the bail, but the second *scire facias* may well be returned, and the plaintiff may proceed thereon, notwithstanding the writ of error, which, affecting only the principal judgment, is distinct from the proceedings against the bail.\*

Ro. Abr. 491, Lock and Tillard, *per* Croke and Jones, *cont.* the opinion of Brampston. \*But the court, on motion, will stay proceedings against the bail.

So, if a man recovers against J S, and on a *scire facias* hath judgment against the bail, and the bail bring a writ of error of the judgment on the *scire facias*; this shall be no *supersedeas* as to the principal judgment, and therefore the plaintiff may take out execution against the principal.

2 Ro. Abr. 491.

[Where a plaintiff, in order to proceed against bail, took out a *capias ad satisfaciendum*, and on the following day a writ of error was allowed, notwithstanding which he called for a return of *non est inventus*, and then waiting till the writ of error was at an end, proceeded by *scire facias* against the bail; the court, on motion, set aside the proceedings; for the ground of them, viz., the return of *non est inventus*, was obtained after notice of the writ of error, which in its nature stopped all sort of proceedings, and the sheriff could not so much as look after the defendant in order to found such a return. Besides, it is an invariable rule, that the *capias ad satisfaciendum* shall in no case operate as against the bail until it has lain four days in the office; and though it have lain that time in the office, a writ of error afterwards allowed and served before the day on which the *capias* is returnable, shall have the effect of a *supersedeas* to any proceedings against the bail.

Smith v. Nicholson, 2 Str. 1186.] {Or the bail may plead it to the *scire facias*. 2 East, 439, Sampson v. Brown.} [Perry v. Campbell, 3 Term Rep. 390.]

|| In the King's Bench, if the defendant bring a writ of error, and the plaintiff bring an action on the judgment and recover, he cannot sue out execution on the second judgment, till the writ of error be determined. But in the Common Pleas, (a) the plaintiff may take out execution on the second judgment, notwithstanding the writ of error, unless the defendant move to stay the proceedings.

Benwell v. Black, 3 T. R. 643; Taswell v. Stone, 4 Burr. 2454. But see Fisher v. Emerton, 1 Str. 526. (a) Humphreys v. Daniel, Barnes, 202; Robinson v. Tuckwell, Willes, 183; Clarkson v. Physick, Ibid. 184; Barnes, 203, S. C.

In the House of Lords, it hath been determined, that taking out execution against the bail below, pending a writ of error in parliament, is a contempt, and breach of privilege.

Throgmorton v. Church, 1 P. Wms. 685.||

If a man brings a writ of error on a judgment, but does not remove the record within six days, this shall be no *supersedeas*, but execution may well be taken out, for it appears that the writ of error is merely for delay.

2 Ro. Abr. 491, Marsh and Whitestone, adjudged *per Cur.*

If upon a *feri facias* on a judgment against B, the sheriff takes the goods of B into his hands; but before any sale of them, B delivers to the

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sheriff a *supersedeas* on a writ of error, B shall have the goods again, for by this seizure no property is altered.(a)

2 Ro. Abr. 491, Sare and Shelton, *per Cur.* (a) ¶ "Which reason," says Lord C. J. Willes, "not being a true one, I give no credit to this case." Willes, 281. An execution being an entire thing, cannot be superseded after it is once begun; therefore, if a writ of execution be executed before a writ of error allowed or notice, it may be returned afterwards; and the utmost length of time the law allows for executing a writ is the day whereon it is returnable; and it is not executable any longer that day than the court sits. So long as it is executable, but not executed, the allowance of a writ of error is a *supersedeas*, but not afterwards. Perkins v. Woolaston, 1 Salk. 321. See Parker v. Bulstrode, 1 Ventr. 255; Meriton v. Stevens, Willes, 271; Barnes, 205, S. C. Where a writ of execution was sued out before, but executed after, the allowance of a writ of error, served on the sheriff and the party, the Court of King's Bench would not set it aside, because the plaintiff in error had not put in bail. But the party taking out execution after the allowance of a writ of error, and before bail put in, does it at his peril; for if the writ of error is regularly followed up, the execution will be set aside. Lane v. Bacchus, 2 T. R. 44.¶

If a writ of error is brought returnable into the Exchequer Chamber, which is allowed by the clerk of the errors, and a *supersedeas* granted thereupon; but the record is not marked by the clerk of the errors, as the usage is, nor notice thereof given to the attorney of the other side; but these matters are omitted, because the attorney was not known, nor the number-roll of the record; yet this is a good *supersedeas* in law, so that if execution be awarded and executed, it is erroneous, and a *supersedeas* shall be awarded *quia erroneè emanavit*: but it is no contempt in the attorney in taking out execution, he having no notice of the writ of error, and the roll not being marked.

Ro. Abr. 492; Mich. 1649; Methwold and Bawd. [See Burr. Rep. 340.] *Supra acc.*

It seems clearly agreed, that an action of debt may be brought upon a judgment in B. R., notwithstanding a writ of error brought in the Exchequer Chamber; for though such writ of error be a *supersedeas* to the execution, yet the duty remains upon record; and it is but reasonable the party should have this remedy for his damages for forbearance. [But (b) execution cannot be sued out upon the second judgment until the writ of error be determined;] ¶ though it is otherwise in the Common Pleas;(c) but even there, the allowance of the writ on a judgment of *nil dicit*, is so entirely a *supersedeas* to a subsequent writ of execution, that if it be sued out and returned pending the writ of error, all proceedings thereon against the bail may be set aside upon motion.

10 H. 6, 6; 2 Ro. Abr. 490; Dyer, 32, pl. 5; Adams and Tomlinson, Sid. 236; Lev. 153; Keb. 127; Raym. 100, S. P. adjudged, Draper and Brightwell; Mod. 121; 3 Keb. 129, 239, 316; Vent. 372, S. P.; 4 Mod. 247, Dighton and Granvil, S. P. (a) Benwell v. Black, 3 T. R. 643; Taswell v. Stone, 4 Burr. 2454. But see Fisher v. Emerton, 1 Str. 526, *contr.* (b) Humphreys v. Daniel, Barnes, 202; Robinson v. Tuckwell, Willes, 183; Clarkson v. Physick, Ibid. 184; Barnes, 203, S. C.

Though the courts will, upon motion, stay proceedings in an action on the judgment, where a writ of error is depending; yet such motion cannot be made until the defendant has put in bail to the action. Nor is it then a mere motion of course; and therefore the application will not be attended to, where the writ of error is obviously for the purpose of delay,(d) or is sued out against good faith,(e) or is returnable of a term previous to the signing of final judgment.(g)

Smith v. Shepherd, 5 T. R. 9. (d) Entwistle v. Shepherd, 2 T. R. 78; Kempland v. Macauley, 4 T. R. 436; Masterman v. Grant, 5 T. R. 714; Box v. Bennett, 1 H.



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Bl. 439; Mitchell v. Wheeler, 2 H. Bl. 30; Miller v. Cousins, 2 B. & P. 308; Spooner v. Garland, 2 M. & S. 474; Hawkins v. Snuggs, Ibid. 476. (g) Cates v. West, 2 T. R. 183. (e) Cook v. Horrock, Barnes, 197.

But the Court of King's Bench will not permit execution to be taken out, pending a writ of error in parliament, on the ground that the writ is brought for delay, merely because the defendant suffered judgment to be affirmed in the Exchequer Chamber without any objection. And they will not infer that a writ is brought for delay from its having been sued out before final judgment signed. Nor can execution be taken out in the Common Pleas, because the defendant's attorney has declared that the debt would be settled, and that time was all the defendant wanted.

Harrison v. Grote, 6 T. R. 400; Somerville v. White, 5 East, 145; Rawlins v. Perry, 1 N. R. 307.]

A writ of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term.

Hill v. Tebb, 1 New R. 298.

It is not necessary that there should be fifteen days between the teste and return of a writ of error.

Laidler v. Forster, 4 Barn. & C. 116.

A writ of error may operate as a stay of proceedings, though sued out before interlocutory judgment.

Emanuel v. Martin, 2 Maule & S. 334.

If a defendant puts in sham bail in error, the plaintiff may treat them as a nullity, and sue out execution.

Ward v. Levi, 1 Barn. & C. 268.

The writ is a *supersedeas* from the allowance, though not served till after execution.

Meagher v. Vandyck, 2 Bos. & Pull. 370.

And though not returned.

Sampson v. Brown, 2 East, R. 439.

And though the plaintiff be at a distance and in ignorance of the allowance.

Hawkins v. Jones, 5 Taunt. 204.

If the plaintiff in ejectment, after verdict, sue out an *hab. fac. poss.* without waiting to tax his costs, the defendant's writ of error is no *supersedeas*.

Doe v. Dyneley, 4 Taunt. 289.

Where the plaintiff several years after judgment brought an action on the judgment, and after judgment signed in this action, the defendant sued out a writ of error on the first judgment, this was held no *supersedeas*.

Bishop v. Best, 3 Barn. & A. 275.

Where the defendant has admitted that the writ of error is for delay, it will not operate as a *supersedeas*.

Hawkins v. Snuggs, 2 Maule & S. 476.

But the declaration of the defendant as to his motive in bringing a writ of error, must be made after action commenced, in order to prevent the writ being a *supersedeas*.

Hamilton v. Scholefield, 6 Moo. 45; Baskett v. Barnard, 4 Maule & S. 331; and see Redford v. Garrod, 7 Taunt. 537; Eicke v. Sowerby, 1 Barn. & C. 287; Spooner v. Garland, 2 Maule & S. 474.

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And if one of several defendants who have severed in defence sues out a writ of error, the plaintiff cannot proceed to execution because one of the other defendants makes an admission that the writ was brought for delay.

Aarons v. Williams, 2 Bing. 304.

(For the 6 G. 4, c. 96, requiring bail to be given in all cases of writs of error, see tit. *Bail*, (B).)

## (1) To what Court a Writ of Error lies: And herein,

## 1. Of Writs of Error into Parliament.

THE court of parliament is the supreme court, where anciently causes of great consequence, as between the *magnates regni*, were heard and determined. Hence the House of Lords is the *dernier* resort, to which a writ of error lies; and therefore (a) if a writ of error is brought of a judgment in the King's Bench into the Exchequer Chamber, and there the judgment is reversed, yet a writ of error lies of such judgment into (b) parliament, and the lords may reverse such second judgment.

(a) Show. Parl. Cases, 24, 110; Vent. 334; Raym. 330; 2 Jon. 99; 2 Lev. 232. (b) When a record comes into parliament upon a writ of error, the king may assign certain earls and barons, and with them the justices, to determine the matter. 22 E. 3, 3; Ro. Abr. 789; 2 Bulst. 164. For the form of the writ, vide Show. pl. 12, and for the manner of proceeding thereon, vide Moore, 834; Cro. Ja. 341; Godb. 250; Ro. Rep. 14, 15; Noy, 76; Raym. 5, 383.

So, a writ of error lies into parliament upon a judgment given in B. R., either in a cause brought there by writ of error, or originally commenced there.

37 H. 6, 13; 11 E. 4, 9; Ro. Abr. 745. For the manner of obtaining and proceeding upon such writ of error, vide 4 Inst. 21; Godb. 247; Bulet. 162, 166; Moore, 834, p. 1122.—That a writ of error may be returnable *ad proximam sessionem parliamenti*. Dyer, 375; Rast. Ent. 805.—But no *supersedeas* ought to be granted upon a writ of error returnable *ad proximum parlamentum*. Vent. 31; Sid. 413.—Writ of error in parliament is no *supersedeas*, if it be not transcribed in fourteen days, and the parliament be dissolved. Bunb. 64.—If error is brought in parliament, though the House is prorogued, and the record has not been transcribed, the court will not on motion grant leave to take out execution. Bunb. 131.—If error in parliament is not transcribed in fourteen days, the defendant in error, on motion, shall be at liberty to take out execution, if it is not transcribed and certified in eight days. Bunb. 69.

And though upon a judgment in the King's Bench, since the 27 El. c. 8, the party may elect either to bring a writ of error in the Exchequer Chamber, or in parliament; yet, if the cause commenced in the King's Bench by (c) original writ, there lies no writ of error but into parliament. Also, if he elects to bring error into the Exchequer Chamber, regularly, he cannot after bring error into parliament upon the first judgment.

(c) Mellor v. Spatham, 1 Saund. 346; Redman v. Edolph, 1 Sid. 424, S. P.; Philips v. Bury, Carth. 180, S. P. In Wilson v. Lawes, Comb. 295, Lord Holt says, "It hath obtained that no writ of error lieth in the Exchequer Chamber, where the action was commenced here by original, but I never understood the reason of it." The words of the statute, § 2, are, "That where any judgment shall be given in the said Court of the King's Bench in any suit *first commenced there*." The reason would seem to be, that the suit in this case is not first commenced in the King's Bench, because it is founded on the original writ, which issues out of Chancery. And for a like reason, a writ of error lies not in the Exchequer Chamber upon a judgment affirmed on error in the King's Bench, but must be brought in the House of Lords. Heydon's case, 2 Bulstr. 162; Harvey v. Williams, 1 Ro. Rep. 264; Hartop v. Holt, 1 Salk. 263.]

And therefore it seems, that if a writ of error is brought upon a judgment in the Exchequer Chamber, where the judgment is affirmed, and after error,

(I) To what Court a Writ of Error lies.

is brought upon the same judgment in the parliament, this writ of error is no *supersedeas*; but, if the writ of error is brought upon the judgment in the Exchequer Chamber, it is a *supersedeas*.

Vide 2 Ro. Abr. 492; 2 Lev. 232.

[By § 12 of the statute of 6 Ann. c. 26, which established a Court of Exchequer in Scotland, a writ of error is given from that court to parliament.

See the statute 48 G. 3, c. 151, concerning appeals to the House of Lords from the Court of Session in Scotland.]

|| Since the union with Ireland, a writ of error lies from the superior courts in that country to the House of Lords.

There must be a warrant for the writ of error from the crown; and where it is against the king, the *fiat* of the attorney-general must be obtained, upon a petition, setting forth the errors intended to be assigned, accompanied with a certificate from counsel, that they are real errors. This practice was anciently used, as a mark of decency and respect; and though it appears to have been laid aside in the time of the usurpation, yet it has since been revived. It was not till the year 1640 that writs of error first began to be made out *ex officio*; and except in the case of the crown, the practice hath been ever since continued without law or warrant, as is noticed by Lord Hale in the following extract.

2 Tidd's Pr. 1103; Sav. 131; Salk. 264.

The writ of error in the ordinary courts of justice is *breve de cursu*, and grantable in Chancery of course; and so is the writ of error in parliament as to some purposes, and therefore made by the cursitor; but, considering that the Court of Parliament is an extraordinary court, whose principal end is to advise the king *circa ardua regni*; that such writs may be brought there for delay, and without any just cause; that the proceedings in parliament must necessarily be dilatory and expensive in respect of the intervention of public business, and their frequent adjournments, prorogations, and dissolution; and that suits for error in parliament are for the most part upon judgments given in the highest court of ordinary justice, the Court of King's Bench, where the proceeding is *coram ipso rege*, and where the causes are discussed by judges of great learning and experience; all these reasons considered, the writ of error in parliament ought not to pass the seal without a petition or bill to the king, and that bill signed by him. And the writ itself was anciently, and still ought to be *per regem*, or *per warrantum domini regis*; and this appears expressly by the books of 22 E. 3; 1 H. 7, 19, Flourdew's case; and Dy. 375, and by the constant endorsement of these writs, viz., *per regem*. And this course anciently obtained till the Long Parliament; where, by reason of the king's absence, he who then exercised the office of attorney-general did grant his warrant to the cursitor for the making of writs of error returnable in parliament, and the writ was endorsed *per warrantum attornati domini regis generalis*. And upon that account it hath been also practised since the Restoration, which is an error, and ought to be reformed.

Hale's Lords' Jurisdiction, c. 23, 25.

The writ of error is now obtained of the cursitor, as in other cases; and if the parliament be *sitting*, is made returnable before the king in his present parliament *sine dilacione*; if *prorogued*, at the *next session*; or after a *dissolution*, at the *next parliament*, specifying the day when it is to be holden.

2 Tidd's Pr. 1106; Lill. Entr. 248, 254; Ibid. 292; 1 Ventr. 31, 266; 1 Mod. 106. ||

## (I) To what Court a Writ of Error lies.

By the late act for the more effectual administration of justice, "writs of error upon any judgment given by any of the Courts of King's Bench, Common Pleas, and Exchequer, shall thereafter be made returnable only before the judges, or judges and barons, as the case may be, of the other two courts in the Exchequer Chamber, any law or statute to the contrary notwithstanding; a *transcript* of the record only shall be annexed to the return of the writ; and the court of error, after errors are duly assigned and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings, and give judgment, as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the court in which the original record remains; from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament." By this act, the several statutes relating to the bringing of writs of error, upon judgments in the Exchequer,<sup>(a)</sup> seem to be virtually repealed: and though the statute 27 Eliz. c. 28, for redress of erroneous judgments in the King's Bench, upon which a writ of error lies in the Exchequer Chamber, before the justices of the Common Pleas and barons of the Exchequer, would probably be considered still in force, yet that statute is confined to the particular actions enumerated therein, and does not extend to actions commenced by original writ, nor where the king is a party. The king, however, not being mentioned in the late act, may still bring a writ of error in parliament, in the first instance: And writs of error *coram nobis* in the King's Bench, or *coram vobis* in the Common Pleas, and the proceedings thereon, to reverse judgments in the *same* court, for error in fact, or in the process, &c., do not seem to be affected by the provisions of the late act.

(a) 31 Edw. 3, stat. 1, c. 12; 31 Eliz. c. 1; 16 Car. 2, c. 2; 20 Car. 2, c. 4. See Tidd's Prac. Sup. 182.

## 2. Of Writs of Error into the Exchequer Chamber.

As no writ of error lay of a judgment in the King's Bench, but in parliament, and as the subjects were often disappointed of their writ of error by the not sitting of parliament, or by their being employed in public business when they did sit; therefore,

By the 27 Eliz. c. 8, reciting, "That erroneous judgments given in the court called the King's Bench are only to be reformed in the High Court of Parliament; which Court of Parliament is not in these days so often holden as in ancient time it hath been, neither yet (in respect of greater affairs of this realm) such erroneous judgments can be well considered of and determined during the time of the parliament, whereby the subjects of this realm are greatly hindered and delayed of justice in such cases, it is enacted, That where any judgment shall at any time hereafter be given in the said Court of the King's Bench in any suit or action of debt, detinue, covenant, account, action upon the case, *ejectione firmæ*, or trespass, first to be commenced there, (other than such only where the queen's majesty shall be party,) the party plaintiff or defendant, against whom any such judgment shall be given, may, at his election, sue forth out of the Court of Chancery a special writ of error to be devised in the said Court of Chancery, directed to the chief justice of the said Court of the King's Bench for the time being, commanding him to cause the said record, and all things concerning the said judg-

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ment, to be brought before the justices of the Common Bench, and the barons of the Exchequer, into the Exchequer Chamber, there to be examined by the said justices of the Common Bench and barons aforesaid; which justices of the Common Bench, and such barons of the Exchequer as are of the degree of the coif, or six of them at the least, by virtue of this present act, shall thereupon have full power and authority to examine all such errors as shall be assigned or found in or upon any such judgment; and thereupon to reverse or affirm the said judgment, as the law shall require, other than for errors to be assigned or found for or concerning the jurisdiction of the said Court of King's Bench, or for any want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and that after the said judgment shall be affirmed or reversed, the said record and all things concerning the same shall be removed and brought back into the said court called the King's Bench, that such further proceedings may be thereupon, as well for execution as otherwise, as shall appertain."

And it is further enacted, § 3, "That such reversal or affirmation of any such former judgment shall not be so final, but that the party who findeth him grieved therewith shall and may sue in the High Court of Parliament for the further and due examination of the said judgment, in such sort as is now used upon erroneous judgments in the said Court of King's Bench."

This statute is confined to the particular actions enumerated therein, and does not extend to actions of replevin,(a) rescous,(b) *scandalum magnatum*,(c) ravishment of ward,(d) or *scire facias* (e) against bail, &c.; so that in these actions error will not lie in the Exchequer Chamber, but must be brought in parliament. In *scire facias* on a judgment against the party or his executors, it seems, that error lies in the Exchequer Chamber, *tam in redditione iudicii, quam in adjudicatione executionis*:(g) but not upon an award of execution only.(h)

2 Tidd's Pr. 1100. (a) 2 Ro. Rep. 434. (b) Ody v. Yate, Moore, 694. (c) Viscount Say and Seale v. Stephens, Cro. Car. 142; Sir W. Jon. 192, S. C.; Ley, 82, S. C.; Earl of Stamford v. Nedham, 1 Sid. 143; 2 Ld. Raym. 954. (d) Barnefeld v. Hutchins, 2 Ro. Rep. 134. (e) Prowse v. Turner, Yelv. 157; Vaughan v. Williams, Cro. Ja. 171; Nevill v. South, Cro. Car. 286; Lancaster v. Keyleigh, Ibid. 300; Sir W. Jon. 325, S. C.; Hartop v. Holt, 1 Ld. Raym. 98. But see Cockeayn v. Hawkins, Cro. Eliz. *constrd.* (g) Nevill v. South, Cro. Car. 286; Anon., Ibid. 464. (h) Bertie v. Clutterbuck, 2 Str. 1102; Andr. 287, S. C., by the name of Crow v. Maddock; Marquis of Powis's case, 3 Atk. 297.

But it is said to have been adjudged, that error lies in this court in an action on the statute of tithes; (i) but whether it lies in debt on the statute of usury was formerly doubted,(k) though it is now settled that it does.(l) It lies in debt *qui tam* on the statute for absents from church,(m) because, though the king is to have part of the penalty, he is not properly a party.

(f) Whitton v. Preston, 1 Sid. 240. (k) Id. Ibid. 1 Ventr. 49. (l) Lloyd v. Skutt, Dougl. 350. (m) Scott v. Knapton, Sir T. Raym. 275.

Errors in *fact*, being examinable in the King's Bench, cannot legally be assigned in the Exchequer Chamber; yet,(n) if a release of errors be pleaded in that court, it would seem they may try it, and award a *venire* under the seal of the Court of Exchequer.

Hopkins v. Weigglesworth, 2 Lev. 38; 1 Ventr. 207, S. C.; 3 Keb. 28, S. C.; Roe v. Moore, Com. Rep. 597. (n) Gomez Serra v. Munez, 2 Str. 821; Mosel. 93, 106, 113, S. C.

Although the statute directs the record and proceedings to be sent back into the King's Bench only *after the judgment shall be affirmed or reversed*,

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yet, if the plaintiff in error be nonsuited, or the writ of error determines by abatement or discontinuance, the record may be remitted; for the Court of Exchequer Chamber (a) have no power to grant execution; but it must be had in the King's Bench. But the judgment is not again in the King's Bench till a *remittitur* is entered; for without a *remittitur* it cannot appear to that court, but that the writ of error is still pending in the Exchequer Chamber; (b) and therefore, in such case, it is usual for the party succeeding in the original action to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution. (c)

Pecock v. Punter, 1 Anders. 143; Anon., 2 Anders. 123. (a) Lumley v. Nevil, Sty. 238. (b) Howard v. Pitt, 1 Salk. 261. (c) Giggeer's case, 1 Salk. 264.

Where a judgment is given against the plaintiff in the King's Bench, on a *special verdict*, by which the damages are assessed, the Exchequer Chamber or House of Lords may, in case of reversal, give a new and complete judgment for the plaintiff to recover those damages. But, (d) where the damages are not assessed, as when judgment is given on *demurrer*, the Exchequer Chamber or House of Lords cannot give a new and complete judgment, but only an interlocutory judgment *quod recuperet*; and the transcript being remitted, the Court of King's Bench will award a writ of inquiry, and give final judgment.

Phillips v. Bury, 1 Salk. 403; 1 Ld. Raym. 9, S. C.; Skinn. 514; Denn v. Moore, 1 B. & P. 30. (d) Winchcomb v. Shephard, Cro. Eliz. 746; Faldowe v. Ridge, Cro. Ja. 207; Yelv. 75, S. C.; Noy, 129, S. C.; Witherley v. Sarsfield, 1 Show. 125.

By 31 El. c. 1, § 2, reciting the above act of 27th of Eliz., and reciting also that "it doth many times fall out, that the full number of the said justices of the Common Bench and barons of the Exchequer, so authorized by the said statute, sometimes for want of health, sometimes through other weighty services and earnest occasions, cannot be present at the days and times of the returns and continuances of the same writs of error, and by reason of their absence and not coming, the said writs of error are discontinued, justice delayed, and the parties put to begin new suit, to their great charges and prejudice:" it is enacted, "That from henceforth, if the full number of the justices and barons authorized by the said act come not at the day or time of return or continuance of any such writ of error, that it shall be lawful for any three of the said justices and barons, at every of the said days and times, to receive writs of error, to award process thereupon, to make and prefix days from time to time of and for the continuance of all such writs of error as shall be there returned, certified or pending; and that the same shall be to these respects as good and available as if all the justices and barons authorized by the same act were present; and that the justices and barons authorized by the said statute may, after that, proceed in all those cases in such sort to all intents as they may do in other cases mentioned in the said statutes, any not-coming of any the said justices or barons notwithstanding.

§ 3. "Provided, nevertheless, that no judgment shall be given in any such suit or error, unless it be by such full number of the said justices and barons as are in that behalf authorized and appointed by the said act."

§ 4. "Provided, also, that the party plaintiff or defendant, against whom any such judgment hath been heretofore or hereafter shall be given in the said Court of King's Bench, may, at his election, sue in the High Court of Parliament for the reversal of any such judgment as heretofore hath been used or accustomed."||

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## 3. Of reversing Judgments in the Court of Exchequer.

Before the statute of 31 E. 3, st. 1, c. 12, (a) errors in the Exchequer were sometimes examined in (b) parliament, and sometimes before commissioners, by force of the king's writ under the great seal.

4 Inst. 72; Moore, 566. (a) Upon motion for the allowance of a judgment in the Exchequer in the 24th of Elizabeth, Manwood said, This court is grown to be of little regard; for in two hundred years there were but six writs of error, and now there are as many in every term. Sav. 31. (b) Ro. Rep. 14, 15.

By that statute, "It is accorded and established that in all cases touching the king (c) or other persons, where a man complaineth of error made in the Exchequer, the chancellor (d) and treasurer (e) cause (g) to come before them in any chamber of council nigh the Exchequer the record of the process out of the Exchequer, and take to them\* justices and other sage persons, such as shall seem to them fit to be taken: and cause also to be called before them the barons of the Exchequer to hear their informations and the reasons of their judgment, and thereupon duly examine the business; and if any error be found, correct it, and amend the rolls, and after send them into the Exchequer in order to do thereof execution as appertaineth."

(c) The king may have error here. Vide Co. 42 a; 3 Co. 1. (d) By 31 Eliz. c. 1, the not coming of the lord chancellor or lord treasurer, or either of them, at any day of adjournment, shall be no discontinuance, so as one of them, or both chief justices come, and are present.—But this statute not providing remedy where they came not at the return of the writ of error, vide 2 Leon. 59, it was enacted by 16 Car. 2, c. 2, that if the chief justices, or either of them, or the chancellor or treasurer shall not come at the return of the writ of error, it shall be no abatement or discontinuance; but no judgment shall be given, unless both chancellor and treasurer shall be present. (e) Intended of the treasurer of England, and at the time of making this statute, the offices of treasurer of England and of the Exchequer were in several hands. (g) Though the barons only are judges, yet the treasurer together with them hath the custody of the records, and therefore the writ of error is to be directed to him and the barons, and it is, though the lord treasurer and treasurer of the Exchequer are the same person. 4 Inst. 105; Sav. 35, 36.—\*If the chancellor and treasurer do not call in the other justices, it seems to be error. 8 H. 7, 13.

In the Bankers' case, adjudged in the Exchequer, which came before the lord keeper, &c., pursuant to the above statute, the lord chancellor and three of the judges were of opinion, that the judgment of the Exchequer should be reversed; and then the question was, whether the judgment of the court should pursue the opinion of the majority of the judges, or that of the lord keeper and the three judges? And three of the judges were of opinion, that the majority of judges should govern this judgment; but the others being of a contrary opinion, the judgment was reversed, which was pronounced by my Lord Keeper Somers.

Carth. 388. Vide the Bankers' case.

[A writ of error from a judgment in the Court of Exchequer issued returnable in the Exchequer Chamber, pending which the plaintiff in error died; whereby the writ abated. Lord Chancellor Hardwicke, and the two Chief Justices, Lee and Willes, were of opinion, that the new writ could not be properly to the Exchequer Chamber, because the record did not reside with them, and the words of the writ are *record. quod coram vobis residet*; for only a transcript of the record is sent into the Exchequer Chamber, and the record itself remains in the Court of Exchequer. But the court made a rule for a *remittitur* to be entered on the record, together with a suggestion of the death.

Rex v. Cotton, 2 Ves. 298; Parker, 142.]

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#### 4. Of Writs of Error into the King's Bench.

The Court of King's Bench superintends the proceedings of all other inferior courts, (a) and being the king's own court in which he formerly sat in person, by the plenitude of its power corrects the errors of those courts. Hence it is, that (b) a writ of error lies in this court of a judgment given in the (c) King's Bench in (d) Ireland.

(a) || Except in London, and some other places. 2 Burr. 777. || (b) 34 Ass. 7; 37 Ass. 5; Ro. Abr. 745; F. N. B. 22; but for this vide 4 Inst. 356; Keilw. 202; 5 Co. 18 a; Calvin's case, Leon. 55; Yelv. 118; Style, 386; Vaugh. 290, 402; and per Ro. Rep. 17, it is said, per Coke, that Ireland was annexed to the crown of England by conquest, and therefore, &c.; but *qu.* 2 Bulst. 163.—It lies not in the parliament of Ireland. Ro. Rep. 17, per Coke. (c) Upon a judgment in *Banco* there, it must be brought in *Banco Regis* here, &c., F. N. B. 22; Yelv. 118. [By stat. 23 Geo. 3, c. 28, § 2, no writ of error or appeal from the courts in Ireland shall be received or adjudged in any court in this kingdom.] || But since the Union a writ of error lies from the superior courts in that country to the House of Lords. || (d) Upon a judgment in Calais, when under the subjection of the King of England, a writ of error lay in B. R. 4 Inst. 282; Raym. 174, S. P., cited; Vaugh. 290, 402, S. P., cited; but yet vide Keilw. 202, S. P. *cont.*—But it lies not upon any judgment in Scotland, because a distinct kingdom, and governed by distinct laws. Show. Par. Cases, 33. Vide *supr.* as to the Court of Exchequer in Scotland.

So, a writ of error will lie of a judgment given in Chancery on the common law side, called the *petty bag*, as upon a *scire facias* upon a recognisance, although both courts were before the king himself, and to (e) some purposes are the same.

Ro. Abr. 744, 745; Ro. Rep. 287; 29 Ass. 47; 4 Inst. 80; Dyer, 315, and vide Moore, 570, pl. 778. (e) As, if issue be joined in Chancery, it must be tried in the King's Bench, and the record delivered over *per proprias manus* of the chancellor. 3 Saund. 23; 2 Keb. 621; Lev. 283; Sid. 436; Mod. 29, Jefferson and Dawson. [No traces of any writ of error being actually brought from the common law side of the Court of Chancery into B. R. are to be met with later than the fourteenth year of Queen Elizabeth, A. D. 1572; Dy. 315. And Lord Keeper North in 1682 declared, that no such writ of error lay, that the books were founded only on the single opinion of Lord Dyer in the above case, and that he would grant injunctions against them. 1 Vern. 131; 1 Eq. Cas. Abr. 129. This opinion of the lord keeper, Sir W. Blackstone says, seems not to have been well considered. However, there are respectable authorities in confirmation of it. Lamb. Archion. 69. The opinion of Mr. Justice Choke, 37 H. 6, 13 b, and 11 E. 4, 9 a; Bro. tit. *Error*, pl. 95. At the same time it must be acknowledged, that the learned commentator cites authorities equally respectable in opposition to it. 18 E. 3, 25; 27 Ass. 24; 29 Ass. 47.] || In the case of Fox-with v. Tremaine, 1 Vent. 102, one of the points there resolved by the Court of King's Bench was, that a writ of error did lie out of the petty bag into that court on an error in fact. ||

If a peer be attainted before the lord high steward, a writ of error lies in the King's Bench of such attainder, and the party has no other remedy.\*

Sid. 208; Lev. 149, per Twisden. \* Error lies in parliament, upon an attainder for treason; for though the stat. 33 H. 8, 20, says, that judgment of attainder by common law shall be of as good force as if done by authority of parliament, this shall be intended of a lawful attainder. Hale's Hist. Pow. and Juried. of Parliament, 19; 4 Inst. 21.

A writ of error lies of a judgment in the Common Pleas into the King's Bench, which only can correct the errors of that court, and from thence into parliament.

4 Inst. 22.

A writ of error lies into the King's Bench of a judgment in a county palatine; for though these are superior courts and have *jura regalia*, yet their jurisdiction is derived from the crown.

4 Inst. 214, 223; Ro. Abr. 745.



(I) To what Court a Writ of Error lies.

If an erroneous judgment be given in Durham in the Chancery upon proceedings according to the common law, or before the justices of the bishop, a writ of error lies before the bishop himself, and if he gives an erroneous judgment, error lies in B. R.

4 Inst. 218.

If the justice in eyre gives an erroneous judgment at a justice seat in a forest, a writ of error lies thereupon in B. R.

4 Inst. 297.

By the 34 & 35 H. 8, c. 26, § 113, errors in judgment in pleas real and (a) mixed, before the justices in their Great Sessions in Wales, shall be redressed by error in B. R. in England; but errors in pleas personal shall be reformed before the (b) president and council.

(a) In ejectment, Griffith's case, Moore, 248, pl. 391, adjudged; Cro. Eliz. 104, adjudged. (b) This court is dissolved by the statute of 1 W. & M. stat. 1, c. 27, and by the same act, errors in pleas personal are to be redressed as errors in pleas real and mixed were by 34 & 35 H. 8, c. 26.

5. Of Writs of Error into the Common Pleas and Inferior Courts.

If an erroneous judgment be given in (c) London, or other place, which is a court of record, the party grieved shall have a writ of error, and this writ may be returned into the Common Pleas, or into the King's Bench, at the pleasure of him who sueth the same.

F. N. B. 44. (c) Though error lies not in B. R. upon a judgment given in London, yet it lies upon a judgment given at Newgate, which is upon commission in their sessions. 2 Leon. 107, so held, and vide 2 Ro. Rep. 97; 2 Lev. 223.†——† If error be of a judgment in the sheriff's court in London, it shall be before the mayor and sheriffs in the hustings. 4 Inst. 248; F. N. B. 22, (H.) Vide Priv. Lond. 164, 168.

No writ of error lies in *Banco* or *Banco Regis*, upon a judgment given within the Five Ports; but by custom such judgment is examinable by bill in nature of a writ of error *coram domino custode seu guardiano quinque portuum apud curiam suam de Shepway*.

4 Inst. 224. See the Courts of Cinque Ports.

If a judgment be given in the Court of Stannaries of the duchy of Cornwall, (d) no writ of error lies upon this in *Banco* or *Banco Regis*, because it hath not been used; but of this there may be an appeal to the guardian of the Stannaries, and from him to the prince; and when there is no prince, to the king's council.

Ro. Abr. 745, l. 20. (d) That is, for any matters touching the Stannaries; otherwise, upon a judgment there given upon collateral matters. 2 Bulst. 183, per Coke, Chief Justice, said to have so been resolved upon a conference by all the judges, as is seen recorded in Chancery in the petty bag office. Q. Owen. 8; Sid. 233.

A writ of error lies in the Common Pleas upon a judgment given before the judges of assize.

Ro. Abr. 745; but vide Leon. 55; 3 Leon. 159; Dyer, 250; Moore, 78; And. 12; N. Bendl. 153; Cro. Eliz. 26; Carter, 222.

Upon a judgment given in the Hustings in London, a writ of error lies at St. Martin's before certain justices.

18 E. 3, 14; Ro. Abr. 745; Lev. 309; 2 Saund. 253, S. P., and that upon a judgment of the said justices, a writ of error lies in parliament, vide 2 Leon. 107. It lies not from the courts of the city of London to B. R., though it does lie thither, from all other corporation courts. 2 Burr. Rep. 777.—An appeal lies to the House of Peers from a decree in the mayor's court. See the case of Littlebury and Buckley, *post*, tit. Evidence, (G.) [In the case of Harrison v. Evans, 6 Br. P. C. 181, on a judgment in the sheriff's court in London, a writ of error was returnable in the Court of Hustings

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there, and on the judgment of that court, a special commission of errors was directed to five of the twelve judges, or any two of them, upon whose judgment a writ of error was brought returnable in parliament.]

§ When any error has occurred in the proceedings of the court below, different from the course of the common law, in any stage of the cause, either in civil or criminal cases, the writ of certiorari, and not the writ of error, is the proper remedy to correct such error, unless some other statutory remedy has been given.

*Davol v. Davol*, 13 Mass. 265; 5 Binn. 27; 1 Gill & J. 196; 2 Mass. 245; 11 Mass. 466; 2 Virg. Cas. 270; 3 Halst. 123; 3 Pick. 194; 4 Hayw. 100; 2 Greenl. 165; 8 Greenl. 293; 1 Overt. 131; 2 Overt. 109; 8 Vern. 271.g

## 6. Where a Writ of Error lies in the same Court in which the Record is.

If upon a judgment in B. R. there be error in (a) the process, or through the default of the clerks, it shall be reversed in the same court by writ of error sued there before the same justices.

F. N. B. 21; Poph. 181; Ro. Abr. 746. (a) And therefore the 27 Eliz. c. 8, which gives a writ of error into the Exchequer Chamber, extends not to errors in fact, for these might have been examined in B. R. 2 Lev. 38; Vent. 207; Cro. Ja. 5, S. P. adjudged.

So, if one is indicted of treason or felony in B. R., or, being indicted elsewhere, the indictment is removed in B. R., and by process of that court he is erroneously outlawed, and so returned; a writ of error may be brought in B. R. for the reversal thereof.

3 Inst. 214.

Also, if an erroneous judgment in point of law be given in B. R. upon an indictment in London, a writ of error may be brought in the same court; for though in civil cases error does not lie in the same court, unless for a matter of fact; yet in criminal cases it lies as well for an error in law as fact.

Sid. 208, Cornhill's case, adjudged; Lev. 149, S. C., adjudged, and said, though it may be brought in parliament, that does not prove but it may be brought here also.—But according to 1 Sid. 208, it seems that this was only for error in fact. And *qu.* If it could be for error in law? And see *infra*.

In (b) Fitz. N. B., it is said, that a judgment cannot the same term it is given be reversed in B. R. without a writ of error, though such judgment may in the Common Pleas. But it does not seem that there is any foundation for this (c) distinction, for, during the term in which any judicial act is done, the record remains in the breast of the judges of the court; and therefore the roll is alterable during the term, as they shall direct.\*

(b) Fitz. N. B. 21. (c) Moore, 186, pl. 332; Yelv. 157; Poph. 181. But when the term is past, the roll is the record, and admits of no alteration. Co. Litt. 260 a; vide tit. *Amendment*. \*An erroneous judgment may be stayed, by moving in arrest of judgment, within four days.

But, if an erroneous judgment be given, and the error lies in the judgment itself, and not in the (d) process, a writ of error does not lie in B. R. of such judgment.

Ro. Abr. 749; 7 H. 6, 30. (d) As, if the court awards an exigent where they ought to award a *pluries capias*. Ro. Abr. 746.—They may reverse their own judgment for false Latin, because this is not the default of the court, but of the clerks. 7 H. 6, 30; Ro. Abr. 746.—Where by reason of fraud, &c., a judgment may be vacated after the term in which entered, vide 2 Ro. Abr. 724.—If judgment be given in an action in B. R., and there also execution be awarded, a writ of error *quod coram vobis residet* does not lie in B. R. in *adjudicatione executionis*. Ro. Abr. 746, 747. Ro. Rep. 65, S. C.

If two bring a writ of error in B. R., upon a judgment in an assize, and pending the writ one of the plaintiffs dies, and after, the court, not knowing

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of the death of one of them, reverses the judgment; and after he, against whom the judgment was reversed, brings a writ of error in the same court of B. R., and assigns the death of one of the plaintiffs in the first writ of error, which was the act of God, not the error of the court, it seems the writ well lies.

Ro. Abr. 747; Cro. Eliz. 105, like point adjudged; 4 Leon. 60, S. P.

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of error for insufficiency is quashed in the King's Bench, the plaintiff in error may have a new writ *coram vobis residen.*, but such new writ is not a *supersedeas* of itself (*a*) as the first writ was, and therefore he must move the court for a *supersedeas*, and put in bail thereon.

Carth. 368, 369. (*a*) || The writ of error in this case is or is not a *supersedeas*, according to circumstances, and these circumstances the court will inquire into on motion for leave to take out execution. In case, therefore, of error brought *coram nobis*, the practice is that the defendant in error shall move the court for leave to take out execution. *Birch v. Triste*, 8 East, 412; *Ribout v. Wheeler*, Sayer, 166. || [In all cases where the record is actually removed, and the writ of error is quashed, error *coram vobis* lies: *secus*, where the record is never removed, as is the case where the writ is quashed for variance between the writ and the record. *Ginger v. Cooper*, 1 Str. 607; 2 Ld. Raym. 1403.]

So, if such second writ be quashed for insufficiency, yet the court will grant a new second writ of error *coram vobis residen.*, as also a *supersedeas* on putting in bail; for such second writ being void, is as if there had been none before.

Carth. 369, 370. *β* The writ *coram nobis* is of course, when bail is put in, otherwise a rule *nisi* must be obtained. *Gibbs v. Travenion*, 8 Dowl. 140. Such a writ is not itself a *supersedeas*, but leave must be obtained before an execution can be obtained. *Sample v. Turner*, 6 Mees. & W. 152. See *Levi v. Price*, 2 Mees. & W. 533; 5 Dowl. 775; *Williams' Adm. v. Applebury*, 1 H. & M. 206.*g*

[Error *coram vobis* does not lie in the King's Bench after error brought in the Exchequer Chamber, and the judgment affirmed; for before the statute of Eliz. the King's Bench could not examine its own errors in fact after an affirmance in parliament; and the Exchequer Chamber is now in the same degree, with regard to the King's Bench in those cases within the statute, as the parliament was before.

*Lambell v. Pretty John*, 2 Str. 690.

Error *coram vobis* lies not in the Exchequer Chamber.

2 Cr. Pr. 337.

*β7. Of Writs of Error into the Supreme Court of the United States.*

A case may be brought to the Supreme Court of the United States from the highest court of law or equity in a state, under the 25th section of the judiciary act of 1789, by writ of error.

*Buel v. Van Ness*, 8 Wheat. 312.

The writ of error may be directed to any court in which the record and judgment on which it is to act may be found; if, therefore, the record has been remitted, by the Supreme Court in a state, to the inferior court, it may be brought by writ of error from that court.

*Gelston v. Hoyt*, 3 Wheat. 246.

A writ of error does not lie from the Supreme Court to reverse the judgment of the Circuit Court, in a civil action which has been carried up to the Circuit Court from the District Court by writ of error.

*United States v. John Goodwin*, 7 Cranch. 108.*g*

(K) Of assigning Errors: And herein,

1. *Of the Manner of assigning Errors.*

UPON a writ of error for want of (a) assigning errors, judgment is not affirmed, (b) but execution goes upon the first judgment, so that the party can have no costs; but his remedy must be upon the recognisance, by which he is bound to prosecute with effect.

Sid. 294, Cowper and Price; 2 Keb. 52, 71, 75, S. C. (a) Error cannot be assigned in a record which is not in the court where the writ of error is brought. 11 H. 4, 47 b; Ro. Abr. 760, 769.—Assignment of error is in the place of a declaration. 9 East, 4, 32.—Error may be assigned in every part of the record. Ro. Abr. 760.—May be moved to the court, though not particularly assigned. 5 Co. 37 b. Error in fact or in law may be assigned on a judgment by default. Ro. Abr. 756; Style, 122. (b) If a record be removed out of the Common Pleas into the King's Bench by writ of error, and the plaintiff will not assign his error, then a *scire facias* shall issue forth *quare executionem habere non debet*; and, upon summons and two *nihils* returned, the plaintiff shall have execution. 2 Leon. 107. [But a *scire facias*, it seems, cannot issue, till the transcript of the record below is removed; and therefore the defendant in error, if the plaintiff is dilatory, must give a rule to transcribe; and if the plaintiff will not do it, he may then *non pros* the writ of error. Ca. temp. Hardw. 351.]

The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; wherefore if the plaintiff in error delay to sue forth his *scire facias ad audiendum errores*, the defendant hath no other way to compel him, but by suing out a *scire facias quare executionem non, &c.*, and if, upon such *scire facias*, the plaintiff in error doth not plead, that his errors are assigned, but suffers judgment to pass upon two *nihils*, no errors afterwards assigned shall prevent execution.

Carth. 40, 41, *per* Holt, C. J., where the errors were assigned in a private manner, without giving notice to the defendant in error.

And by a rule of the Court of King's Bench, if the plaintiff in error doth not assign his errors, and give a copy of them to the defendant's attorney in error, by or before the time given by the rule on the *scire facias* is out, the defendant's attorney in error may enter judgment on the *scire facias*, and take out execution thereon, but can have no costs, unless he gives a rule for the plaintiff to assign error on record; which, if he doth not do, he may be non-pressed, and then the defendant in error shall have his costs.

Also, by another rule of the same court, when the plaintiff in error hath assigned the general errors, he must give a copy of them to the defendant's attorney, who may plead *in nullo est erratum* to it immediately, and enter both on the roll, paying the plaintiff's attorney 2s. 4d. for the same.

If the defendant in error sues out a *scire facias quare executionem non debet*; this is merely collateral to the record removed, and yet by matter *ex post facto* may become a record; as, if the plaintiff, upon the return of the *scire facias*, appears, and pleads a release, or other matter, as he well may, then this is a record annexed to the first record removed; but, if upon the return of the *scire facias*, the plaintiff appears, and assigns errors, or hath a day given him to assign them, and upon this record assigns his errors insufficiently; this *scire facias* is but a piece of paper filed to the record, no proceedings being thereupon.

Yelv. 6, 7.

In a writ of error it is no good assignment of error, *quod in omnibus erratum est*; for the court is not bound to inquire of the errors, if the party does not show them.

6 E. 4, 6; Ro. Abr. 761; Bro. *Attaint*, 86.

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In a writ of error to reverse an (a) outlawry, errors cannot be assigned by attorney, but the party must appear in person.

2 Leon. 82; Cro. Eliz. 611, S. P. Wade et Ux v. Smith, where the husband and wife being outlawed, and the wife refusing to appear, the outlawry could not be reversed, and vide Carth. 7, S. P., where a difference was taken, that where the error appears on the face of the record it may be assigned *per attornatum*, but no opinion given thereon. (a) A person attainted of treason or felony, before he can have a writ of error to reverse the attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 Hawk. P. C. c. 50, § 11.—And no such writ of error is to be allowed without an express warrant from the king, or the consent of the attorney-general. Sid. 69; Bulst. 71; 3 Mod. 42; Ro. Rep. 175.

[A defendant convicted for a misdemeanor, and in execution for the fine, may, with leave of the court, assign errors by attorney.

Rex v. Stapleton, 1 Str. 443.]

If two bring several writs of error, and several *scire facias*'s to reverse a judgment in an assize against them, they may assign errors jointly.

11 H. 4, 92 b; Bro. Error, 50; Ro. Abr. 761, S. C.

If a writ of error upon a judgment in an assize be brought by four, and only one appear, and the others make default, he cannot assign errors alone, till the others are summoned and severed.

Yelv. 3, 4, Cromwell and Andrews; Cro. Eliz. 891, S. C., adjudged. [In such case, he must move the court for time to assign his errors, till the others can be summoned and severed. Frescobaldi v. Kinaston, Str. 783.]

So, if upon a judgment in a *quare impedit*, a writ of error be brought by the bishop and incumbent, the incumbent only, without summons and severance, cannot assign errors.

Cro. Ja. 94, Lancaster and Law, adjudged.

If two are outlawed in an appeal of murder, and they bring a writ of error to reverse it, and one appears, but the other does not, he shall not assign errors till the other does; because he hath joined with him in the writ of error.

Sid. 316, The King and Tothill, adjudged; but vide 2 Ro. Rep. 490.

Two brought a writ of error, and made two attorneys; upon the *scire facias*, the one attorney assigned error, to which the defendant took issue, and then the other would plead in abatement of the writ: it was held *per Cur.*, if one of the plaintiffs had made default, he should be severed; but, if they go on, they must proceed jointly; and if one attorney will assign error, &c., without authority from both, we cannot help him, let him take his remedy against the attorney.

6 Mod. 40, Shepherd and Baily v. Orchard, Lev. 146.

[A writ of error cannot be non-prossed without a rule to assign errors. But, where neither plaintiff in error nor his attorney could be found, so as to be served with the rule, the court of K. B. ordered, that fixing the rule up in the King's Bench office should be good notice.

Leith v. McFarlan, 3 Burr. 1772; Thompson v. Baker, Ca. temp. Hardw. 130.]

Where a judge's order for time to plead has been obtained, the defendant cannot assign for error the want of an original writ.

Hoggett v. Higinson, 7 Moo. 311.

A bill may be filed to warrant a judgment after the want of a bill has been assigned for error; for if there is a bill on the file of the proper term, the court will not inquire how it came there.

French v. Cook, 1 Taunt. 125; and see 2 H. Black. 608.

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## (K) Of assigning Errors.

## 2. Of assigning Errors in Fact and in Law.

The plaintiff in error cannot assign error in (a) fact and error in law together; for these are distinct things, and (b) require different trials.

Ro. Abr. 761; Sid. 147; Leon. 105.  $\beta$  The plaintiff in error is, in general, confined to the objections taken at the trial, and stated on the face of the bills of exceptions. *Baring v. Shippen*, 2 Binn. 168. See 7 S. & R. 277; 6 S. & R. 12. But see *Pike v. Gandall*, 9 Wend. 149. And error cannot be assigned when the matter decided, and which is the subject of complaint, is collateral to the action. *Irwin v. Gallaher*, 8 S. & R. 528. $\gamma$  (a) As that he was under age when he levied a fine. *Raym.* 231; *Vent.* 252.—That the plaintiff was a feme covert. Ro. Abr. 761.  $\beta$  Error in law and error in fact cannot be assigned together. *Moody v. Vreeland*, 7 Wend. 55. $\gamma$  (b) Viz., Matters of fact to be tried by a jury, those of law, i. e. those appearing on the face of the record, by the judge before whom the record is removed. *Yelv.* 58.  $\beta$  In New York, the court for the correction of errors has no jurisdiction to reverse a judgment of the Supreme Court for errors in fact, unless the question has been first examined and decided upon a writ of error *coram vobis*, in that court. *Davis v. Packard*, 6 Wend. 327. $\gamma$

[And as error in fact and error in law cannot be assigned on one writ; so, after affirmance on error in law assigned, error *coram vobis*, and error in fact assigned, shall not be allowed.

*Burleigh v. Harris*, 2 Str. 975.]

If the plaintiff in error assigns error in fact and error in law, which are not assignable together, and the defendant in error pleads *in nullo est erratum*; this is a confession of the error in fact, and the judgment must be reversed; for he should have (c) demurred for the duplicity.

*Style*, 69; *Lev.* 6; *Salk.* 268, pl. 15, 270, pl. 18; 3 *Salk.* 399, pl. 3; 6 *Mod.* 113, 206; 2 *Ld. Raym.* 1005. (c) Where the errors assigned were, 1. That the declaration was *minus sufficiens in lege*. 2. That judgment was given for the plaintiff, when it should have been for the defendant. 3. That the plaintiff in the action died before the verdict given; and though it was agreed, that this assignment of matter of fact and matter of law was double, and would have been ill on a general demurrer; yet the court held, that the advantage thereof was lost by pleading *in nullo est erratum*. *Carth.* 338, 339, *Edmonds* and *Probert*.

Also, if an error in fact be well assigned, *in nullo est erratum* is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country.

*Sid.* 93; *Raym.* 59.

But, if an error in fact be ill assigned, *in nullo est erratum* is no confession of it; as (d) if it be assigned, that such a one at the time of the return of the *venire* was not sheriff, and the record be removed into B. R. by *certiorari*, there, *in nullo est erratum* is no confession of that error, because the record is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*.

*Cro. Ja.* 12, 29, 529; *Raym.* 231. (d) *Cro. Car.* 421; Ro. Abr. 758

So, if the plaintiff in error assigns an error in fact, viz., that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though the defendant in error pleads *in nullo est erratum*, yet it shall not amount to a confession, but shall be taken only for a demurrer.

*Yelv.* 58, *King v. Gosper* and *Shire*. [This case is not law; where error in fact is assigned, the plaintiff must conclude with an *averment*, in order to give an opportunity of trying the fact by the country, if the defendant in error chooses it. *Sheepshanks v. Lucas*, 1 *Burr.* 412; *Carth.* 367.

Also, if an error in fact that is not assignable be assigned, and *in nullo est erratum* be pleaded, it is no confession; as, if it be assigned, that at such a

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day there was no Court of Common Pleas sitting; because that is against the record; and in such case *in nullo est erratum* is only a demurrer. So, if a man say he did not appear, and the record say he did, *in nullo est erratum* is no confession, but a demurrer, because it is (a) against the record.

Cro. Car. 12, 29, 52; Yelv. 58; Raym. 231; Vent. 252; 3 Keb. 259; Lev. 76. (a) If a man appear and plead as a prisoner in *custodia maresch.*, he cannot after assign for error, that he was not in *custodia maresch.* Cro. Ja. 568; Hob. 264; Ro. Abr. 762.

After errors assigned, and a release pleaded by the defendant, the plaintiff discontinued; and because there was manifest error in part of the record remaining in B. he obtained a writ out of Chancery to the chief justice to remove the residue of the record, which being removed in B. R., he would assign errors upon a new part removed: it was ruled *per Cur.*, that inasmuch as the first writ was discontinued, and this a new writ, the plaintiff is not tied to the former errors, but may show others at his pleasure; for it is now as if none were assigned before, and he may assign other errors out of the record; and the removing of the record in this manner was held allowable. But this being entered upon another roll, it was held a misentry, and the plaintiff was put to a new writ of error.

Yates and Windham, Cro. Eliz. 155, 281; 2 Leon. 2, S. C.

Irregularities in the conduct of the jury in the court below cannot be assigned for error.

United States v. Gillies, 1 Pet. C. C. R. 159.

It cannot be assigned for error that the charge of the court was drawn up by one of the counsel in the cause.

Selin v. Snyder, 11 S. & R. 319.

It cannot be assigned for error that the court declined answering a question on a point of law, put by a juror.

Krider v. Lafferty, 1 Whart. 303.

Two executors confessed a judgment to a copartnership, of which one of the executors was a member; it was held to be an error in fact, for which the judgment was reversed.

Pearson v. Nebbit, 1 Dev. 315.

Nothing of which the party could have taken advantage in the court below can be assigned for error in fact.

Wetmore v. Plant, 5 Conn. 541.

3. Of assigning that for Error which appears contrary to the Record.

It seems a general rule, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

Ro. Abr. 757.

Hence it is, that in a writ of error to reverse a fine, the plaintiff cannot assign, that the conusor died before the teste of the *dedimus*, because that (b) contradicts the record of the conusance taken by the commissioners, which evidently shows that the conusor was then alive, because they took his conusance after they were armed with the commission, and the *dedimus* issued.

Dyer, 89; Ro. Abr. 757; Cro. Eliz. 469. (b) But the plaintiff in error may say, that after the conusance taken, and before the certificate thereof returned, the conusor

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died, because this is consistent with the record. Ro. Abr. 757. Vide head of *Fines and Recoveries*.

A consuance of a fine was taken before R. M., one of the justices of the Common Pleas, and after, in the prosecution of the fine, the *dedimus* was directed to Sir R. M., he being after the consuance made a knight, who returned the *dedimus* with his name and title; and this was assigned for error, that the person who took the consuance was not the same who was empowered to take it; but it was not allowed, because it contradicts the record, which is, that the *dedimus* was directed to Sir R. M., and that Sir R. M. by virtue thereof took the consuance.

Arundel and Arundel, Yelv. 33; Cro. Eliz. 677, S. C.; Ro. Abr. 757; Cro. Ja. 11, 12; 3 Mod. 141, S. C. cited.

If a writ of error be brought upon a judgment in an inferior court, and the record certified of a court held before the mayor, bailiffs, and burgesses of A by custom, it cannot be assigned for error, that there is no such custom, for this is contrary to the record, and even what the writ of error itself supposes, viz., that they have a court.

Whistler and Lee, adjudged, 2 Bulstr. 243; Ro. Rep. 53, S. C.; Cro. Ja. 359, S. C.; and *per totam Curiam*, this assignment being against the record, it is not receivable; wherefore the judgment was affirmed.

If, upon diminution alleged, the plaintiff in error procures an original to be certified, and the defendant surmises there is a good original; and upon a new *certiorari* granted that is certified; the plaintiff in error cannot assign that the proceedings were upon the first writ, for that is contrary to the record; for when there is a good writ to warrant the proceedings, a man shall never be admitted to say the proceedings were upon the bad writ.

Cro. Ja. 597, Johns and Bowen; Palm. 428.

If the defendant appears by John Green, his attorney, it cannot be assigned for error, that the said John Green was dead before the day of appearance, because that is against the record.

Cro. Car. 53, Morris and Fletcher, adjudged upon a writ of error in the Exchequer Chamber. [Nor can it be alleged that the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. Plummer v. Webb, 2 Ld. Raym. 1415.]

In a writ of error upon a judgment in the Palace Court held *coram Jacobo Duce Ormond*, it cannot be assigned for error, that the duke was not there, because that is contrary to the record, though in fact the court was held before his deputy, according to the patent.

Molins and Wheatly, Lev. 76; Sid. 94; Keb. 355, S. C., adjudged.

In a writ of error upon a judgment in an inferior court, it may be assigned for error, that the mayor, who was the judge, had not received the sacrament, and taken the oaths, according to the 25 Car. c. 2, because his office is made void, and so the proceedings *coram non iudice*.

Kipply and Tuck, 2 Lev. 184; 2 Jon. 81, S. C., adjudged *per Cur. præter* Wild.; 3 Keb. 606, 665, 721, S. C., adjudged *nisi*; but vide 2 Lev. 242; 2 Jon. 137, S. P., adjudged *cont.*

[Where in the description of the justices of assize, A & B just., &c., *ad capiend. iuxta formam*, &c., the word *assizes* was omitted; yet, as it appeared from other parts of the record, that they were justices of assize, the court held, that this could not be assigned for error, inasmuch as it would be contradictory to the record.

Baker v. Thompson, Ca. temp. Hardw. 166.



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If A B is sworn upon the principal panel, and another of the same name is sworn upon the *tales*; it shall not be assigned for error that the A B first sworn, and A B the talesman were one and the same person, so as to make it a trial by eleven jurors only; for this is contrary to the record, which says, that they who were sworn on the *tales* were *alii de circumstantibus*; he could not be *idem* consistently with the record, which says, that he was *alius*; and therefore such an averment, contrary to the record, shall not be admitted.

1 Ro. Abr. 758, pl. 8.

So, it shall not be assigned for error, that A B, who was sworn as a juror, returned upon the principal panel, was never returned by the sheriff: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem*, it says, *jurata inter partes præd. ponitur in respectu* till the next term, *nisi prius* the justices come, &c.; at which time they come, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of those returned by the sheriff,) viz., A B *venit et in juratam illam juratus existit*; so that the record expressly says, that the A B who was sworn, was one of them who was returned by the sheriff, and therefore the error assigned is contrary to the record.

Helbut v. Held, 2 Str. 684; 2 Ld. Raym. 1414.

So, as being contrary to the record, it shall not be assigned for error, that the defendant filed his warrant to defend by A B his attorney, and that it appears on the judgment that he appeared and defended by C D his attorney.

Bradburn v. Taylor, 1 Wils. 85.

A defendant in ejectment cannot assign for error that, being an infant, he appeared by attorney.

Goodright v. Wright, 1 Str. 25.

{A defendant pleads infancy, and a verdict is found against him; he cannot assign for error that he was an infant, and did not appear by guardian.

3 John. Rep. 437; Ingersoll v. Wilson.}

4. Of assigning that for Error which is for the Party's Advantage.

It seems agreed, as a general rule, that a man cannot reverse a judgment for error, unless he can show that the error was to his (a) disadvantage.

5 Co. 39; 8 Co. 39. {3 Cran. 300, Douglas v. McAllister; 1 Wash. 6, Smith v. Harmanson; Ibid. 381, Pendleton v. Vandevier; 2 Hen. & Mun. 55, Preston v. Harvey.} (a) And therefore a man cannot assign error in process, or delay, which is for his own advantage. F. N. B. 21; 8 Co. 59. β The plaintiff in error cannot complain of an erroneous answer of the court in his favour. Collins v. Rush, 7 S. & R. 147. See Brown v. Caldwell, 10 S. & R. 114; Prevost v. Nichols, 4 Yeates, 479. Nor will a judgment in his favour be reversed for the error of the court. Hughes v. Stickney, 13 Wend. 280. See Inhabitants of Shirley v. Inhabitants of Lunenburg, 11 Mass. 379; Whiting v. Cochran, 9 Mass. 532.γ—But a man may assign the want of a warrant of attorney of his own attorney, though it be his own default. 11 H. 4, 44; Ro. Abr. 760.

Hence it is, that no man can have a writ of error to reverse a fine that took any estate by it; for it would be trifling with the courts of justice, and unreasonable to defeat the estate which he accepted by the fine.

5 Co. 39 b.

For the same reason, the conusor cannot assign any error in the grant and render; because by that the estate which passed from him by his conusance

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is restored to him, and therefore he shall not be admitted to defeat the estate which by his own agreement be accepted.

5 Co. 39 b; Moore, 74.

But, if the error be the default of the court, though it be for the advantage of the party, yet the party that hath the benefit by it may assign it for error, for the course of the court ought to be observed.

8 Co. 59; Ro. Rep. 759. {2 Cran. 126. Therefore a plaintiff may assign for error the want of jurisdiction in a court of limited jurisdiction, though he chose to resort to it. 2 Cran. 126, Capron v. Van Noorden.}

As, if in action of debt it is found, that the defendant owes the plaintiff 5*l.*, and the jury assess damages to 2*d.*, and costs 2*d.*, and after judgment is given, that the plaintiff should recover *debitum et damna prædict.* to 2*d.*, and no judgment is given for the costs, though this is for the advantage of the defendant, yet he may assign it for error, because this is the error of the court to alter the manner of judgments.

Ro. Abr. 759, Holmes and Twiste, adjudged, and the judgment reversed accordingly.

So, if the plaintiff in a suit retracts, by which judgment is given against him, but he is not amerced as he ought; though this is for his own advantage, yet for that the amercement ought to be parcel of the judgment, and so the judgment is not perfect without it, he may assign it for error.

8 Co. 59, Beecher's case; Cro. Ja. 211, S. C. adjudged.

So, in every case where a judgment is given against a man, in which he ought to be amerced, if he be not amerced, he may assign it for error, though it be for his own advantage.

8 Co. 59; Ro. Abr. 759, 760. But where this will be aided by the statute of jeofails, vide tit. *Amendment and Jeofail.*

So, if a man be amerced by the judgment, where he ought to be fined; though this be for his advantage, yet he may assign it for error; for the form of the judgment, which is the act of the court, is altered by it.

Ro. Abr. 760; 5 Co. 59; Cro. Eliz. 84, S. P. adjudged; but for this vide Cro. Eliz. 65, 107; Poph. 203; 2 Saund. 47, and tit. *Amendment and Jeofail.*

[So, if one defendant only be charged with the whole of the damages and costs, this may be alleged for error by the other defendant not charged; for this is an error in the final judgment, it is the fault of the court.

Kent v. Kent, Ca. temp. Hardw. 50; 2 Str. 971; 2 Barnard. 357, 386, 441.]

But if, in a writ of annuity, the issue be found for the plaintiff, and no damages found for him, and judgment be given according to the verdict, the defendant cannot assign it for error, that no damages were taxed against him, because this is for his advantage; and here the defect is not in the judgment, as it is where it is a *capiatur* for a *misericordia*, but in the verdict.

Ro. Abr. 769; Bent and March, *per Cur.* Ro. Rep. 88, S. C. adjudged; 2 Bulst. 279, 280, S. C. adjudged; 11 Co. 56 a, S. C. adjudged; by which books it appears, that the plaintiff before judgment released his damages, and had judgment for the annuity only, which made it more clear; and so it is in Ro. Abr. 784, S. C.

Upon an issue between a peer of the realm and another, if the *venire facias* be *quod summoeneat 12 liberos et legales homines*, and do not say, *tam milites, quam alios*, as the register is, (a) though the peer of the realm may assign it for error, yet the other cannot, because it does not concern him.

Ro. Abr. 37, between the Earl of Worcester and Trade. (a) Yet this being the error of the court, may be assigned for error. Vide 2 Saund. 258.

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In a writ of error brought by the tenant, it cannot be assigned for error, that the court awarded a *grand cape*, where they ought to have given judgment for the defendant to recover, because the award of the *grand cape* was only in delay of the demandant, and not to the prejudice of the tenant, and therefore not by him to be alleged for error, because not *ad grave damnum tenentis*.

Williams v. Gwyn, 2 Saund. 45; 3 Keb. 450, 551, 605, S. C.

5. *Where the Matter assigned for Error is aided by the Appearance of the Party, and not being taken Advantage of in proper Time.*

A man shall never assign that for error which he might have pleaded in abatement, for it shall be accounted his folly to neglect the time of taking that exception.

Carth. 124, laid down by Holt as a general rule, Salk. 2 S. P.

As, if a feme covert bring an action in her own name, *per attornatum*, and the defendant plead in bar to the action, he shall never afterwards assign the coverture for error.

Carth. 124.

So, if a feme sole brings trespass and recovers, and a writ of inquiry of damages is awarded; and before the return thereof, the plaintiff takes husband; and after the writ is returned, and judgment given thereupon, without any exceptions taken by the defendant; he shall not have advantage of this in a writ of error, because the writ was only abateable by plea.

Ro. Abr. 781, Smith and Odyham.

Also, if there be an (a) omission of any writ or process, or one writ awarded in lieu of another; yet if the judgment is not given thereupon, but after the party appears and pleads to issue, and judgment is given upon the verdict; this is not erroneous, because he had not taken advantage of this before pleading to issue.

3 H. 6, 9; Ro. Abr. 779, 780. (a) Where an error in process is helped by appearance, vide Cro. Eliz. 83; Style, 237; Vent. 220, 249; Cro. Ja. 424; Bulst. 143; Latch. 118; Cro. Car. 351; Humble v. Bland, 6 T. R. 255.

If a man in B brings a bill upon his privilege, but hath no writ of attachment of privilege; yet, if the defendant after appears and pleads, this shall be helped by the appearance.

Ro. Abr. 780, Havert and Gibbons; Ro. Abr. 205, S. C., adjudged; 3 Bulst. 61, S. C.

If a man be indicted, and no addition be given to him as there ought, yet if the defendant appear and plead to issue, and this be found against him, it is helped, for the addition is ordained by the statute, that the party who may happen to be outlawed ought to have notice of it; and here he hath notice, and *constat de personâ* by the appearance.

Ro. Abr. 780, Johnson's case; Cro. Ja. 609; 2 Ro. Rep. 225, S. C. adjudged.

A *capias* was directed to the sheriff of B, and it was returned by one who was not sheriff, and this was held a manifest error: but because the defendant had appeared after and pleaded, it was held not material.

Cro. Eliz. 582, Thorowgood and Sewys, adjudged.

If upon a trial between a peer and a common person, the sheriff does not return a knight, as he ought, yet, if the array is not challenged for this, the peer cannot take advantage of it afterwards; for this is a privilege only which the law gives him, and which he may waive if he please.

Ro. Abr. 781, Lord Powis and Kirtman. [This challenge is taken away by 24 G. 2, c. 18, § 4.]

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So, if the sheriff who returns the panel in an assize was brother to him for whom the assize passed; yet, if the party does not challenge the array, it is no error.

3 H. 4, 6; Ro. Abr. 782.

¶ If a peer plead in chief to a bill filed against him in the Court of King's Bench, he cannot afterwards assign for error, that he ought to have been sued by original writ, and not by bill.

Earl of Lonsdale v. Littledale, 2 H. Bl. 299.¶

If a verdict be quashable for the misbehaviour of the jury, as for the receiving evidence of one part, after departure from the bar, which was not given in evidence at the bar; if this be not shown in arrest of judgment, no advantage can be taken thereof in a writ of error, for this shall not be examined after judgment.

Ro. Abr. 783, 784; Cro. Eliz. 616.

The writ was in debt for 40*l.* and the *capias* and all the process to the return of the *pluries capias* accordingly, and then the entry was, that *querens obtulit se in placito* 40*s.*, and upon the default of the defendant an exigent was awarded; and the defendant after appeared and pleaded, and confessed the action; and this was held no error, being helped by the appearance; for as an appearance saves defaults in mesne process, so it saves the fault of the (a) continuance by an *obtulit se*.

Cro. Ja. 311, Lovelace and Juniper. (a) Style, 209, Swift and Nott; Keb. 641; Sid. 173; and vide Cro. Eliz. 367.

If a writ be brought to the damage of 40*l.*, and the plaintiff declares *ad damnum* 200*l.*, and the verdict gives 30*l.*, this is no error after verdict, for the writ is (b) not abated *de facto*, but only abateable by plea.

Palm. 270. (b) Here the general rule to be observed is, that where the writ is *de facto* a nullity and destroyed, so that judgment thereupon would be erroneous, there the writ is *de facto* abated; as, if an action be brought against a feme covert as sole, this makes another man's property liable, without giving him an opportunity of defending himself, which would be contrary to common justice; and therefore the writ is *de facto* abated, for which vide Cro. Eliz. 121, 185, 193, 330; Couls. 106; 2 Leon. 162; 3 Leon. 93; Ro. Rep. 176; Palm. 311; Hob. 37, 162, 279, 281; Godd. 11; Style, 477; Yelv. 56; 3 Co. 85 a; Vaugh. 95.—So, if the return of a *pluries* is laid to be after the beginning of a term, and the memorandum of the bill is entered generally of that term; this makes the writ a perfect nullity, for, by the plaintiff's own showing, he had no cause of action at the time when the action was brought. Carth. 172.—And in these cases, which are more than matters in form, the party may move in arrest of judgment, or have advantage of them by writ of error. Jon. 304; Cro. Ja. 654; Cro. Eliz. 722.

If upon an *audita querela* a *scire facias* be brought bearing date before the *audita querela*, and the defendant appear, and for this cause demur; this fault is cured by the appearance, for the *audita querela* is more of the nature of a commission than a writ; and if the party be in court, the matter ought to be inquired into, without inquiring into the nature of the process by which he was brought in.

Vaughan and Lloyd, Sid. 406: Vent. 7, S. C. adjudged, the *scire facias* being only in the nature of mesne process, to bring in the party to answer. 2 Keb. 461. -

But a *scire facias* upon a judgment differs, and a fault therein will not be cured by appearance.

Sid. 406; Vent. 7, S. P. For this is the foundation, and *quasi* an original; and if an original should bear date on a Sunday, or other like defect be therein, it would not be helped by appearance.

If a *quare impedit* be brought against the bishop and incumbent only, without naming the patron, though this might have been pleaded in abate-

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ment; yet, if the defendant plead in bar, &c., it cannot after, upon a writ of error, be assigned for error; for though the want of the patron's being made a defendant might make the writ abateable, yet it was not thereby actually abated; and nothing shall be assigned for error concerning the writ, but what actually abates it.

Sir George Savil and Thornton, Cro. Ja. 651; Palm. 306, 311, S. C., adjudged; 2 Ro. Rep. 239, S. C., adjudged.

So, though it be a good plea for a defendant to say, that a stranger is tenant in common with the plaintiff; yet, if he does not plead it in abatement, he shall not have advantage of it in arrest of judgment.

Salk. 4.

If an action be brought against Sir Francis Fortescue, knight and baronet, and he appear, and plead to issue, and a verdict and judgment be given for the plaintiff, the defendant in a writ of error shall not assign for error, that he was a knight of the Bath, and ought to be so named, for he has lost his advantage by appearing to the other name, and thereby concluded himself.

Ro Abr. 781, 791, Markham and Sir Francis Fortescue; Ro. Rep. 450, S. C., adjudged.

If an alien brings a real action as heir to J S against another, and recovers, the defendant cannot assign for error, that he was an alien born, inasmuch as he did not take this exception at first, as he should have done.

Ro. Abr. 782.

Although a person acquitted on an erroneous indictment or appeal may be tried again, and cannot plead that he was acquitted, because his life was never in danger on such erroneous indictment or appeal: yet, if the error were in the process only, the acquittal may be pleaded to a second indictment or appeal, because such error is saved by the appearance.

For this vide 2 Hawk. P. C. c. 27, § 107, 108, 109, 110; c. 35, § 8.

If a judgment be given in an inferior court and no (a) plaint entered, this is error, and not aided by the appearance of the party; and therefore, where by the record it appeared, that the defendant (b) *summonitus fuit*, where the first entry ought to be A B *queritur* versus C D, &c., judgment was reversed for this reason.

Leon. 189, 302, Knight and Savage. (a) Yelv. 158; Ro. Rep. 338, and Salk. 266, that the want of a plaint is the same as the want of an original in the Common Pleas, which may be certified on alleging diminution; but in records out of inferior courts no diminution can be alleged, but the court must take them as they find them. (b) Cro. Ja. 108.—And that the Court of King's Bench is to take notice of the particular laws and customs of the place where judgment was given. Salk. 269, pl. 17.

6. Where Matters which might have been assigned for Error are aided by a Release, and the Consent of Parties.

If the plaintiff recovers more damages than he has declared for; as if he declares for 40*l.*, and the jury give him 49*l.*, though (c) this be error, yet, if before judgment he releases the overplus, he may take judgment for the 40*l.*

10 Co. 115, Pilford's case. Where the plaintiff may release damages for part, and take judgment for the rest, vide F. N. B. 107; Moore, 281; Leon. 92; 2 Bulst. 280; Brownl. 235; Style, 364; Hardw. 58. (c) If a man brings a plaint in an inferior court, and in the declaration sets forth particular demands, which overrun the sum mentioned in such plaint, though never so little, and the jury give a verdict according to the sums mentioned in the declaration, this is erroneous; for the plaint is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment are for more than is contained in the writ or plaint,

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though beyond it never so little, by the same reason they may go to larger sums *in infinitum*, and then the plaint or writ would be no direction for the future proceedings of the court; but in such case the plaintiff may remit the overplus. Yelv. 5; Noy, 44; 1 Saund. 286.

Also, where the jury find greater damages than the party declared of, the court may, to prevent error, give judgment for so much as the party declared for, *nullo habito respectu* to the rest, as well as the party may release the overplus, and take judgment for the rest.

Yelv. 45. [And where for this cause a writ of error was brought, the court permitted the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. Pickwood v. Wright, 1 H. Bl. 643.]

In an *ejectione firmæ*, if part of the things declared for be well demanded, and others not, and the plaintiff have a verdict for the whole, and entire damages given, he may release all the damages in that which is not well demanded, and pray judgment for the residue; and this helps the error, if judgment be given accordingly.

Ro. Abr. 786, Clive and Vere; Cro. Car. 458.

As, in an *ejectione custodiæ terræ et hæredis*, if a verdict be given for the plaintiff, the issue being upon the tenure, and entire damages given and costs, the plaintiff may relinquish the damages and costs, and have judgment of the ejectment of the land only, for that such writ does not lie for the body.

Ro. Abr. 784, 786, Clifford's case; Dyer, 369; Cro. Ja. 104; 5 Co. 108, and 10 Co. 130, S. C., cited.

So, in an *ejectione firmæ de uno tenemento* and several acres of land, upon not guilty pleaded, if a verdict be given for the plaintiff, and entire damages found where the action does not lie for the tenement for the uncertainty; the plaintiff may relinquish his damages and have judgment for the lands only, without error.

Ro. Abr. 784, 786, Rhetorick and Chappel; 2 Bulst. 28, S. C.; Cro. Ja. 146; Cro. Eliz. 119; 3 Leon. 128; Style, 30, S. P., adjudged.

In a writ of debt for 100*l.* against an executor, if the plaintiff counts upon an obligation for 99*l.* and upon a *mutuatus* by the testator for 20*s.*, and upon the issue, the jury find for the plaintiff in the whole, and assess damages entire, where it appeared no action lay against the executor upon the *mutuatus* of the testator; yet, if the plaintiff releases the 20*s.* and all the damages, and hath judgment for the residue, this judgment is not erroneous.

Ro. Abr. 764, Ashford's case; 1 Saund. 286, like point debated.

In a *quare impedit*, if the jury give damages and costs, where no costs ought to be given, for that the statute did not give them, and after judgment is entered *quod nullo habito respectu* of the costs, the court awards that he shall recover the damages, this special entry, without any release of the costs, shall help the error.

2 Ro. Abr. 784, Grange and Denny; Ro. Abr. 363; 3 Bulst. 174, S. C., adjudged.

If a bill of debt be brought against an attorney upon three several obligations, and, upon demand of *oyer*, it appear by the condition of one of the obligations, that the day of payment thereof is not yet come; after a verdict for the plaintiff, upon conditions performed pleaded, and costs and damages given, though the plaintiff cannot have judgment for this obligation, of which the day of payment is not yet come, yet, upon his release of costs and damages, he shall have judgment for the other obligations.

Hob. 178; Ro. Abr. 785, S. C.; Saund. 286, S. C., cited.

If in debt upon the statute of usury it is laid in the writ, that he *corrup-*

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*five* lent 40*l.*, &c., and that he lent 20*l.*, &c., but it is not said *corruptive*, and the defendant pleads *nihil debet*, and it is found against him, the plaintiff shall have judgment as to the 40*l.*; and in this case it was said, that if the defendant had demurred, the plaintiff should have had judgment for this part.

Cro. Ja. 104, Woody's case.

If in trespass the plaintiff declares for taking the mare of the plaintiff and several goods, but does not say of the plaintiff, and thereupon the defendant demurs, the plaintiff may have judgment for the mare, and release the action for the rest.

Raym. 395, Cutforth and Taylor.

In an action of debt for 10*l.*, if the plaintiff declares upon a lease for years, rendering rent at certain feasts, and concludes *et quia* 10*l.* of the said rent, for such a time ending at such a feast, &c., he brought this action, where it appears by the declaration, that there was 4*s.* wanting of the 10*l.*, so that the rent in arrear amounted but to 9*l.* 16*s.*, and thereupon the defendant pleads *nihil debet*, and upon this there is a verdict for the plaintiff, and damages and costs given; though the demand be entire, *scilicet* of 10*l.*, and it appear by the plaintiff's own showing that he had no cause of action for the whole; yet the plaintiff may release the 4*s.* and damages, and take judgment for the rest.

Ro. Abr. 785, Barber and Pomrey, adjudged; *cont.* Justice Jermin; Style, 175, S. C.; 1 Saund. 286, like point upon demurrer debated, but no judgment given; and vide All. 29. ¶ Upon this case of Barber and Pomrey being cited in the argument of Duppa v. Mayo, 1 Saund. 286, Lord Hale said, that there was no judgment given. But this is a mistake; for in the case of Crips v. Ingledew, 7 Mod. 87, the roll in Barber v. Pomrey was brought into court, by which it appeared that judgment was entered for the plaintiff. See too 2 Ld. Raym 816; 5 Mod. 215, S. C. & S. P.¶

If in trespass for an assault, battery, and taking his corn, the defendant justifies as to the battery in defence of his corn, upon which there is a demurrer, and pleads not guilty as to the corn, upon which issue is joined, and found for the plaintiff, and damages taxed thereupon; the plaintiff may relinquish the demurrer, and pray judgment on the verdict, and this will not be error.

Ro. Abr. 785, Washman and Rowe.

In trespass for a battery against two, if one pleads not guilty, and the other pleads a special plea, and upon this a demurrer by the plaintiff, and it is adjudged for the plaintiff,(a) he may relinquish his action against the other, and have his writ to inquire of the damages against him.

Ro. Abr. 785, Starr and Cuckow. (a) For this vide 2 Ro. Abr. 100.

In an action of trespass, if there be three issues joined, *scilicet*, one, not guilty to part; the second, upon a prescription for common; the third, whether the beasts *raptim momorderunt* in going to take the common; and the jury find the first issue for the plaintiff, and the second issue for the defendant, but did not inquire of the third issue; the plaintiff relinquishing the third issue may pray judgment for the first issue, and this shall prevent any error.

Ro. Abr. 785, Brown and Stephens.

If a *venire facias* be awarded to the coroners, where it ought to be to the sheriff, or the *visne* come out of a wrong place, if it be *per* (b) *assensum partium*, and so entered of record, it will stand good.

Co. Litt. 125 a. (b) If by consent the defendant on a *cepi corpus* appears by attorney,

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this is no error. 21 E. 4, 77 b; Ro. Abr. 787.—So, if the defendant appears by attorney upon the exigent by consent, this is not error. 7 H. 6, 21; Ro. Abr. 787. For the rule therein is *consensus tollit errorem*, for which vide several cases in 5 Co. 40; 2 Ro. Rep. 21; Godb. 428; Noy, 107.

Upon the rule of *consensus tollit errorem*, it hath been (a) adjudged, that an action, in its own nature local, may, by the (b) consent of parties, be tried in a different county: so, (c) if it be doubtful in which of two counties the action did arise, it may be tried by a jury from both counties; and this being done by assent, can be no error.

(a) 44 E. 3, 6; 44 Ass. 4; Ro. Abr. 787; Ro. Rep. 166; Palm. 100; Raym. 373; 2 Jon. 199. (b) But the consent must be entered on record, otherwise it is error; for which vide Hob. 5; Ro. Abr. 787; Bulst. 216; Cro. Eliz. 664; Hob. 266; 5 Co. 40; Dyer, 284; Sid. 339. (c) 7 H. 6, 21; Ro. Abr. 787, S. C.

[A party who has agreed under a consolidation rule not to bring a writ of error, is precluded from bringing one, though there be manifest error on the record.

Camden v. Edie, 1 H. Bl. 21.

Executors against whom a *scire facias* is sued out to recover damages assessed on an interlocutory judgment against their testator in his lifetime, cannot bring error, if the testator's attorney agreed for him, that no writ of error should be brought in that action.

Executors of Wright, Bart., v. Nutt, 1 T. R. 388.]

## (L) What Defence the Defendant in Error may make: And herein of pleading a Release.

THE defendant in error may plead (d) release of all errors, or a release of all (e) suits; and these pleas, if found for him, will forever bar the plaintiff in error. (g)

(d) 9 H. 6, 48; Ro. Abr. 788. [And a release of errors in the same instrument with the warrant of attorney, and dated the term in which judgment was entered, is good. Landon v. Pickering, 2 Str. 1215.]—The defendant in pleading a release must lay a *venue*.—But, though it be ill pleaded, yet, if there are not errors, the judgment will be affirmed. Salk. 268, 270; 3 Salk. 399; 6 Mod. 113, 206; 2 Ld. Raym. 1005. (e) Latch. 110, Cole's case, resolved *per Cur.* (g) ¶ Where there are several plaintiffs in error, the release of one of them shall not bar the others. Razing v. Ruddock, Cro. El. 648; Blunt v. Snedston, Cro. Ja. 116, 117; Hackett v. Herne, 3 Mod. 134. ¶ But it is a bar as to him. Clark v. Goodwin, 1 Blackf. 75. When the defendant gives a *cognovit*, and expressly agrees not to bring error, and he afterwards does so, the plaintiff may nevertheless issue execution. It seems there is a difference between a release of error and an agreement not to bring error. Best v. Gompertz, 2 Dowl. P. C. 395; 4 Tyr. 280; 2 C. & M. 427. g

So, where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but, where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar.

Co. Litt. 228 b; 8 Co. 152; Ro. Abr. 788; 2 Ro. Abr. 405.

Also, if a man loses in a real action, and he releases all his right to the land, this shall bar him of his writ of error; for no person that is not entitled to the land, &c., can bring a writ of error to reverse a judgment; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears.

9 H. 6, 46; Ro. Abr. 747, 788; Dyer, 90 a; 3 Lev. 36, Hutchinson's case.



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Hence it is, that if a man releases all his right to the land of which a fine was levied, he has thereby barred himself of his writ of error; for his release having forever excluded him from the land, he can have no writ of error, because nobody is entitled who cannot have the land of which the fine was erroneously levied.

Cro. Eliz. 469.

So it is, if a fine be levied of 120 acres of land, and he that has right to a writ of error make a (d) feoffment of the whole, he shall never reverse the fine; but, if the feoffment had been made, or a release had been given of twenty acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because he has not transferred his right as to those, and therefore may be reinstated if the fine be erroneous.

Ro. Abr. 788; Cro. Eliz. 469; Moore, 413; Owen, 22, S. C.; Wright and the Mayor of Wickham. (d) A lease for years of the land is a suspension of the writ of error for the time. Lev. 72, *per Cur.*; Keb. 350; Bridgm. 57.—But a feoffment is an extinguishment thereof. Lev. 72, *per Cur.*, and vide Godb. 26; 4 Leon. 135, 221; Palm. 247; Co. 112; Bridg. 57.

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage after inspection is recorded by the court, but, before the fine reversed, he levies another fine to another; this second fine shall hinder him from reversing the first; because the second, having entirely debarred him of any right to the land, must also deprive him of all remedies which would restore him to the land.

Hart's case, Ro. Abr. 788; Noy, 59, S. C.; and there said the fine was not pleaded, because not engrossed, and the engrossing was stayed on purpose by the conusee.

But, if tenant in tail levies an erroneous fine with proclamations, and then levies a second fine, which is also erroneous, and dies; if the issue in tail brings a writ of error to reverse the first fine, the defendant may plead in bar the second fine; for though there be error in the second, yet, till that appears judicially to the court, it must be looked upon as a fine duly levied, and, consequently, a bar to the plaintiff; because while the second stands in force, he cannot have the land. But, if in this case the plaintiff brings another writ of error to reverse the second, and the defendant pleads in bar the first fine, the plaintiff may reply upon the first writ of error that the second fine was erroneous, and upon the second writ that the first fine was erroneous, and so be levied against both; for here the examination of both fines comes judicially before the court, and if there appears any error, the court will set them aside, and not suffer them to stand in the way of the plaintiff's right.

Carrington's case, Ro. Abr. 788; Cro. Eliz. 151; 2 Leon. 211; Moore, 366; Ro. Rep. 306; Bridg. 77.

But in a writ of error to reverse a fine, the defendant cannot plead the same fine now endeavoured to be reversed, and five years in bar of the writ of error, any more than in a writ of error to reverse an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio istius rei cujus petitur dissolutio*.

Cockman and Farrer, T. Jon. 181; Raym. 461; Vent. 353; 2 Sid. 92; Fortescue Aland v. Mason, 2 Str. 861, and 2 Ld. Raym. 1433, S. P.

So, if a fine be levied of land in ancient demesne, the lord may reverse it after five years expired; but, if a second fine had been levied, the lord should be barred of his writ of disceit after five years from the second fine; for a fine of ancient demesne is not originally within the courts of Westmin-

## (L) What Defence the Defendant in Error may make.

ster, and the statute in relation to the bar does not extend their jurisdiction; but, when a fine is levied of ancient demesne, it comes within the consuance of the king's courts till the fine be reversed, and, by consequence, they have a jurisdiction of it, and so the fine becomes a bar.

2 Inst. 518; 2 Bulet. 244; Cro. Ja. 333; Ro. Rep. 36; Raym. 469; W. Jon. 181.

If a man (a) outlawed upon a *redisseisin* releases all actions to the recoverer, yet he may have a writ of error of the outlawry, because that this does not belong to the party, but to the king in interest, and he may assign error in the judgment of the *redisseisin* to reverse the outlawry.

11 H. 4, 6, 94; Ro. Abr. 788. (a) Where a man is outlawed in a personal action by process upon the original, and brings error; a release of actions personal is no bar, because he is to be restored to nothing against the plaintiff, though when by the outlawry he forfeited all his goods to the king, he shall be restored to them and to the law, so as to be of ability to sue. Co. Litt. 288 b; 8 Co. 152 a.

If the tenant, pending a *præcipe* against him, aliens in fee, and (a) after judgment is given against him, and he brings a writ of error; this feoffment is not any bar to the writ, because he was privy to the judgment after.

Ro. Abr. 788; Bridg. 77; Ro. Rep. 306. (a) So, if the tenant, pending a *præcipe* against him, aliens in fee, and repurchases for life, and after judgment is given against him, he shall have a writ of error, and his feoffment is no bar. Ro. Abr. 748, 788.—— So, after his death his heir shall have a writ of error, because of the privity. Ro. Abr. 788.

In a writ of error to reverse a common recovery, it is no good plea, that the plaintiff pending the writ of error hath entered into part; for before the possession was taken from him, he might have error to reverse the judgment, though not to have restitution.

Lev. 72, Winn and Lloyd.

In a *scire facias* against a terretenant, he may plead a release of error, though he be not privy to the judgment.

9 H. 6, 48; Bro. 9, S. C.

But the terretenants cannot plead (b) in abatement of the writ of error, but only in bar as a release, &c., in maintenance of their title.

Lev. 72. [1 Burr. 362.] (b) Where a *scire facias* is awarded generally against the terretenants, without naming them, and several are returned warned, and appear; one may plead non-tenure to discharge himself, though not to abate the writ as to the rest; as might be done, if all were named in the writ; for which vide Holland and Jackson, Bridg. 72; Ro. Rep. 301, &c.; Cro. Eliz. 739; Palm. 123, 227.

In a writ of error against the heir of the recoverer within age, and a *scire facias* against the terretenants; if the parol demurs for the heir, and the judgment is reversed against the terretenant; yet at full age the heir may plead the release of the demandant of the right, or of the errors, and bar him.

9 H. 6, 48; Ro. Abr. 766.

[By stat. 10 & 11 W. 3, c. 14, a writ of error for the reversing of any fine, recovery, or judgment, must be commenced, or brought and prosecuted within twenty years after such fine levied, recovery suffered, or judgment signed or entered of record.

Although it should appear on the record that the judgment is above twenty years' standing, yet cannot the defendant have the benefit of this statute without pleading it, because there is a saving of rights of the persons mentioned in the act, as infancy, &c., which may be replied to take off the effect of the plea; and therefore the court cannot take notice of it merely as it appears upon the record itself. And this plea, as well as the plea of a

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release of errors, must conclude with praying that the plaintiff may be barred of his writ of error, not that the judgment be affirmed, for they admit the judgment to be erroneous.

Street v. Hopkinson, Ca. temp. Hardw. 345; 2 Str. 1055, S. C. Ibid. Cunningham v. Horston, 1 Str. 127; Dent v. Lingwood, 2 Str. 683; Kirle v. Clifton, 1 Show. 50.]

(M) Of the judgment to be given on the Writ of Error: And herein,

1. *Where, on the Writ of Error, Part only, or the whole Judgment, shall be reversed.*

A JUDGMENT being an entire thing (a) cannot regularly be reversed for part, and affirmed for part; as (b) in a *formedon de uno crofto*, messuage, &c., if the demandant recovers, and in a writ of error it is adjudged that a *formedon* does not lie of a *croft*, the judgment for the residue shall be reversed also, because the writ is not good, inasmuch as there cannot be a good judgment upon a bad writ.

(a) For this vide Moore, 366; Noy, 117; 2 Leon. 178; Cro. Eliz. 425; 2 Sid. 57, 94; 2 Ro. Rep. 136; Sid. 357; 2 Jon. 374; Carth. 235. (b) Ellis and Wallis, Ro. Rep. 2; 2 Bulst. 214; Allen, 74; Ro. Abr. 774, S. C. β A judgment may be reversed in part and affirmed in part, as, for example, when it is good for the debt, but not for the costs. Swearingen v. Pendleton, 4 S. & R. 396; Boaz v. Heister, 6 S. & R. 18; Nelson v. Andrews, 2 Mass. 164; Drown v. Stimpson, 2 Mass. 445; Waite v. Garland, 7 Mass. 453; Whiling v. Cochran, 9 Mass. 532. But when a judgment is entered jointly against two, and it is erroneous as to one, it is not divisible, and must be reversed *in toto*. 6 S. & R. 18; Gaylord v. Payne, 4 Conn. 80.γ

So, in an action of trespass against three, if one (c) dies pending the writ, and yet judgment is given against all three, in a writ of error upon this judgment, the whole judgment shall be reversed, because it is entire, though the writ by the death abates but against one.

Ro. Abr. 775, and vide Allen, 43; Yelv. 209. (c) But vide 17 Car. 2, c. 8, by which it is enacted, that in all actions real, personal, or mixed, the death of either party between the verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after the verdict; and vide Sid. 385.—\* And the stat. 8 & 9 W. 3, c. 11, § 7, the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit, and suggesting the death, it cannot be alleged for error.\*

In an action of debt upon a bill, and upon a contract upon an *emisset*, if the defendant pleads *non est factum* as to the bill, and *nil debet* as to the contract, and both are found by verdict against the defendant, and judgment against the defendant *quod capiatur*† for denying his deed; and it is not also *quod sit in misericordia* as to the contract, as it ought to be, and entire damages given, and a writ of error is brought; for this the whole judgment shall be reversed, *scilicet*, as well the judgment upon the bill as for the contract.

Eltonhead and Deerman, Ro. Abr. 775, 776; Allen, 74, S. C., cited; Vent. 27; 2 Keb. 506, 545, like point; but for this vide 16 & 17 Car. 2, c. 8, where this is aided, tit. *Amendment and Jeofail*.—† *Capiatur pro fine*, taken away, and other provisions in lieu thereof. 5 W. & M. c. 12.

In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all.

Bird and Orms, Ro. Abr. 776; Cro. Ja. 289, S. C. and S. P., adjudged; Allen, 74, 75, S. C. cited, and S. P. adjudged; Style, 121, 125, 406, S. P., adjudged.

If an action be brought against A as a feme sole, where she is covert, and against B and C, and they all plead to issue, and A as a feme sole, and judgment is given against them all accordingly; in this case the baron of

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A with A B and C may join in error, and assign for error the coverture of A, and thereupon the judgment shall be reversed for all, because it is entire.

Ro. Abr. 776, Hayward and Williams, adjudged.

If there is debt for rent on two several demises, and on the first the demise and reservation are laid right; but as to the second, the demise is with a reservation of rent *secundum ratam* 18l. *per annum*, which is a void reservation, because no certain time or day being appointed of payment, it would subject the lessee to an action of debt every hour; (a) though the error be only in the second demise: yet, the judgment, being entire, must be reversed *in toto*.

Carth. 234, 235, Parker and Harris, adjudged in B. R. and the judgment given on demurrer in C. B. reversed accordingly; 4 Mod. 76; Salk. 262; 2 Vent. 249, 270, S. C. (a) So, where A brought an action on the case against B for words spoken of him, and for causing him to be indicted, &c., and the jury found for the plaintiff as to both, and entire damages given; yet, it being afterwards held that the words were not actionable, the judgment was reversed *in toto*; but for this vide Cro. Ja. 424; Hob. 6; Ro. Rep. 24; Cro. Ja. 343; Allen, 75; Ro. Abr. 775; Vent. 27; 40.

But in a writ of dower, if the plaintiff recovers by default, and upon this a writ is awarded to the sheriff or bailiff, where the recovery is to deliver to the plaintiff *tertiam partem per metas*, and to inquire of the value by the year; and how much time is past after the first demand of dower, and what damages she hath sustained; and upon this the sheriff or bailiff returns, that he had delivered the third part of the lands, and the value found by the jury to 30l. *per annum*, and that two years are past after the first demand, and damages 50l., and thereupon judgment is given accordingly to hold in severalty the said third part, and to recover the said damages; in this case, though the judgment is not good as to the damages, inasmuch as it is not averred that the husband of the plaintiff died seised, (as the use is,) nor is it so found by the jury, nor was it so commanded by the writ to be inquired, by which the judgment as to this is erroneous; yet it shall be reversed only as to this, and shall stand as to the recovery of the third part of the land.

Ro. Abr. 776, Tie and Atkins.

So, in an action of account, if judgment is given *quod computet*, and after, auditors are assigned, and upon the account, judgment is given against the defendant, and damages and costs, and after a writ of error is brought upon both judgments, and thereupon the last judgment only is found to be erroneous; in this case, the last judgment only shall be reversed, and not the first judgment, but this shall stand in force; for these are two distinct judgments, and perfect; for the first judgment is *ideo consideratum est quod computet, et defendens in misericordia*.

Williams v. White, Cro. Eliz. 806; Sty. 290, S. C., cited by Rolle, C. J.

If a judgment is given against executors in an action of debt, and after a *scire facias* judgment is given against them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this case, if the first judgment be good, and the last erroneous, the last judgment only shall be reversed, and the first judgment shall stand.

5 Co. 32, Pettifer's case; and vide Ro. Abr. 776.

But, if a man recovers in debt upon a judgment, if the first judgment be reversed, the second judgment shall also.

43 E. 3; 1 Ro. Abr. 777; Sid. 253, S. P., and the court took time to advise, whether, by the reversal of the first judgment, the other was not *ipso facto* void. Palm. 187, per Dodderidge. The reversal of the first judgment does not reverse the second, but

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defects it, so that the plaintiff shall have no fruit thereof. Palm. 303, S. P., *per* Chamberlain, J.

After a recovery in a redisseisin, if the first judgment be reversed, the judgment on the redisseisin shall be reversed also.

8 Co. 143; Ro. Abr. 777.

By the reversal of the original judgment, the outlawry depending thereupon shall also be reversed.

Ro. Abr. 777. But by the reversal of the outlawry, the original judgment shall not be reversed. Ro. Abr. 777; 2 Brownl. 39, S. P.

If a man recovers in an annuity, and has a *scire facias* thereupon afterwards, and the judgment upon the *scire facias* is after affirmed in a writ of error; yet, if the first judgment of the annuity be reversed, the other shall be also.

11 H. 4, 48; Ro. Abr. 777.

If a man recovers upon an original, and hath another judgment in a *scire facias*; if the first judgment be reversed, the other shall be also reversed.

8 Co. 143; Ro. Abr. 777.

If a man recovers in a *quare impedit*, and hath a writ to the bishop, and after recovers against the bishop in a *quare non admisit*, and after the judgment in the *quare impedit* is reversed, the judgment in the *quare non admisit* shall be also reversed by this, though this was for the contempt to the king.

26 E. 3, 75; Ro. Abr. 777.

If the demandant recovers against the tenant, and the tenant against the vouchee; if the heir of the vouchee reverses the judgment of the value, because the vouchee was dead at the judgment rendered; this shall reverse the judgment against the tenant also.

Ro. Abr. 777.

If the principal is outlawed of felony, and the accessory attainted and executed, and after the principal reverses the outlawry, and is indicted, and found not guilty of the felony; by this reversal and acquittal, the attainer against the accessory is annihilated; for his heir may have a *mort d'ancestor*, it seems, because he hath no remedy by writ of error, or otherwise, to reverse it; for this depends upon the principal.

9 Co. 119; Ro. Abr. 777.

If the conusee of a statute recovers in detinue by erroneous judgment against the garnishee, and sues execution; if the garnishee in a writ of error reverses the judgment given in the detinue, yet the execution is not reversed by this, because it is a collateral thing executed.

8 Co. 142, 143; 5 Co. 90 b; Ro. Abr. 777.

If an infant and one of full age join in a fine, and the infant after brings error for the reversal thereof, it shall be reversed *quoad* the infant only.

Leon. 317; Co. 76 b; Hob. 278; Cro. Eliz. 115, 124; 2 Leon. 108; Moore, 565; 2 Jon. 182.

If husband and wife join in a fine when they are of full age, it shall bind them both; but, if the feme be within age, they may join a writ of error to reverse it (a) during the minority of the wife.

F. N. B. 21; Leon. 115. (a) By the opinion of some books, the fine shall be reversed *in toto*, both against the husband and wife; as Cro. Eliz. 129; Leon. 115; Owen, 21.—But by others, the writ of error shall reverse the fine as to the wife, but no execution shall be awarded during the life of the husband. Bro. tit. *Fines*, 29, tit. *Error*, 28; Leon. 116.—And accordingly in 3 Lev. 36, Hutchinson's case, a *vacat* was entered *quoad* the wife only.

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If a fine be levied of land, of which part is guildable, and part ancient demesne, and as to that which is ancient demesne, the fine be reversed by writ of disceit, yet the fine shall stand for the residue; for a mark shall be made on the fine, in the nature of a cancelling of that which is ancient demesne only.

Ro. Abr. 775; F. N. B. 98; Cro. Eliz. 469; Jon. 374; 2 Jon. 182.

[Where a judgment is partly by the common law, and partly by statute, it may be reversed in part; for that which was a judgment at common law will remain a judgment, and be complete without the other.

Per Holt, C. J., 1 Salk. 24; Ca. temp. Hardw. 50.

A judgment in an information *qui tam*, &c., may be reversed as to the informer, and stand for the king.

Moore, 565.

And wherever the judgments are distinct, part may be affirmed and the other part reversed. Hence, if a judgment for a common informer give damages for detention, and costs *de incremento*, the judgment for the penalty may be affirmed, and for the damages and costs reversed. But, (a) where costs are merely accessory to the principal judgment, there, if they are erroneously given, the judgment cannot be reversed as to them only, but must be reversed *in toto*.

Frederick v. Lookup, 4 Burr. 2021; Bellew v. Aylmer, 1 Str. 489, S. P.; Kent v. Kent, 2 Str. 673; Ca. temp. Hard. 50, S. P.; Green v. Waller, 2 Ld. Raym. 893, S. P. {2 Mass. T. Rep. 164, Nelson v. Andrews. Judgment in a criminal case will not be reversed in part. 2 Bin. 79, Jackson v. The Commonwealth.} (a) Lampen v. Hatch, 2 Str. 934; Rous v. Etherington, 2 Ld. Raym. 870; 1 Salk. 342.]

The omission of the name James, (William Norton instead of Will. James Norton,) in entering the *postea* on the finding of the jury, was held to be no ground of error.

May v. Pigé, 1 Bing. R. 314; and see De Tastet v. Rucker, 3 Bro. & B. 65; G Moo. 135.

Where error was assigned for entering a verdict for a sum exceeding the damages in the declaration, the court allowed the plaintiff to amend the judgment and transcript in a term subsequent to that in which judgment was signed, by entering a *remittitur* for the excess.

Usher v. Dansey, 4 Maule & S. 94.

On a writ of error on a judgment, on conviction of felony at the sessions, the court will only look to the record of conviction, though the justices return also the record of a former acquittal.

Rex v. Wildey, 1 Maule & S. 183.

Judgment having been given in the C. P. for the plaintiffs, upon a special verdict in *assumpsit*, which was reversed upon writ of error in K. B., the defendant is entitled, in the latter court, not only to judgment of acquittal, but also for the costs of his defence in C. P., being the same judgment which the court below ought to have given, the defendant in such case being entitled to his costs by statute 23 H. 8, c. 15.

Gildart v. Gladstone, 12 East, R. 668.

(As to amendments after error brought, see tit. AMENDMENT.)

## 2. What Judgment shall be given on the Reversal of the first.

If judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment shall only (b) be *quod*

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*judicium reverteretur*; (c) for the writ of error is brought only to be eased and discharged from that judgment.

Cro. Car. 442; Ro. Abr. 774; 2 Saund. 256; Carth. 253, 254; Salk. 962, 963; Cuming v. Sibly, 4 Burr. 2489. [Pugh v. Goodtitle on the demise of Bailey, House of Lords, 16th May, 1787.] (b) If the error be error in fact, and not in the record, as for infancy, the judgment shall be *quod pro errore predicto judicium predictum revoceatur*, without saying, *et alius in recordo*. Ro. Abr. 805.—If judgment be affirmed in B. R. upon a writ of error, the judgment shall be *quod judicium redditum remanebit stabile in perpetuum*. 21 E. 4, 44; Ro. Abr. 805.—[If defendant demur for duplicity, and have judgment; the entry shall be *quod judicium affirmetur*. Jeffry v. Wood, 1 Str. 439. If a release of errors, or the statute of limitations be pleaded, and found for the defendant: the judgment must be, *quod querens nil capiat per breve, not quod judicium affirmetur*. Kirle v. Clifton, 1 Show. 50; Cunningham v. Houston, 1 Str. 127; Dent v. Lingwood, 2 Str. 683; Street v. Hopkinson, Ibid. 1055; Ca. temp. Hardw. 345. In the House of Lords, if judgment below be given for the plaintiff, and deemed right, it is simply affirmed. Countess Dowager of Cavan v. Doe on the demise of Pulteney, 7 May, 1795. So, if judgment be given in the Exchequer or King's Bench for the plaintiff, reversed in the King's Bench, or Exchequer Chamber, and that reversal approved by the Lords, their judgment is, that such second judgment be affirmed. Sutton v. Johnstone, 22 May, 1787; Home v. Earl of Camden, 22 June, 1795. So, if two former judgments concur, and are deemed right, they need only be affirmed. Foley v. Burnell, House of Lords, 27 April, 1789. ¶(c) It would seem that in this case, as well as where the judgment below is against the plaintiff, the court of error should, upon reversal, give the same judgment as the court below ought to have given; for their duty is to *reform* as well as to *affirm* or *reverse* the judgment. Where therefore judgment had been given in the Common Pleas for the plaintiff, upon a special verdict in *assumpsit*, which was reversed upon a writ of error in the King's Bench; the defendant was holden to be entitled in the latter court, not only to judgment of acquittal, but also for the costs of his defence in the Common Pleas, which is the same judgment which that court ought to have given; the defendant in such case being entitled to his costs by the statute 23 H. 8, c. 15; Gildart v. Gladstone. 12 East, 608.¶ 2 When the Supreme Court reverse a judgment of the court below, given either on a special verdict, a case stated, or a general verdict, they give judgment as the court below ought to have given. Stephens v. Cowan, 6 Watts, 513; but see 4 S. & R. 396; Pangburn v. Ramsay, 11 Johns. 141; Close v. Stuart, 4 Wend. 95. And when substantially right, the judgment will not be reversed for any informality; or, if reversed, the court would immediately enter a new judgment. Inhabitants of Buckfield v. Inhabitants of Gorham, 6 Mass. 445.¶

But, if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, but the court shall also give such judgment as the court below should have given; for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given.

Ro. Abr. 774, 805, S. P.; Cro. Car. 442; Yelv. 47; 2 Saund. 256, 317; Show. Parl. Cases, 57; Salk. 262; Carth. 243, 254, S. P.; Ld. Raym. 5; 4 Mod. 106; Skin. 447; Salk. 403.

As, in an action upon the case for words, if judgment be given against the plaintiff, that the words are not actionable, upon which the plaintiff brings a writ of error, and thereupon the first judgment is reversed, because the words are actionable; the court, after reversal of the first judgment, ought to give judgment, that the plaintiff shall recover; for this court ought to give the same judgment which the first court might have done.

Ro. Abr. 774, Hopkins and Chele; Cro. Car. 509, S. P., and judgment given accordingly.

So, in an *ejectione firmæ*, upon not guilty pleaded, issue is joined, and a special verdict found, and upon this verdict judgment given against the plaintiff, and after the plaintiff brings a writ of error, in which the judgment is reversed, the plaintiff shall have judgment and recover his term, his

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declaration being good, and the law being for him upon the special verdict ; for the court that reverses the first judgment ought to give the same judgment which ought to have been given in the first suit.

Ro. Abr. 774, Omulcunrie and Ayres ; Cro. Car. 512, adjudged upon a writ of error out of Ireland.

If in an action of waste in the hustings in London judgment is given for the defendant, and after upon a writ of error brought before commissioners in St. Martin's, according to the custom of the city, that judgment is reversed ; the commissioners shall give the same judgment as before ought to have been given ; for the custom of proceeding in London shall be intended according to the common law, if no precedent appear to the contrary.

Lev. 310, Cole and Green ; 2 Saund. 256, S. C. adjudged, and afterwards affirmed in parliament.

In replevin *in banco*, the defendant pleaded a lease made 1 Octob., &c., and avowed for rent reserved thereupon ; and the plaintiff, in bar thereof, pleaded *non demisit 1 Octob., &c., modo et forma* ; upon which issue being joined, it was found for the plaintiff, and judgment for him, and the defendant brought error in B. R., and it was agreed to be an immaterial issue, and the judgment erroneous, and yet that the court could not award a repleader, as the Common Pleas might have done, (and as the ancient usage was, but disused for one hundred years ; ) and there being gross faults in the avowry, it was said, that if they reversed the judgment, perhaps they must give judgment upon the declaration for the faults in the avowry.

2 Lev. 11, 12, Holbeach and Bennet ; 2 Saund. 317, 319, S. C., and S. P. as to the repleader agreed, but Hale *contr.* Twisden held the issue was aided by the statute of jeofails, and said, the judgment could not be reversed for the faults in the avowry ; and the judgment was affirmed.

If the Court of Exchequer Chamber reverse a judgment in the King's Bench for the defendant on demurrer, they cannot award a writ of inquiry, but must remit the record to the King's Bench, with an order to that court to award such writ and execution upon the return of it.

Feldowe v. Ridge, Cro. Ja. 206 ; Yelv. 74, S. C. ; Noy, 129, S. C. ; Wetherley v. Sarsfield, 1 Show. 127 ; Kent v. Kent, Ca. temp. Hardwicke, 51.

But in the case of (a) Phillips and Bury, where the House of Lords reversed the judgment that was given in B. R. on a special verdict, there the House of Lords gave a new judgment, which was executed accordingly, on refusal of the B. R. to give a contrary judgment to what they had given before, although it was objected that they could not, having a transcript only, and not the record itself, before them.

(a) Carth. 319 ; Skin. 514. {In the Exchequer Chamber, when judgment for the defendant on a special verdict is reversed, that court will give a final judgment for the plaintiff. 1 Bos. & Pul. 30, Denn v. Moore.}

If in a writ of right close in ancient demesne, the demandant makes his protestation to sue in nature of a *mort d'ancestor*, and the tenant pleads in abatement, and judgment is given for him ; and after, upon false judgment brought, the writ is affirmed good, the Court of Common Pleas shall proceed as the inferior court should have done.

4 Inst. 270 ; F. N. B. 19 ; Skin. 515, S. C. cited.

|| If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count ; the court of error



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cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record.

Campbell v. French, 6 T. R. 200.]

[It is now settled, though it was in one case (a) denied, that a court of error may award a *venire facias de novo*. And this it may do, after a bill of exceptions allowed upon a demurrer to evidence, and after a general verdict, when some of the counts are defective.

Hardwood v. Goodright, Cowp. 89; Grant v. Astle, Dougl. 731; Bent v. Baker, 3 T. R. 27. {3 Dall. 19, 42, Bingham v. Cabot; Ibid. 415, Clarke v. Russel; 1 Bin. 238, Sterrett v. Bull; Ibid. 537, Shaffer v. Kintzer; 1 Mass. T. Rep. 83.}—In Kinaston v. Mayor, &c., of Shrewsbury, 2 Str. 1051; 4 Br. P. C. 271; Haswell *qui tam* v. v. Chalie, 2 Str. 1124; Andr. 392; Parker v. Wells, 1 T. R. 783; Lickbarrow v. Mason, 5 T. R. 367, the House of Lords directed a *venire de novo* to be awarded by B. R. (a) Street v. Hopkinson, 2 Str. 1055; Ca. temp. Hardw. 345.—In Trevor v. Wall, 1 T. R. 151, the court of B. R. refused to award such a writ, on the ground that the proceedings upon which error was brought originated in an inferior court. But in Davis v. Pierce, 2 T. R. 125, where a bill of exceptions had been tendered in the court of Great Sessions in Wales, and the proceedings were removed by writ of error into B. R., that court, being of opinion that the bill was properly tendered, awarded a *venire de novo* into the next English county.] {Where the record itself is removed, the *venire de novo* is awarded by the court of error; but where only a transcript is removed, the record is remitted to the lower court, with directions to them to award the *venire*; which award must be made to warrant the second trial. See the above-cited cases, and 1 Cain. 587, Livingston v. Rogers; 3 Johns. Rep. 443, Brown v. Clark.}

¶ When a plaintiff in error dies, pending a writ of error, judgment of affirmance or reversal will be directed to be entered *nunc pro tunc*, as of a term when he was alive.

Ring v. Dana, 21 Wend. 253; Remus v. Beekman, 3 Wend. 667.

When the plaintiff in error dies before assignment of errors, the writ abates at common law; but if after, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous. The writ of error does not abate by the death of defendant in error, whether it happen before or after errors assigned.

Green v. Watkins, 6 Wheat. 260.

On reversal in the court of dernier resort of a judgment of the Supreme Court, rendered on a judgment removed into that court from the Common Pleas, the court will render such judgment as ought to have been given in the court.

Close v. Stuart, 4 Wend. 95. See Pangburn v. Ramsay, 11 Johns. 141.g

3. To what the Parties shall be restored on the Reversal of the first Judgment.

If a man recovers by erroneous judgment, and by virtue thereof presents to a church, or enters into the perquisite of his villein, and after the judgment is reversed; these collateral things executed shall not be divested thereby; but collateral things executory are, after reversal, as (b) if no judgment had ever been.

8 Co. 142 b. (b) In an assize, if the tenant loses by verdict, he shall be restored to the lands, if it be reversed in a writ of error. 8 H. 6, 2; Ro. Abr. 778.—So, he shall be restored to the mesne issues. 8 H. 6, 2. So, if the tenant loses in a writ of entry *sur disseisin*, and after it is reversed for error, he shall be restored to the mesne issues. Ro. Abr. 778.

If a man recovers damages, and hath execution by *feri facias*, and upon the *feri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed; the party shall be restored only to the money for

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which the term was sold, and not to the term itself; because the sheriff had sold it by the command of the writ of *feri facias*.

8 Co. 19, 143; Ro. Abr. 778; Cro. Eliz. 278; Moore, 573; and vide Leon. 96; 3 Leon. 89; Godb. 27; Gouls. 103; Cro. Ja. 246.  $\beta$  On reversal of the judgment, a writ of restitution is not *ex debito iustitiae*, it depends on the grace of the court. *Fitzalden v. Lee*, 2 Dall. 205; S. C. 1 Yeates, 160, 207; *Kirk v. Eaton*, 10 S. & R. 108. But see *Bank of U. S. v. Bank of Washington*, 6 Pet. 8. $\gamma$

But, if the goods of an outlawed man are sold by the sheriff upon a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored (a) to the goods themselves; because the sheriff was not compellable to sell those goods, but only to keep them to the use of the king.

Hoe's case, 5 Co. 90; Ro. Abr. 778, S. C. cited; Cro. Eliz. 278, S. P., adjudged, where a termor being outlawed upon the statute of recusancy, the lord treasurer and barons of the Exchequer sold the term. (a) If the king grants over the land of a person outlawed for treason or felony, and afterwards the outlawry is reversed, the party may enter on the patentee, and needs neither to sue a petition to the king, nor a *scire facias* against the patentee. 2 Hawk. P. C. c. 50, § 19; cites 1 And. 188.

If a man recovers damages in a writ of covenant, as the particular case was, against B, and hath an *elegit* of his chattels, and of the moiety of his lands; and the sheriff upon this writ delivers a lease for years of land which B had, to the value of 50*l.* to him that recovered, *per rationabile pretium et extantum* (as the words were) to have as his own term, in full satisfaction of 50*l.* part of the sum recovered, and after B reverses the said judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet (b) here is no sale to a stranger, but a delivery of the term to the party that recovered, by way of extent, without any sale; and therefore the owner shall be restored.

Ro. Abr. 778; Cro. Ja. 246; Yelv. 179; Brownl. 107, 108, S. C. adjudged. (b) That it would be otherwise if sold to a stranger. Yelv. 108; Brownl. 107, 108.

And for the same reason, if personal goods were delivered to the party *per rationabile pretium et extantum*, upon the reversal of the judgment, he shall be restored to the goods themselves.

Ro. Abr. 778.

If in debt upon an escape the plaintiff recovers, and hath execution, and after, the first judgment is reversed; yet the judgment for the escape remains in force.

8 Co. 142 b; 3 Mod. 325, S. C. cited.

But, if an action of escape be brought against the sheriff, and the judgment upon which it is founded be reversed before such time as the defendant is forced to plead, he may plead *nul tiel record*.

8 Co. 142 a.

But there is a diversity between a recovery by prior title, and a reversal of a judgment by writ of error; as, if a woman hath judgment and execution in dower in ancient demesne, and it is after reversed in a writ of false judgment; and because she had held the lands for two years between the first judgment and reversal, the value of the land was inquired, and taxed at twenty marks; in a *scire facias* against her, it was adjudged she could not plead a recovery in a writ of right close in nature of a *cui in vita*.

8 Co. 143 a.

If an advowson comes to the king by forfeiture upon an outlawry, and the church becoming void, the king presents, and then the outlawry is re-

## Escape in Civil Cases.

versed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson.

Beverley v. Cornwall, Moore, 269.

But, if a church is void at the time of the outlawry, and the presentation is thereby forfeited, as a chattel principally and distinct of itself; there, upon the reversal of the outlawry, the party shall be restored to the presentation.

Moore, 269, agreed *per Curiam*.

If a termor, being outlawed for felony, grants over his term, and after, the outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the outlawry and the assignment; (a) for by the reversal it is as if no outlawry had been, and there is no record of it.

Cro. Eliz. 170; Ognel's case, adjudged. (a) Vide 13 Co. 20, 22.

If after judgment in a *scire facias* against bail, the judgment against the principal is reversed; (b) this is no reversal of the judgment against the bail, because it is a collateral judgment by itself.

Cro. Ja. 645; Appesley and Sir John Key, agreed *per Curiam*. Palm. 187, 301, S. C. (b) But the bail may be relieved by *audita querela*: for which see title *Audita Querela*.

See further tit. BAIL, (B) 7, and tit. SCIRE FACIAS.

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# ESCAPE IN CIVIL CASES.

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ESCAPE in general is understood, where any person, who is under lawful arrest, and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before delivered by due course of law.

For the better understanding whereof I shall consider,

(A) Where the Party shall be said to be legally committed, so that the suffering him to go at large shall be judged an Escape: And herein,

1. *Where the Authority by which he is committed shall be said to be sufficient for that Purpose.*

2. *Where the Form of the Commitment, or being in Custody, shall be said to be regular.*

(B) What Degree of Liberty, or going at large, shall be deemed an Escape: And herein,

1. *With what Strictness Prisoners are to be kept.*

2. *What on this account shall excuse the Sheriff, Jailor, &c., when acting in Obedience to some Authority; as removing a Prisoner on a Habeas Corpus, &c.*

3. *What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement.*

(C) Of the Difference between voluntary and negligent Escapes.

(D) Of the Difference between an Escape on Mesne Process and Execution.

(E) What Persons are answerable for, and to be charged with an Escape: And herein.

1. *Of the preceding or succeeding Sheriff, Warden, &c.*

2. *Where Sheriffs, Wardens, &c., their Superiors or Deputies, are liable at the Election of him who is injured by the Escape.*

3. *Where the Party injured may have his Remedy against the Person escaping; and herein of Escape Warrants.*

(A) Where the Party said to be legally committed, &c.

(F) Of the proper Remedy and Nature of the Action to be brought for an Escape.

(G) Of the Manner of laying the Action.

(H) Of the Party's Defence who suffered the Escape: And herein of pleading fresh Suit.

(A) Where the Party shall be said to be legally committed, so that the suffering him to go at large shall be adjudged an Escape: And herein,

1. *Where the Authority by which he is committed shall be said to be sufficient for that Purpose.*

It seems agreed as a general rule, (a) that wherever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such person to go at large is an escape; for he cannot judge of the validity of the process, or other proceedings of such court, and therefore cannot take advantage of any errors in them. Hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, though it be erroneous. But, if the court hath no jurisdiction of the matter, then all is void, and consequently, the officer not punishable for suffering a person taken up upon such void authority to escape.

(a) This distinction is laid down in Moore, 374; Dyer, 175; Poph. 203; Leon. 30; 8 Co. 141 b; 10 Co. 76 a; 5 Co. 64; Cro. Ja. 3, 280, 289; 2 Bulst. 64, 256; 2 Saund. 100, 101; 3 Mod. 325; Carth. 148, 234.  $\beta$  It is no defence to an action for the escape of a defendant in execution, that the *ca. sa.* was irregularly issued, without a previous *f. fa.* Scott v. Shaw, 13 Johns. 378; Hinman v. Prees, 13 Johns. 529; Bissell v. Kip, 5 Johns. 89; Ontario Bank v. Hallett, 8 Cowen, 192; Jones v. Cook, 1 Cowen, 309.g

Upon this distinction it hath been adjudged, that if A obtains judgment against B, and a year afterwards, without any *scire facias*, takes out a *capias ad satisfaciendum*, upon which B is taken, and the sheriff lets him go at large, that this is an escape; for though the award of the *capias* (b) after the year without a *scire facias*, was erroneous, yet the sheriff could not take advantage thereof, for it was sufficient authority for him to make the arrest, and might have been pleaded by him in an action of false imprisonment.

Cro. Eliz. 188, Bushe's case. (b) Shirley v. Wright, 2 Ld. Raym. 775; 1 Salk. 273; 2 Salk. 700, S. P. adjudged; but there said that it would be otherwise, had it been on a *capias ad respondend.* bearing *teste* in Trinity term, and returnable in Hilary, because such process must be returnable from term to term, otherwise it is out of court.

$\beta$  The sheriff having a *ca. sa.* against the defendant, returned N. E. I. His deputy had the defendant in custody during the same time under other process, but not knowing that the sheriff had the *ca. sa.*, discharged the defendant. The sheriff was held liable, though he did not know his deputy had the defendant in custody.

Wheeler v. Hambright, 9 S. & R. 390.

|| The statute of 37 G. 3, c. 112, authorized the justices of the peace, "at the first or second general quarter session, or general session, to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances. The justices in the county of S, "at a general quarter session holden by adjournment" after the passing of the act, but which appeared to have been an adjournment of a session holden before the act passed, ordered the jailer of the sheriff's jail to discharge an insolvent, who was in the custody of the sheriff in execution. It was holden, that this adjourned session, not being an original

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session holden after the passing of the act, nor an adjournment of such a session, had not any jurisdiction under the act: and, as the court of general session or general quarter session had not, independently on the act, any authority over a person charged in execution in a civil suit, the proceeding was *coram non judice*, and, consequently, the sheriff, being responsible for the act of his servant, was liable to the party at whose suit the insolvent was in custody for an escape, agreeably to the rule above laid down, that when the court hath not jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action lies against the officer, who executes the process of the court.

*Brown v. Compton*, 8 T. R. 424. In this case the case of *Orby v. Hales*, 1 Ld. Raym. 3, which was recognised in 4 Mod. 353, was overruled as against the Marshalsea case, 10 Co. 76; and the whole current of authorities. That case decided, that if the justices of the quarter sessions make an order under 2 W. & M. c. 15, for the discharge of poor prisoners, which order is not warranted by the statute, (as if the prisoner were in execution for more than 100*l.*.) and the sheriff discharge the prisoner accordingly, he shall not be liable for an escape.  $\beta$  The order of a court of competent jurisdiction, discharging a person from arrest on a *ca. sa.* in consequence of privilege, is a conclusive justification in an action for an escape against the sheriff in any other court of justice. *Hurst's case*, 4 Dall. 388. Whether the discharge by the sheriff of a prisoner by virtue of a void order given by a judge, is a voluntary escape, seems not settled. *Hecker v. Jarrett*, 3 Binn. 404. Where a constable discharged a defendant by order from a justice, and the justice had no jurisdiction, this was held to be an escape. *Van Slyck v. Taylor*, 9 Johns. 146. See *Jackson v. Smith*, 5 Johns. 115. $\gamma$

So, where upon a recognisance in Chancery, the conusee sued out execution by a *capias ad satisfaciend.*, by force whereof the conusor was taken and escaped; the court held, that, though the *capias ad satisfaciend.* in this case was erroneously awarded, yet it was a good execution for the party as long as it continued unreversed, and, consequently, the sheriff liable for the escape.

*Coniers, Sheriff of Durham's case*, Cro. Eliz. 576; *Ognell v. Paston*, Ibid. 165; *Moore*, 274, and 2 Leon. 84, S. C. & S. P.; 8 Co. 142, S. C. cited; *Leighton v. Garmons*, Cro. Eliz. 707, S. P. But *Weaver v. Clifford*, Ro. Abr. tit. *Escape*, (F. pl. 2,) *contr.* ¶ This last case seems to have depended several years, and there are many reports of it, which are not quite consistent. *Yelverton* states the judgment of the court below to have been that the action did not lie, and so does *Brownlow*, whose report is almost a transcript of *Yelverton's*. *Yelv.* 42; *Brownl.* 82. But *Croke* says that the court inclined in favour of the action, but adjourned; *Cro. Ja.* 3: and *Bulstrode* expressly states that judgment was entered in the King's Bench for the plaintiff, 2 *Bulstr.* 62; a statement which agrees with Lord Rolle's account of the result of the writ of error in the Exchequer Chamber, that the judgment in B. R. was reversed, because there was no award of the *capias* by the court, but it was taken out without warrant, and so merely void.¶

So, where in debt for an escape, it was found by special verdict, that the plaintiff had outlawed J S, after judgment upon a *capias ad satisfaciend.* sued out within the year, and that two years after the outlawry he was taken up upon a *capias ullagatum*, and the sheriff suffered him to escape; it was admitted, that if a *capias ullagatum* had been sued out within the year, no prayer to charge him in custody had been necessary, because the plaintiff might have had a *capias ad satisfaciend.* without a *scire facias*; but this being after the year, the question was, Whether he could be said to be in execution for the plaintiff in the original action without prayer? and the court held that he was, though no prayer was entered, because he would have been (a) so, if he had been taken within the year; (b) and here is no difference, for the plaintiff was at the end of his process at the exigent, and

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no continuance or *scire facias* after a *capias utlagatum*, and the very *capias utlagatum*, which is sued at his charge, imports an election of the body.

Salk. 319, Wolf and Davison; 5 Mod. 200, S. C. adjudged. ¶ Comb. 373, S. C., that the court inclined to give judgment for the plaintiff, but adjourned, that they might hear Mr. Serjeant Levinz's argument. Mr. Viner, in his abridgment of this case, adds, "N. B. The defendant died, so no judgment was given, but Holt, C. J., on hearing thereof, said, they were inclined to give judgment for the plaintiff." This fact is not noticed either in Salkeld or the 5th Modern: indeed, in the last, it is expressly said, that judgment was given for the plaintiff. ¶ (a) 5 Co. 88 a, Garmon's case, adjudged. Bridgm. 6; Ro. Abr. 810, S. P. adjudged. (b) ¶ Holt said, according to the report in Comberbach, that "he never understood the difference taken in the cases within the year or after, and that it was taken suddenly." ¶

If at the petition of A and the rest of the creditors of B, a commission upon the statute against bankrupts is issued out against B, and thereupon the commissioners sit and offer interrogatories to C, and he refuses to be examined, and by them is thereupon committed to prison, and the jailer suffers him to escape; as the commissioners had sufficient authority to commit, and A was prejudiced by the escape, he may maintain an action against the jailer.

Barnes and Cary, adjudged, Ro. Rep. 47; Moore, 834, S. C. adjudged; and *note*, according to Moore, the action was debt.

So, if there be a suit in the ecclesiastical court between A and B, in which B is excommunicated, and afterwards taken upon an *excommunicato capiendo*, and suffered to escape, A may bring an action on the case for the escape, though it was objected that this was a spiritual matter, and that A had other remedy, as by writ of recaption.

Slipper v. Mason, adjudged; Lutw. 121; 2 Ld. Raym. 768, S. C.

Also, upon this rule, that the sheriff cannot take any advantage of the irregularity of the proceedings of a court which hath jurisdiction of the matter, it hath been holden, (a) if a nobleman be taken in execution, and the sheriff let him go, it will be an escape.\*

(a) 2 Bulst. 65, *per* Coke, C. J., in the case of Weaver v. Clifford. \**Qu.* the defendant not being liable to be taken in execution, and no court having power to award an execution against the person of a peer, in a civil suit?

Upon the second part of the distinction, that an officer shall not be liable to an action for the escape of a person taken on a writ, which issued out of a court that had not jurisdiction of the matter; it hath been (b) holden, that if A bring an action against an officer of an inferior court for an escape, and declare that he brought an action against J S, in the court of Kingston-upon-Hull, upon an obligation made at Halifax in *Com Ebor.*,) but do not allege it to be within the jurisdiction of the court,) and that he obtained judgment, upon which J S was in execution, and suffered to escape by the defendant; that this declaration for want of alleging Halifax to be within the jurisdiction of the inferior court, is insufficient to maintain the action; for though the action be in its own nature transitory, yet (c) inferior courts being tied down to matters arising within their own limits, they must show that they had consueance of the matter, otherwise their proceedings will be void, as being *coram non iudice*, of which the officer may well take advantage.

(b) Ro. Abr. 809, 810, Richardson and Barnard, adjudged. ¶ In 2 Lutw. 1567, this case is cited by Powell, (John,) J., who observes, that the reason of the judgment was, because it appears in the body of the declaration, that the place where the obligation was made was in the body of the county, out of their jurisdiction. But, where nothing of this sort appears, he says, it ought to be notified to the court by plea to the jurisdic-

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diction, which plea if the court refuse, or receive it and proceed afterwards, if the plea be offered as it ought to be, before imparlance, and upon oath, all proceedings after shall be void, and the judge and officer will be liable to actions.¶ (c) So, though a writ issue out of a superior court, yet, if such superior court had no jurisdiction of the matter, it will be void, and the officer may take advantage thereof, as, if a *formedon* issue out of the King's Bench, or an appeal out of the Common Pleas. 2 Bulst. 64; and vide 5 Mod. 413; Ld. Raym. 397; Carth. 234.

So, if A declares that he prosecuted one J S in the court of Ely, upon a bond made *infra jurisdictionem*, upon which he was in execution, and that the defendant suffered him to escape; if the jury find that there was such a prosecution, but that the bond was not made *infra jurisdictionem*, the action does not lie; for all that was done was *coram non judice*, and therefore no legal commitment; and though the defendant in the court below pleaded *non est factum*, yet that could not give the court any jurisdiction which it had not originally in the cause.

Squibb v. Hole, adjudged by three judges against Justice Ellis, 2 Mod. 89. ¶ Freem. 193, S. C. According to this report, North, C. J., said, that although the proceedings in this case (the action being of such kind as was cognisable in the court of Ely) should not be said to be *coram non judice*, so as to have made the bailiff or officer subject to an action of false imprisonment for executing the process of the court; yet he conceived, that as this case is, it shall be said to be *coram non judice* as to the plaintiff, to excuse the officer from this action, because it was a thing that lay in his assignances, that the bond was made out of the jurisdiction of the court, and so the court had nothing to do with it. But, perhaps, if an executor had brought the action, it might have been otherwise, because he shall not be presumed to know where the bond was made. And the other judges seemed to agree with him; *sed adjournatur*.¶

[In an action on the case against the defendant, bailiff of the borough court of Southwark, for an escape upon mesne process, it was moved in arrest of judgment, that the declaration was ill, because it appeared that the plaint in the court below was levied against *two* persons, but only *one* was proceeded against, so that the plaintiff, by process against *one* only, could not have had the effect of his suit below. To this it was answered, and resolved *per Curiam*, that even supposing the plaint to be erroneous, yet the officer shall not take advantage thereof in a collateral action as this is; he may justify the arrest under the process, and shall not be suffered to say in this action, that the plaintiff could not have the effect of his suit below. It was then objected, that the declaration did not allege in what manner the defendant below was indebted to the plaintiff: but only in general that he was indebted: it might be on a judgment, or such a debt as that court had no jurisdiction of: nor did it appear that the cause of action arose within the jurisdiction. To this it was answered, and resolved *per Curiam*, (a) that this being after a verdict, they would suppose every thing proved at the trial which was necessary to be proved; and that the cause of action arose within the jurisdiction, unless the contrary could be made to appear upon the face of the record.

Bull v. Steward, 1 Wils. 265. (a) [But see Trevor v. Wall, 1 T. R. 151.]

See tit. TRESPASS, (D).]

2. Where the Form of the Commitment, or being in Custody, shall be said to be regular.

The sheriff cannot be charged with an escape (b) before he had the party in his actual custody by (c) a legal authority; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an (d) escape.

(b) Bro. Escape, 22. (c) And therefore it seems that an officer who arrests a person

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on a Sunday, contrary to the 29 Car. 2, c. 7, cannot be charged with an escape for letting him go again, vide 6 Mod. 95; Salk. 78. (d) But, if an officer refuses to arrest a person that he may, an action on the case lies against him; and hence it hath been adjudged, that if a *capias ad satisfaciend.* is directed to the coroners of a county, and one of them, when he may arrest the party, refuses so to do, the plaintiff must bring his action singly against the coroner so refusing, for this is a personal tort. 2 Mod. 23, 24.

But, if A is arrested, and in the actual custody of the sheriff, and afterwards another writ is delivered to him at the suit of J S, upon the delivery of the writ, A, by construction of law (a) is immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare that he was arrested by virtue of the second writ, which is the operation it hath by law, and not according to the fact.

5 Co. 89, Frost's case. (a) So, if the sheriff of Northumberland has a man in custody in Northumberland, and the sheriff himself is in London, and a writ is delivered to him against that person, he is in his custody immediately upon that writ: otherwise, if the man was out of the county at the delivery of the writ; as in case the sheriff was bringing him to Westminster on a *habeas corpus*. Salk. 273, per Holt, Ch. Just.

So, in escape against the sheriffs of London, the plaintiff may declare, that he levied a plaint in the sheriff's court against J S, being then in the counter in custody on a former plaint levied against him by J N, and being so in custody was suffered to escape; for the entering of the plaint is of the nature of a writ or precept in another court, upon which the *serjeant at mace* arrests the party by his general authority; and therefore, by entering the plaint, and charging the defendant in the counter, he is in actual custody of the sheriff.

Jackson v. Humphreys, 1 Salk. 273, cited in Bull. N. P. 66.

|| So, if a writ of execution be delivered to the sheriff against A at the suit of B, and a warrant made out thereon, and before the return of that writ A is taken in execution at the suit of C, and then escapes, B may maintain debt against the sheriff for the escape, although the party was not arrested under the writ at the suit of B.

Benton v. Sutton, 1 B. & P. 24.

If A declares against the marshal of the King's Bench for the escape of a prisoner, (b) formerly in the Fleet, that he *virtute brevis de habeas corpus*, directed to the warden of the Fleet, was *debito modo commissus* to the King's Bench; this will not be sufficient, without alleging an actual commitment, for he cannot be committed on a *habeas corpus*, and the *debito modo* will not help it.

2 Show. 17, Bourne and Cooling, adjudged, and judgment arrested accordingly. (b) If A obtains judgment against B in B. R., and also another judgment in C. B., upon which he is taken in execution and committed to the Fleet, and afterwards he removes himself to the Marshalsea by *habeas corpus cum causa*; if the marshal suffer him to escape, he is liable to both debts. Dyer, 152.

If by *habeas corpus* the body of J S, together with a plaint entered against him in the court of Norwich, be removed before the Chief Justice of B. R., who upon the return of the writ accepts bail; the acceptance of bail, though before the filing thereof, is a discharge of the prisoner; and though afterwards a *procedendo* should be awarded, yet the sheriff cannot be charged with the escape.

Farneley v. Bassett, Cro. Ja. 203.

If a person out upon bail renders himself in discharge of his bail, and a *reddidit se* is entered in the judge's book, and a *committitur* filed in the office, and the prisoner afterwards escapes; yet if no notice was given the marshal



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of such render, nor any entry made of the commitment in his book, the prisoner shall not be deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial.

Watson v. Sutton, 1 Salk. 273.

Where a party was taken on a *ca. sa.*, had removed himself by *habeas corpus* to the custody of the marshal, and while there was detained under an order of the Insolvent Court for a certain period, pending which he was taken upon a *habeas corpus* to the Central Criminal Court, on a charge of forgery, and admitted to bail, whereupon he was sent back again to the custody of the marshal, without any fresh warrant, and escaped; held that, the latter being an illegal custody, the marshal was not liable, nor was he estopped from setting up the illegality of such detention.

Contant v. Chapman, 2 Gale & D. 191.

It hath been held, that entering a *committitur* upon the roll was not sufficient evidence to charge the marshal with an escape, without proving an actual imprisonment; but that proving the party to be actually in prison, though there be no entry made in the marshal's book (without which he pretends he knows not how to take charge of them) is sufficient.

Sid. 220; Keb. 775, Canny and Jacob.

{If a debtor, surrendered in open court by his bail in a civil action, and committed by the court to the custody of the sheriff, is permitted to go at large, the sheriff is answerable for the escape, though he was not furnished with a copy of the order of the court committing the debtor. He is, indeed, by the *habeas corpus* act, liable to a penalty for not furnishing the prisoner, on demand, with a copy of the process on which he is committed: but it is not incumbent on the creditor to deliver him a copy to enable him to do so; he must himself procure a copy from the record.

2 Mass. T. Rep. 549, Randall v. Bridge.}

[In an action against the marshal for an escape, it was laid, that the prisoner being brought before Sir William Chapple, one of the justices of our lord the king, at his chambers in Serjeants' Inn, was there committed to the custody of the marshal at the suit of the plaintiff, as by the said commitment may more at large appear. To this the defendant demurred, and showed for cause, that it did not appear the commitment was of record. And on argument the court held it ill; for he is not in point of law in the marshal's custody, till the commitment is entered on record; nor can the court take notice that Sir William Chapple had any power to commit him, he being only styled one of the justices of the king, which every common justice of the peace is.

Wightman v. Mullens, 2 Str. 1226.] {3 Bos. & Pul. 456, Turner v. Eyles, S. P.}

And now for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, by the 8 & 9 W. 3, c. 27, § 9, it is enacted, "That if any person or persons whatsoever, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputy or deputies, or by any other keeper or keepers of any other prison or prisons, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keepers of any other prison or prisons, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or, in default thereof, shall forfeit the sum of 50*l.*; and if such marshal or warden, or their respective deputy or

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deputies exercising the said office, or other keeper or keepers of any other prison or prisons, shall give a note in writing, that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as a sufficient evidence that such person was at that time a prisoner in actual custody."

(B) What Degree of Liberty, or going at large, shall be deemed an Escape: And herein,

1. *With what Strictness Prisoners are to be kept.*

EVERY person in prison by process of law is to be kept in *salva et (a) arcta custodia*, in order to compel him the more speedily to pay his debts, and make satisfaction to his creditors.

Plowd. 36; 3 Co. 44; 2 Inst. 381; Ro. Abr. 806. (a) And by Westm. 2, c. 11. *Carceri mancipentur. in ferris*, which, my Lord Coke says, was enacted in order to oblige them to a more speedy compliance with their duty. 3 Co. 44 a; and 2 Inst. 381; in his comment on this statute, he says, that though prisoners, if need require, may now be kept in irons, yet that it could not be done by the common law.—And Co. Litt. 260 a, he says, imprisonment must be *custodia et non pœna*, for *carcer ad humines custodiendos, non ad puniendos, dari debet.* β Every liberty not authorized by law is an escape. Colby v. Sampson, 5 Mass. 310; Commonwealth v. Drew, 4 Mass. 391; Clap v. Cafran, 7 Mass. 101; Bartlet v. Willis, 3 Mass. 107; 18 Johns. 48; 9 Johns. 329; 13 Johns. 366; 9 Johns. 329; 5 Johns. 115; 15 Johns. 152; 3 Binn. 404; Keonus v. Maddox, 2 Har. & Gill, 106; Jones v. The State, &c., 3 Harr. & Johns. 559 g

Therefore, if the sheriff or other officer who hath the custody of a prisoner, either bail him when he is not bailable by law, or suffer him to go out of the (b) limits of the prison, though with a keeper, and for ever so short a time, it is an escape.

Ro. Abr. 806; 3 Co. 44; Plowd. 36; Dyer, 166; Hetley, 34. (b) For the limits of the Fleet prison, vide 2 Mod. 921, 922. {See 3 Mass. T. Rep. 86, Bartlet v. Willis. And if the sheriff, after having taken a prisoner in execution, permits him to go about before he takes him to prison, it is an escape, though he is attended by a servant of the sheriff. 1 Bos. & Pul. 24, Benton v. Sutton.}

But the law and provision made by Westm. 2, c. 11, being eluded by the acts and contrivances of sheriffs, and other keepers of prisons, by the 8 & 9 W. 3, c. 27, § 1, it is enacted, "That all prisoners, either upon contempt or mesne process, or in execution, who are or shall be committed to the custody of the marshal of the King's Bench prison or warden of the Fleet, shall be actually detained within the said prisons of the King's Bench and Fleet, or the respective rules of the same, until they shall be from thence discharged by due course of law; and if at any time the said marshal or warden, or any other keeper or keepers of any prison, shall permit and suffer any prisoner committed to their custody, either on mesne process, or in execution, to go or be at large out of the rules of their respective prisons, (except by virtue of some writ of *habeas corpus*, or (c) rule of court, which rule of court shall not be granted, but by motion made, or petition read in open court,) every such going or being out of the said rules shall be adjudged and deemed, and is hereby declared to be, an escape."

(c) The intent of a day rule is, that the prisoners may be brought to Westminster Hall, and by indulgence they have been allowed to go to any of the inns of court, to consult with their counsel or attorneys; but suffering them to go on their pleasure, as to a playhouse, &c., is an escape. 2 Show. 298.

|| This statute having made the rules to all purposes the same as the walls of the prison, it follows, that an escape from them without the marshal's knowledge is a negligent and not a voluntary escape; for the escape is not voluntary, unless it be with the consent or by the default of the marshal,

(B) What degree of Liberty shall be deemed an Escape.

and his allowing the rules of the prison is not any default in him, because the law gives a sanction to it; and it cannot be inferred thence, that he consents to the escape, if he has taken security that the prisoner shall not go beyond the rules, and immediately on his return has confined him in close custody.

*Bonafous v. Walker*, 2 T. R. 126.

In an action for an escape against the marshal of the King's Bench, it appeared, that the prisoner, who was in execution in the marshal's custody, at the suit of the plaintiff, was seen at large about 11 o'clock on the first day of Michaelmas term. The defence was, that he was out upon a day-rule granted by the court on the same day, and by the above statute that rule could only have been granted at the sitting of the court, and the court, in fact, did not sit till after the time he was at large. It further appeared, that the plaintiff had actually filed his bill against the marshal in this action before the sitting of the court on the same day. The petition had been signed by the prisoner in the morning before he went out of prison. The court were of opinion, that the day-rule was a justification to the marshal for the liberation of the prisoner on the whole of the day by relation; that though it was only granted, as legally it could only have been, when the court sat on the first day; yet, when granted, it was a liberty for that day, and covered the antecedent part of the day; because, generally speaking, there is no fraction of a day, but where it is necessary to look to it in order to answer the purposes of justice.

*Field v. Jones*, 9 East, 151; *Sir Thomas Tipping's case*, cited in 1 Str. 503, S. P. See *Wilkinson v. Morris*, 8 Mod. 80, S. P.

But the rule when made would not extend to a prisoner who had not signed the petition at the time.

*Anon.*, 1 Str. 503.]

To allow a prisoner in execution the liberty of the jail-yard is not an escape. But if he escape from the jail-yard, nothing is a justification but the act of God or a common enemy.

*Green v. Heim*, 2 Penna. R. 167. See *Steere v. Field*, 2 Mason, 486.

If the sheriff take the real debtor, but by a writ directing him to arrest a party of a different Christian name, he is not bound to detain him in custody, and therefore is not liable to an action of escape for letting him go, though the sheriff would be justified in detaining him.

*Morgans v. Bridges*, 1 Barn. & A. 647.

A sheriff who takes a bail bond, and on inquiry denies that he has taken one, cannot therefore be sued for an escape.

*Mender v. Bridges*, 5 Taunt. 325.

The marshal of the K. B. prison is not liable for an escape for obeying the warrant of commissioners of bankrupt, in bringing before them a bankrupt, charged in execution in his custody, in order to be examined on the second day of the meeting of the commissioners.

*Spence v. Jones*, 5 Barn. & A. 705.

If the sheriff on a *ca. sa.* receive the money from the prisoner before the return day of the writ, and liberate him before he has paid the money to the plaintiffs in the action, he is liable for an escape.

*Slackford v. Austin*, 14 East, R. 468. See 6 Moo. 111; and 6 Taunt. 490; 2 Marsh. 186.

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Bail put in after the term in which the writ is returnable, is not an answer to an action against the sheriff for an escape brought before it was put in.

Moses v. Norris, 4 Maule & S. 397.

Where the sheriff arrested a party on a *ca. sa.* in a particular liberty, and without any *non omittas* clause in the writ, he was held still liable for an escape; for the arrest, though wrongful as against the bailiff of the liberty, was not void.

Pigott v. Wilkis, 3 Barn. & A. 502.

If the marshal discharge B out of custody, on a rule for discharge entitled A against B, when the action in which he is in custody is A against B and C, he is liable for an escape, for the rule is nugatory.

White v. Jones, 5 East, 292.

A sheriff who carries a prisoner taken in execution to a lock-up house within his own bailiwick, and keeps him there fourteen days before the return, is not thereby guilty of an escape; taking to a lock-up house is now warranted by usage.

Houlditch v. Birch, 4 Taunt. 608.

If a jailer covenant with the sheriff not to let prisoners escape, and the sheriff direct a warrant to the jailer and W W (his turnkey,) "by me (the sheriff) for this time only specially appointed," and a prisoner escape from W W acting under this warrant, the jailer is not liable on this covenant.

Ryland v. Lavender, 2 Bing. 65.

2. *What on this Account shall excuse the Sheriff, Jailer, &c., when acting in Obedience to some Authority, as removing a Prisoner on a Habeas Corpus, &c.*

The writ of *habeas corpus* is an (a) ancient writ, and what the subject is by law entitled to; yet (b) if a sheriff or other officer, who hath the custody of a prisoner, by colour thereof, suffer the prisoner to go at large, it is an escape.

(a) Cro. Car. 14; Ro. Abr. 808. (b) Hob. 202; 3 Co. 44; Cro. Car. 14.

As, if a *habeas corpus* be returnable the next term, and the sheriff or jailer in the mean time suffer the prisoner to go at large, it is an escape, though he appear at the return of the writ; for the writ only empowers the jailer to bring him directly to the court, and if he gives him any liberty in the mean time, it is at his peril.

Hard. 476; agreed by Hale, Chief Baron, and the whole court.

So, where a *habeas corpus ad (c) testificandum* was directed to the marshal to carry one Reynolds to the assizes at Wells in Somersetshire, who after the assizes was suffered to go sixty miles beyond Wells; though he returned again to the marshal, yet it was held an escape.

Mod. 116, Mosedel's case. So ruled upon evidence, and the plaintiff had a verdict for 6200*l.* 3 Keb. 305, S. C. (c) If J S is in execution, and a *habeas corpus ad testificandum* is directed to the jailer, who, according to the command of the writ, carries the prisoner to give his testimony; this is an escape. Sid. 13; said by Twisden to have been adjudged by all the judges. β A sheriff who has a defendant in custody on execution, is bound to obey a writ of *habeas corpus ad testificandum*, according to the exigency of the writ; and if, in so doing, he take his prisoner out of the county, and return with him again without unnecessary delay, it is not an escape. Hassam v. Griffin, 18 Johns. 48*g*.

So, if the jailer carry him round about (a) a great way for the accommodation of the prisoner, it is an escape; but he is not bound to bring him the direct way for fear of being rescued.

Mod. 116, *per* Hale. [2 Bl. Rep. 1050.] (a) That he is to bring him in convenient

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time, and the most convenient way; and this is to be judged of by the judges. Cro. Car. 14; Dalt. Sheriff, 561. ¶ If the officer take him out of the direct road, it is an escape. Per Buller, J., in *Benton v. Sutton*, 1 B. & P. 68.]

Also, it hath been adjudged, that if the sheriff hath one in execution, and a *habeas corpus* issues to have his body in court such a day, and before the return of the writ the sheriff brings the prisoner to an inn in Smithfield in his way to Westminster, and the prisoner of his own head goes without any keeper to Southwark, and next morning returns again to the sheriff, so that at the return of the *habeas corpus* the sheriff delivers the prisoner into court, this is no escape.

3 Co. 44, Boyton's case.

[If a sheriff, having arrested a defendant on *mesne* process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action as for an escape, if the jury find that the plaintiff has not been delayed or prejudiced in his suit.

Planck v. Anderson, 5 T. R. 37.]

As the sheriff must be careful that he does not give the prisoner more liberty than by law he ought to do, when he acts in obedience to a lawful authority; so he must take care that he does not let him go at large by colour of a void authority.

Dalton Sheriff, 486.

Therefore, if one in execution at the suit of the king and a private person be, by warrant from the lord chancellor or treasurer, suffered to go at large with a keeper, in order to collect the money due to the king; this is an escape, as to the private person, although he return again to prison; for the king himself cannot license one in prison to go at large with a keeper.

Dyer, 297 a; Ro. Abr. 808, S. C.

So, where the sheriffs of York pleaded, that they let the prisoner go at large by virtue of a writ of privilege directed to them from the council of York; and it not appearing to the court that the writ was a sufficient warrant for that purpose, or that the council of York could in such case discharge a prisoner, the plea was held ill.

Cro. Eliz. 893, Colston v. Ross and Levett.

If an act of parliament is made for the relief of confined debtors, and pursuant thereto the justices of the peace are enabled to discharge such and such prisoners, if they authorize the sheriff to discharge a person that does not come within the description of the act, and he lets the party go at large, it will be an escape.

Anon., Salk. 273. (b) The contrary was adjudged in Sir Thomas Orby's case, 1 Ld. Raym. 3; 4 Mod. 353; but Lord Raymond questions the law of that decision, because, if the sum, for instance, exceeds that which the statute allows a discharge for, the justices have no jurisdiction, and the sheriff is bound to take notice at his peril for what sum his prisoner is charged in execution.] ¶ It has since been denied to be law in the case of *Brown v. Compton*, 8 T. R. 424, *supra*.]

[Debt was brought by the plaintiff, executor of A, against the defendant as executor of B, formerly sheriff of the county of D. Upon *nil debet* pleaded, the jury found a special verdict, viz., that A recovered a judgment against F, and sued a *capias ad satisfaciendum* directed to B, then sheriff, &c., which writ was executed by the undersheriff, and F being in custody, assigned a term for years to the undersheriff in satisfaction of the money recovered by the judgment, and to be discharged out of execution, which assignment was to be void upon payment of the money recovered by the judgment

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at a day, after B's office would determine. Upon this B was discharged out of execution, and at the day, &c., he paid the money to the undersheriff; but the undersheriff did not pay the full money to A. B died; and A died; and the plaintiff as executor of A brought this action.—It was adjudged, that it did not lie: because the release of F out of custody was an escape in the sheriff, and the receipt of the money afterwards could not purge it.

Langton v. Wallis, 1 Ld. Raym. 399; 1 Lutw. 582, S. C.

{B being in custody at the suit of A in a joint action against B and C, justified bail in an action entitled by mistake A against B only, and a rule so entitled was served on the marshal of B. R., who thereupon discharged B out of custody, he being charged in only one action at the suit of A. The marshal was held liable for an escape. The rule was to discharge the defendant out of custody in one cause, and the marshal discharged him in another cause, for which he had no authority..

5 East, 292, White v. Jones.}

β Where a creditor arrested his debtor by a writ of attachment, after he had left his prison limits, for the purpose of preventing his return, until he could bring an action against the sheriff; it was held that the sheriff was not liable for the escape.

Drake v. Chester, 2 Conn. 473. See Van Wormer v. Van Voast, 10 Wend. 356.

If, after an arrest of a person, the sheriff discovers that he is privileged from arrest, and, in consequence of it, discharges him, he is not liable for the escape.

Green v. Edson, 2 N. H. Rep. 152; Ray v. Hogeboom, 11 Johns. 433.

A discharge from the prison rules, under the insolvent law of Virginia, although obtained by fraud, is a discharge in due course of law.

Simms v. Slacum, 3 Cranch, 300. See Ammidon v. Smith, 1 Wheat. 447.

### 3. *What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement.*

The marshal of the King's Bench being sued to judgment, if he be afterwards taken in execution, he can be admitted to no other prison but the Marshalsea; and if he is committed to that prison whereof he is keeper, without securing the prisoners there first, it will be an escape in law of all the prisoners.

Style, 465, per Glyn, C. J., and vide Dalton Sheriff, 487.

If a woman warden of the Fleet prison marries her prisoner, or if a sheriff, &c., marries a woman in execution with him, in either case it will be deemed an escape in law.

Plowd. 17. β If an underkeeper of a jail be taken in execution and delivered at the jail-house, and neither the sheriff nor any authorized officer be there to receive him, it is a constructive escape. And if the jail-keeper be imprisoned by the sheriff and trusted with the keys, it will be considered an escape. Colby v. Sampson, 3 Mass. 310; Gage v. Graffam, 11 Mass. 181; Steere v. Field, 2 Mason, 486; Day v. Brett, 6 Johns. 22.γ

If a man hath judgment against two (α) persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them still in custody.

Ro. Abr. 810. (α) So, if baron and feme are taken in execution, if the feme escapes, the sheriff shall answer the whole debt, though the baron continues still in execution. Ro. Abr. 810; Cro. Ja. 657, S. P.

By the 8 & 9 W. 3, c. 27, § 8, it is enacted, "That if the marshal or

(C) Of the Difference between voluntary and negligent Escapes.

warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor, at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law.

(C) Of the Difference between voluntary and negligent Escapes.

It was formerly held, that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in such case absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who by means of such escape became *debitor ex delicto*.

Leon. 73, Arundell and Wytham; Hob. 202, S. P., *per* Hobart, in the Sheriff of Essex's case.

But the latter resolutions have been contrary; and it has been (a) adjudged, that where a sheriff suffered a voluntary escape, the plaintiff might have a new action of debt or *scire facias quare executionem non* against the prisoner.

(a) Sid. 330, Allanson and Butler; Show. 174; Buxton and Home, 2 Mod. 136; Basset and Salter, Vent. 269; W. Jon. 21, 22; Mod. 194; Compton and Ireland, 2 Lutw. 1264; Sudal and Wytham. 4 Appleby v. Clark, 10 Mass. 59; Brown v. Getchell, 11 Mass. 11; Commonwealth v. Drew, 4 Mass. 391; Cheever v. Merrick, 2 N. H. Rep. 376.g

Also, the statute 8 & 9 W. 3, c. 26, § 7, hath taken away all distinctions between voluntary and permissive escapes with regard to the plaintiff's remedy; for thereby it is enacted, "That if any prisoner, who is or shall be committed in execution to either or any of the said respective prisons, shall escape from thence by any ways or means howsoever, the creditor or creditors, at whose suit such prisoner was charged in execution at the time of his escape, shall or may retake such prisoner by any new *capias* or *capias ad satisfaciendum*, or sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution."

But yet there remains a difference as to other purposes between permissive and negligent escapes; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of trespass against him.

Carter, 212. [2 Wils. 295; 5 T. R. 25, and vide the authorities *supra*.] 2 Tillman v. Lansing, 4 Johns. 47; Peters v. Henry, 6 Johns. 123; Richmond v. Tallmadge, 16 Johns. 307.g

This must be understood of custody in execution; for if the prisoner be in custody on *mesne process*, the sheriff may retake him after having permitted him to go at large.

Atkinson v. Matteson, 2 T. R. 172; Lewis v. Morland, 2 Barn. & A. 56.

[And where the escape is voluntary, nothing afterwards can purge it; for whenever a jailer permits a voluntary escape, from that moment he commits a tort.

Ravenscroft v. Eyles, 2 Wils. 295.]

If the marshal of the King's Bench or warden of the Fleet, or any other who hath the keeping of prisons in fee, suffer a voluntary escape, it is a forfeiture of the office.

3 Mod. 146; Carter, 212.

## (D) Of the Difference between an Escape in Mesne, &amp;c.

And now a further penalty is added by the 8 & 9 W. 3, c. 26, § 4, which enacts, "That if any marshal or warden, or their respective deputy or deputies, or any keeper of any other prison within this kingdom, shall take any sum of money, reward or gratuity whatsoever, or security for the same, to procure, assist, connive at, or permit any such escape, and shall be thereof lawfully convicted, the said marshal or warden, or their respective deputy or deputies, or such other keeper of any prisons, as aforesaid, shall, for every such offence, forfeit the sum of 500*l.* and his said office, and be forever after incapable of executing any such office."

## (D) Of the Difference between an Escape in Mesne Process and Execution.

If the sheriff suffer a person arrested on mesne process to escape, an action lies against him at (a) common law, from the delay and prejudice which the party suffers thereby.

2 Ro. Abr. 99, 807; Broby and Lumley, Moore, 852; Cro. Eliz. 623, 652, 868; Cro. Ja. 280. (a) And by the express words of 8 & 9 W. 3, c. 26. [2 Bl. Rep. 1049.] *β*An escape under a *capias ad respondendum* was held to be no breach of a sheriff's bond. The State v. Wailes, 3 Har. & M.H. 241. See Swepson v. Whitaker, 1 Hayw. 224; Tuton v. Sheriff, 1 Hayw. 485; Cady v. Huntingdon, Adams, 138; Langdon v. Hathaway, Adams, 367.*g*

But there is this difference between an escape on mesne process, and execution, that if the sheriff arrests a person on mesne process, and he is rescued by J S, he may return the rescue, and such return is good, and no action of escape lies against him after such return; but the court will issue process against such rescuer, or fine him: for in this case, though the sheriff may, yet he is not obliged to raise the *posse comitatus*.

2 Ro. Abr. 807; Jon. 207; Ro. Rep. 388; 3 Lev. 46. *β*Crumpler's Ex'rs. v. Glisson, N. C. Term R. 79. See Cargill v. Taylor, 10 Mass. 206.*g*

But after an arrest on a *capias ad satisfaciendum* the sheriff cannot return a rescue, for in such case, the sheriff is obliged to raise the *posse comitatus*, if needful; and therefore, if he return a rescue, an action of escape lies, or a new *capias*, (a) for the return of an ineffectual execution is as none.

Ro. Abr. 807; vide the authorities *supra*. (a) Cro. Car. 240, 255; Ro. Abr. 904; 8 Co. 142. [Upon the same principle the jailer will be liable for an escape upon the rescue of one brought out of jail by *habeas corpus* between judgment and execution. Crompton v. Ward, 1 Str. 429.]

||After an arrest on mesne process, the jailer may suffer the prisoner to go at large, provided he has him at the return of the writ. But, if a defendant taken in execution be afterwards seen at large, for any the shortest time, even before the return of the writ, the sheriff will be chargeable for an escape; for it is his duty to obey the writ, and the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff. Hence in Noy, 72, a distinction is taken, that in actions for escape on mesne process, the writ surmises, that *ad largum ire permisit, et non comperuit ad diem*; but on process of execution, *ad largum ire permisit* is sufficient. And so are the precedents. (b)

Atkinson v. Matteson, 2 T. R. 72; Hawkins v. Plomers, 2 Bl. Rep. 1048. *β*After an arrest on mesne process, the sheriff is justified if he has the defendant on the return-day. Stone v. Woods, 5 Johns. 182.*g* If the escape be involuntary, and the defendant, though he were in execution, return before action brought, the jailer may plead it, as he may a retaking on fresh pursuit. Chambers v. Gambier, C. R. 554; 2 T. R. 129, S. C., cited by Buller, J. But such plea of return before action brought must show a detention of the prisoner, and that it continued to the time of the action, or that it has been legally terminated. Chambers v. Jones, 11 East, 406. This plea cannot



## (D) Of the Difference between an Escape in Mesne, &amp;c.

be received without an affidavit, that the escape was not voluntary; for otherwise by stat. 8 & 9 W. 3, c. 27, § 6, the plea of fresh pursuit is not allowable. *Rex v. Huggins*, C. R. 422; 1 Barnardist. K. B. 350, 416, S. C. If a jailer retakes a prisoner in execution after a voluntary escape, he is liable to an action of false imprisonment. 3 Co. 52 b, and *per Grose, J.*, in *Atkinson v. Matteson*, *ubi supra*. (b) Rast. 171.

But a sheriff who carries a prisoner taken in execution to a lock-up house within his own bailiwick, and keeps him there for some time before the return of the writ, is not thereby chargeable with an escape.

*Houlditch v. Birch*, 4 Taunt. 608. ||

Also, upon an arrest on mesne process, the sheriff is obliged to take bail by the statute 23 H. 6, c. 10: therefore, if the plaintiff declares, that the defendant, being sheriff of Y, did arrest J S at the suit of the plaintiff, and afterwards did suffer him to go at large; and the defendant pleads the statute, and that he took good and sufficient bail, and the plaintiff replies and traverses, that the defendant took good and sufficient bail; this action does not lie; for *quoad* the plaintiff, the sufficiency of the bail is altogether immaterial, it is for the security of the sheriff; and if the party does not appear, the plaintiff need not take an assignment of the bail bond, but proceed against the sheriff by way of amercement, and leave the sheriff to take his advantage against the bail.

2 Mod. 177, *Ellis and Yarborough*, adjudged; 1 Mod. 227, S. C.; 1 Freem. 219, S. C.; *Gilb. C. P.* 22, S. C. See 1 Ld. Raym. 425; 1 Salk. 99; 6 Mod. 122; Noy, 72; Semb. *contra*. || But these cases are not law, and the case of *Etherick v. Cowper*, in 1 Ld. Raym. and 1 Salk., in which Lord Holt is made to say, that if the sheriff takes insufficient bail, he is liable to an action, as well as to amercements, is noticed by Salkeld to be contrary to the case of *Grosvener v. Soame*, 10 Mod. 288, where it was adjudged, that no action lies against the sheriff for taking insufficient bail, but he shall be amerced if he has not the body. ||

|| It was determined in one case (that case professing to go upon the authority of *Ellis v. Yarborough*) that putting in bail after the return of the writ, though before the expiration of the rule to bring in the body, was no defence to an action against the sheriff for returning *cepi corpus* where he had permitted the defendant in the original action to go at large without taking a bail bond, and had him not at the return of the writ. But this decision hath been overruled; for if in such case bail is put in before the expiration of the rule to bring in the body, it is put in within due time according to the practice of the court, and the sheriff is, consequently, not liable for an action either for an escape or a false return. It was decided, it is true, by the Court of Queen's Bench, that where the sheriff permits the party to go at large, and does not take a bail-bond, it is a breach of his duty, if bail are not put in within due time. But the result of that case is, that putting in bail to the action in due time is an answer to the action, and that he is only liable where he has not done so.

*Jones v. Eamer*, Anstr. 675; *Pariente v. Plumbtree*, 2 Bos. & Pull. 35; *Fuller v. Prest*, 7 T. R. 109. See also *Murray v. Durand*, Esp. N. P. C. 87, and *Allingham v. Flower*, 2 Bos. & Pull. 246. ||

§ The escape of a defendant in execution remits the plaintiff to all his former rights, and the imprisonment is no longer a satisfaction.

*McGuinty v. Herrick*, 5 Wend. 240. g

An attachment for non-payment of money is in the nature of mesne process; and the sheriff is not liable for an escape for permitting the defendant to go at large, provided he have him at the return of the writ.

*Lewis v. Morland*, 2 Barn. & A. § 56. *Sed vide cont.* 4 Price, 23.

A bankrupt having escaped out of the custody of the marshal, and being

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at large, surrendered to a commission subsequently issued, and received the protection of the 5 G. 2, c. 30, § 5; it was held, that he might, notwithstanding, be retaken, and detained in custody by the marshal.

Anderson v. Hampton, 1 Barn. & A. 308.

## (E) What Persons are answerable for, and to be charged with an Escape; And herein,

1. *Of the preceding or succeeding Sheriff, Warden, &c.*

WHERE a new sheriff is appointed, his predecessor ought to deliver over by (a) indenture all the prisoners in his custody, charged with their respective executions; for the prisoners, until they are turned over to the new sheriff, remain in the custody of the old sheriff, and if he omits to deliver them over, every omission will be deemed an escape, wherewith he will be chargeable.

Hob. 266; 2 Ro. Abr. 457; Cro. Eliz. 365; Bulst. 70; 2 Leon. 54; 4 Co. 79. (a) See the form thereof, Dalt. Sheriff, 18. When a debtor has been committed to the state jail, under process of the courts of the United States, and he escapes, the marshal is not liable. Randolph v. Donaldson, 9 Cranch, 76.

As, where one Bustard was in execution in the custody of the defendants, then sheriff of London, as well at the suit of A as at the plaintiff's suit, and the defendants at the end of the year delivered over the body of Bustard to the new sheriffs by indenture, wherein the execution at the suit of A was mentioned, but the execution at the plaintiff's suit was omitted, and afterwards Bustard, in the time of the new sheriffs, escaped; it was resolved by the whole court, that the defendants being the old sheriffs should be charged with this escape, for that the old sheriffs ought to have given (b) notice to the new sheriffs of all the executions wherewith any person was charged in their custody.

3 Co. 71, Westley's case. (b) That such notice may be by word only, or by some note in writing under the old sheriff's hand, or under the hand of his undersheriff, and need not be by indenture, unless the new sheriff require it. Moore, 689; Dalt. Sheriff, 16; Cro. Ja. 588; Poulter v. Greenwood, Barnes, 367.

But, if the sheriff dies during his shrievalty, the new sheriff, as soon as he is appointed, must take notice of all persons in custody, and of the several executions with which they are charged; and this he must do out of necessity, for there being nobody to inform him, he must himself take notice thereof at his peril.

3 Co. 72. [By stat. 3 Geo. 1, c. 15, § 8, the duties of the office of sheriff are, in this case, to be executed by the undersheriff, until a successor is appointed. And it is not usual to appoint a new sheriff till the end of the year.]

J S being in execution in the Fleet, was suffered to make a voluntary escape, after which he returned again to the Fleet; and the defendant being made warden in the place of the former warden, J S was turned over with the other prisoners, and afterwards suffered to escape; and the question was, Whether the voluntary escape suffered by the former warden did not so entirely discharge the execution, that the prisoner could not be retaken, nor judged in execution, by law, even though he should yield himself to it? And it was held, that it did not, and that the succeeding warden should be chargeable with the escape suffered in his time.

2 Lev. 109, Lenthal and Lenthal, adjudged; 3 Keb. 487, S. C.; Vent. 269, James and Pierce, S. P. adjudged, and the case of the sheriff of Essex, in Hob. 202, (*ante*, C.) *cont.* denied to be law. Until assignment the prisoners are considered in custody of the old sheriff. Partridge v. Westervelt, 13 Wend. 500.

β A prisoner on execution escaped and returned into custody; afterwards

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the sheriff went out of office and assigned the prisoners to his successor, and, while in his custody, the prisoner applied for his discharge under the insolvent laws, and the plaintiff, not knowing of the escape, opposed his discharge, in consequence of which the prisoner remained in custody; it was adjudged that this was not such an election to affirm the debtor in custody, as amounted to a waiver of the plaintiff's remedy against the former sheriff for the escape.

*Dash v. Van Kleeck*, 7 Johns. 477.

If a new sheriff receive a prisoner from his predecessor, he is bound to detain him, although a voluntary escape may have existed in the time of his predecessor.

*Rawson v. Turner*, 4 Johns. 469.*g*

So, in the case of one Grant, who being in the custody of the former marshal was suffered by him voluntarily to escape, after which he returned voluntarily to prison, and being found in prison, the succeeding marshal detained him; in an action of false imprisonment brought by him, the court held that he might, and that if he had suffered him to go at large, it would have been an escape.

6 Mod. 183; *Grant v. Southers*, Stra. 423.

2. Where Sheriffs, Wardens, &c., their Superiors or Deputies, are liable, at the Election of him who is injured by the Escape.

Where one hath the custody of a jail or freehold or inheritance, and commits it to another person who is insufficient, the (a) superior is answerable for all escapes suffered by his inferior; but, if the inferior be sufficient, the action must be brought against him, and not against the superior.

(a) But in what cases at common law, and upon the statute of Westm. 2, c. 11, the rule of *respondet superior* will hold, vide 2 Inst. 382, 466; 9 Co. 98; T. Jon. 60; 2 Lev. 158; Vent. 314; 2 Mod. 119; 3 Keb. 591, 656, 701, 754, 758, 773; Noy, 69; Comb. 95.

Also, by the 8 & 9 W. 3, c. 27, § 11, it is enacted, "That the offices of marshal of the King's Bench prison, and warden of the Fleet, and each of them, shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, lands, tenements, and other hereditaments of the said prisons of King's Bench and Fleet, or either of them, shall then belong or appertain respectively, in his or their respective proper person or persons, or by his or their sufficient deputy or deputies, for which deputy or deputies, and for all forfeitures, escapes, and other misdemeanors, in their respective offices by such deputy or deputies permitted, suffered, or committed, the said person or persons in whom the aforesaid inheritances respectively are, or shall then be, shall be answerable, and the profits and aforesaid inheritances of the said several offices shall be sequestered, seized, or extended to make satisfaction for such forfeitures, escapes, or misdemeanors respectively, as if permitted, suffered, or committed by the person or persons themselves, or either of them, in whom the respective inheritances of the said prisons shall then be."\*

\* Note: By 27 G. 2, c. 17, the power of appointing the marshal of the King's Bench is revested in the crown.

If the (b) bailiff of a franchise suffer an escape, and be insufficient, the lord of the franchise shall answer for him.

2 Brownl. 50, *per totam Cur.*; 2 Lev. 160, S. P. (b) If his deputy suffers an escape, he shall answer for it himself. Litt. Rep. 33, *per Curiam*.

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If a jailer, who is the sheriff's servant, suffers a prisoner to escape, the action must be brought against the sheriff, not (a) against the jailer; for an escape out of the jailer's custody is by intendment of law an escape out of the sheriff's custody, (b) for by the 13 E. 3, c. 10, sheriffs are to put in such keepers of jails as they shall answer for.

2 Lev. 159; T. Jon. 62; 2 Mod. 124. (a) Vide 5 Mod. 414, 416; Ld. Raym. 424; Salk. 272, where it is said in general, that jailers are liable for escapes; but the question being there touching the escape of a person committed for a criminal offence, must be understood of escapes in those cases, for which whoever *de facto* occupies the office of jailer is liable to answer; nor is it material, whether his title to the office be legal, or not. Hale P. C. 114; 2 Ro. Rep. 146; 2 Hawk. P. C. c. 19, § 28, and vide Hard. 29 to 35, that where actions for escapes are said to lie against jailers, such absolute jailers are intended, as writs are directed to. (b) || The sheriff is answerable *civilièr*, though not *criminahèr*, for the acts of his officers: *their* acts are by intendment of law *his* acts. But, though not answerable *criminahèr*, that is, not liable to be indicted, for the acts of his officers, he is liable in a penal action for them. Sturmy q. t. v. Smith, 11 East, 25; Stanway q. t. v. Perry, 2 B. & P. 157. ||

So, an arrest by the sheriff's officer is in judgment of law the (c) same as if the arrest were by the sheriff in person; and if such officer suffer the party arrested to escape, the action must be brought against the sheriff.

5 Co. 89; Ro. Abr. 94. (c) Although in law the custody of the bailiff be the custody of the sheriff; yet the sheriff cannot return that such a one was in his custody, and rescued out of the custody of his bailiffs, because of the repugnancy; but he may return, that he was rescued out of his own custody, although he was never in his actual custody, or out of his bailiff's custody. 3 Salk. 586, and vide Sid. 332; T. Jon. 197. || A return made by a sheriff that the person arrested was rescued out of the custody of the bailiff, has been holden to be bad: the return must be, that the person was rescued out of the sheriff's custody. *Per* Buller, J., in *Woodgate v. Knatchbull*, 2 T. R. 156. ||

But, if the sheriff directs his warrant to his bailiff, and afterwards J S puts in his own name as special bailiff, and thereupon arrests the defendant, who escapes; here J S shall be only chargeable, and not the sheriff, because the defendant was never in the sheriff's custody, but only in the custody of J S.

Cro. Eliz. 745; Dalt. Sheriff, 560. [It hath been repeatedly holden, that where a special bailiff is appointed on the nomination of the plaintiff in the action, the sheriff is not answerable for the acts of such bailiff. *De Moranda v. Dunkin*, 4 T. R. 120.]

So, if a writ comes to the sheriff, and he makes out his mandate to the bailiff of a liberty, who takes the party, and after suffers him to escape, (d) an action lies against the bailiff of the franchise, and not against the sheriff.

Ro. Abr. 98, 99; Bro. *Escape*, 40; Noy. 27. (d) [And if the bailiff in such case remove the party to the county jail situate out of the liberty, and there deliver him into the custody of the sheriff, he will subject himself to an action for an escape. *Boothman v. Earl of Surry*, 2 T. R. 5.]

So, where a *capias ad satisfaciendum* was awarded to the sheriff of Berks to arrest J S, who then was in custody of the mayor and burgesses of W, and thereupon the sheriff made a warrant to the mayor, &c., to take him, and afterwards they let him escape; it was clearly held, that the mayor, &c., and not the sheriff, were chargeable with the escape.

Cro. Eliz. 26.

If a *capias* issues against A out of the sheriff of London's court, directed to one of the serjeants, who arrests A and lets him escape before he is carried to the counter, the serjeant, in this case, and not the sheriff, is chargeable with the escape; for the sheriff is judge of the court, and not a ministerial officer. But, if A had been carried to the counter, and escaped

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thereout, the sheriff would then have been answerable, as jailer or keeper of the counter.

Ro. Abr. 806, Dunn and Patie; Sid. 318, S. P.

So, if a serjeant at mace arrest a man by virtue of a warrant issuing out upon a *latitat*, and afterwards suffer him to escape before he brings him to the counter; in this case, an action lies against the sheriff only for this escape, because he was in the custody of the sheriff presently upon this arrest; and the sheriff is the officer of the Court of King's Bench, and not the serjeant.

Ro. Abr. 806.

If upon a plaint levied in the court of B before the bailiffs of B, according to the custom there, a warrant is directed to the underbailiffs, to take *J S ita quod habeant corpus ejus coram ballivis ad prox. curiam*, and the underbailiffs take him and commit him to the prison *sub custodiâ* of the jailer of the prison of B; if they have him not at the day, &c., an action lies against them, and not against the jailer; for there was no commitment to him by any lawful authority, and that custody the jailer had was only as a servant to the underbailiffs.

Cro. Eliz. 743, Baldry v. Johnson, adjudged.

A prisoner in Wood street counter, upon a mesne process on a plaint levied against him, &c., escaped, whereupon the plaintiff brought his action against both the sheriffs of London; and, upon a demurrer to the declaration, the plaintiff had judgment; and it was resolved, that though the plaint was levied before one of the defendants only, and the prisoner escaped out of his counter, and by his negligence alone, yet that both sheriffs had the custody of the prisoners in both counters, and, by consequence, the action was well maintainable against both.

Carth. 145, Ryding and Edwin.

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and (a) merely personal, the party can only have remedy against the survivor.\*

Cro. Eliz. 625, Benion v. the Sheriffs of the City of York. (a) That no action lies against the executor or administrator of a person who suffers an escape, because it is a personal tort, and comes within the rule *actio personalis moritur cum persona*, vide Dyer, 271, 322; W. Jon. 173; Noy, 87; Latch. 167; Poph. 187; Vent. 31; 6 Mod. 125, 126. —\*By 8 & 9 W. 3, c. 11, § 7, the death of a plaintiff or defendant, where there is another surviving, shall not abate the suit.

3. Where the Party injured may have his Remedy against the Person escaping, and therein of Escape Warrants.

It has been already observed, that if the sheriff suffers the prisoners voluntarily to escape, the party at whose suit he was in custody may, notwithstanding, sue out any new execution against the person escaping; for it would be unreasonable that he should be allowed to take advantage of his own act, or that the creditor should be compelled, whether he will or no, to take his remedy against the sheriff, who may die or become insolvent.\*

\* It is put out of doubt by the stat. 8 & 9 W. 3, c. 26, which vide *ante*.

Therefore, where to a *scire facias quare executionem non* upon a judgment the defendant pleaded, that he was formerly taken in execution by a *capias ad satisfaciendum* upon the same judgment, and the sheriff suffered him to escape, to which escape the plaintiff then and there consented; this was

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held an ill plea: for the assent (a) subsequent will not make it an escape with the consent of the plaintiff, and therefore he has either his remedy against the sheriff, or may retake the party.

Salk. 271, Scott and Peacock. (a) Show. 174, S. P. adjudged on the like plea.

But, if (b) a man in execution upon a judgment for debt or damages be delivered out of execution by the sheriff or jailer who hath him in execution, with the (c) assent of him at whose suit he is in execution; and after by colour of this judgment he take him again and put him in prison, an *audita querela* lies upon this matter, and thereupon he shall be delivered.

Ro. Abr. 307, Welby and Andrews, adjudged. (b) So, if the plaintiff consent that one defendant only shall be delivered out of execution on a joint *capias ad satisfaciendum*. Style, 387; Clarke v. Clement, 6 T. R. 525.—So, if he consent that one of the bail shall be delivered out of execution, he shall not take the other. 2 Leon. 260. ¶ Though a discharge by act of law, as under an insolvent debtor's act, of one of several defendants taken on a joint *capias ad satisfaciendum*, has been holden not to operate as a discharge of the other defendants. Nadin v. Battie, 5 East, 147. So, where the prisoner in execution has been discharged upon terms which are not afterwards complied with; as, upon an undertaking to pay the debt by instalments; Vigers v. Aldrich, 4 Burr. 2482; or to render himself on a given day, if he did not in the mean time pay the debt; Clarke v. Clement, 6 T. R. 525; or to pay the debt at a future time; Tanner v. Hague, 7 T. R. 420; and on failure, that he should be liable to be taken in execution again; Blackburn v. Stupart, 2 East, 243.¶ (c) Where the consent was only that he should come to a tavern out of the rules. Style, 117.—Where one was in execution in the King's Bench, and some proposals were made to the plaintiff in behalf of the prisoner, who, seeing there was some likelihood of an accommodation, consented to a meeting in London, and desired the prisoner might be there, who came accordingly; this was held to be an escape with the consent of the plaintiff, and he could never after be in execution at his suit for the same matter.

[In an action against the warden of the Fleet, for an escape on mesne process, a verdict was given for the plaintiff with 300*l.* damages. The facts of the case were as follows:—The plaintiff had recovered against one Fakeney a debt of 11,000*l.*, but at the time of the escape a writ of error was pending, and final judgment not entered up. On Friday, the 24th of November last, the deputy warden of the Fleet (the warden himself being not in town) received a notice in writing (which notice it was in proof was duly served) from the plaintiff, to discharge Fakeney. The deputy warden having some doubts whether the notice were really the handwriting of the plaintiff in the suit, and those doubts being increased by its having been brought by one Knight, a man of very bad character; he did not immediately obey it, but employed himself in inquiring into the matter, and endeavouring to discover whether this were actually the handwriting of the plaintiff, or not. On the Saturday, the next day, he met the plaintiff's attorney, who told him, he was not enough acquainted with plaintiff's handwriting to be able to give any opinion on it. On the following day, Sunday, in the afternoon, he met the plaintiff and his attorney; the plaintiff then acknowledged that the notice which defendant had received was written by him, but after some conversation, swore that he had been made a dupe of in giving it, and immediately served the defendant with a countermand of it. The defendant disregarded this countermand, and that evening discharged Fakeney. Lord Loughborough's idea at the trial was, that this first notice could amount to nothing more than merely to entitle Fakeney to a *supersedeas*, that it by no means warranted an immediate discharge, and therefore, as the defendant had taken upon him to judge of the legal effect of it, he thought he ought to take the consequences, and told the jury that they should find for the plaintiff.

Holland v. Eyles, C. P. M. 28, G. 3, MSS.

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Bond, Serjeant, moved, that a nonsuit should be entered upon the above evidence as it appeared on the judge's notes. He insisted, that by the letter of discharge all claims by the plaintiff on the defendant for the detention of Fakeney were put an end to, and that that letter of discharge could not be countermanded. For, in the first place, this notice from the plaintiff was a legal discharge; a parol direction to the jailer by the plaintiff in the suit to let the prisoner go out of prison, is a good discharge. Brown Anal. 29; and such direction is a good defence by the jailer in an action for an escape. 2 Inst. 382. Lord Coke, commenting on the words *sine assensu domini*, says, this assent may be by parol, and shall be a sufficient bar in an action of debt for the escape. Dy. 275 a; Cro. Car. 329; Vesey v. Harris and wife, Goulds. 81. These cases prove, that where there is the consent of the plaintiff, a discharge without writ is a sufficient defence in an action against the jailer for an escape. But this order of discharge having been thus properly given, could not in law be countermanded. To see whether it were countermandable or not, it will be necessary to see what was to be its operation on the prisoner. As, with respect to him, it was a grant of liberty, a grant of an interest of the highest nature, and therefore not countermandable. For wherever a valuable interest is given by grant or manumission, it cannot be countermanded. A villein enfranchised for an hour, i. so forever; an express manumission of a villein cannot be upon condition, for once free in that case, and ever free. Co. Litt. 274 b; Finch, 29. The law invariably makes the distinction between matters of profit or interest, and matters of pleasure, ease, trust, authority, and limitation; with respect to the former it allows of no countermand; with respect to the latter, they may be countermanded, though a power of revocation be taken away in the most positive terms, for a man cannot by his own act make that not countermandable, which by law and in its nature is countermandable. This was settled in Viner's case, 8 Co. 82, where it was determined that a submission to an award is revocable, though the party have declared it to be irrevocable; but the grant of a valuable interest is in its nature irrevocable. Sheph. Abr. tit. *Countermand*, 464. If I present J S to a church, I cannot after vary and present anew, for a kind of interest passeth out of me. Finch, 32; Dyer, 348 a. In Plowd. 36 a, it is stated *arguendo* that if a personal thing be once in suspense, or the person of a man be once discharged for a personal thing, that is a discharge forever. From all these authorities then it is clear, that where a valuable interest is derived to a party, it is not subject to a countermand. And further, by this order of 24th of November, Fakeney can never be deprived of his liberty again for this debt. It is said in the case of Alanson v. Butler, cited in Show. 177, that in an escape by consent of plaintiff, neither the plaintiff nor the sheriff can retake, though the debt be unsatisfied. And in Freem. 213, in the case of Basset v. Salter, North, C. J., says, since the law is so strict that matters of deed shall not be discharged but by deed, he wondered that the law should permit an execution to be discharged by a mistake of the plaintiff's; and he cited a case, where a creditor went over to the King's Bench to treat with a prisoner, and brought him over the water to a tavern to treat, and it was held, that he could never take him again, and so the law is clear when he is once discharged by the consent of the plaintiff. S. C. in 2 Mod. 136. These words ought to have the more weight, because the C. J. seems to express a dissatisfaction in declaring the law to be so settled. But when this order was delivered to the warden, he was bound to obey it, otherwise he would

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have been guilty of a trespass, and he actually was guilty of one, in detaining Fakeney till the Sunday. That the action of trespass will lie in this case is determined in 3 Bulstr. 96, *Withers v. Henley*. But, if the defendant is chargeable in an action at the suit of Fakeney for detaining him, he cannot be chargeable in an action at the suit of Holland for discharging him.

See *Fytche v. Bishop of London*, House of Lords.

On the other side it was answered by Adair, Serjeant, that as to the first set of cases which were cited by the council for the defendant, and which went to prove that an interest once granted cannot be revoked; admitting that position to be true, yet liberty is not the interest meant in those cases; all those cases relate merely to property. That as to the case that was cited from *Freem. 213*, and *2 Mod. 136*, in the second set of cases, which struck the court as pressing rather hard upon the plaintiff, where it was held, that if a creditor had once taken his debtor out of prison, though for the express purpose of a compromise, he could not afterwards detain him; in that case it should be considered that there was an actual discharge, not, as in this, a mere assent to a discharge. There is another distinction, which was exceedingly material; and that is, between a party in prison under an execution, and under mesne process; execution is much more like an interest than a detention under mesne process; for the discharge of the party under mesne process by no means annihilates the debt; for the creditor, though he cannot arrest the debtor again, yet he may sue him for the debt, and then take him in execution.

An authority to a jailer to discharge a prisoner on mesne process is merely a license not coupled with an interest, therefore may be countermanded.

Lord Loughborough.—The point made at the trial was this, that a discharge once given, no matter by what means obtained, whether by fraud or fairly, was irrevocable. I did not leave it to the jury to inquire whether there had been any fraud used in obtaining the discharge, but summoned up the evidence without adverting to that part of the case. I thought the counsel extremely judicious in not pressing upon that ground, as I was strongly of opinion that the plaintiff had been grossly imposed upon, and should most certainly have summed up to the jury with very strong observations. The case therefore now comes before the court, bearing as an admitted fact upon the face of it, that the plaintiff had been duped, and therefore it is for the defendant's counsel to contend that the original order of discharge was effectual, notwithstanding it was obtained by a fraud upon the plaintiff.

The defendant's counsel, after some hesitation, confessed, that if the case were put upon that ground, they should be unable to support it, and not choosing to let the whole go again to a jury, the rule was discharged.]

By the 1 Ann. st. 2, c. 6, it is enacted, "That if any person committed or rendered to, or charged in the custody of the marshal of the Queen's Bench for the time being, or to or in the prison of the Fleet, either in execution, or upon mesne process, or upon any contempt in not performing orders or decrees (a) made by any of her majesty's courts at Westminster, and such person shall at any time after such commitment, render, charge, or being in execution, and before he shall have made payment or satisfaction to the plaintiff or plaintiffs, creditor or creditors, or shall have cleared himself of such contempt as he shall be charged with at the time of such his commitment, render, charge, or being in execution as aforesaid, make any escape from the custody of the marshal of the Queen's Bench for the time



(F) Of the proper Remedy and Nature of the Action.

being, or from the prison of the said Queen's Bench, or from the prison of the Fleet, or either of them, or shall go at large at any time after the three-and-twentieth day of January, in the year 1702, it shall and may be lawful, upon oath thereof in writing, to be made by one or more credible person or persons, before any one of the judges of (b) that court where such action was entered, or judgment and execution were obtained, or where the party was so committed or charged as aforesaid, to and for such judge before whom such oath shall be made as abovesaid, and such judge is hereby authorized and required from time to time to grant unto any person whatsoever, who shall demand the same, one or more warrant or warrants under his hand and seal, therein reciting the action or actions, execution or executions, contempt or contempts, with which such person so escaping or going at large stood charged, or was committed, at the suit of any person or persons on whose behalf such warrant or warrants shall be demanded, at the time of such escape or going at large, (which warrant or warrants shall be in force in all places whatsoever within the kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed,) directed to (c) all sheriffs, mayors, bailiffs, constables, headboroughs, and tithingmen, therein and thereby commanding them and every of them in their respective counties, cities, towns, and precincts, to seize and (d) retake such person (e) so escaped or going at large; and such person so retaken upon such warrant, forthwith to convey and commit to the common jail of such county (g) where such person so escaped or going at large shall be retaken, there to remain without bail or mainprize, or being thence (h) upon any account whatsoever delivered or removed until he shall have made full payment or satisfaction to the plaintiff or plaintiffs, creditor or creditors, in such action or actions, execution or executions, named, or until the judgment or judgments on which such execution or executions was or were sued out against such person shall be reversed or discharged by due course of law, or until judgment in such action or actions be given for such person or persons so committed as aforesaid, or until the contempt or contempts for which such person shall be committed be cleared and discharged," &c.

(a) [The escape warrant not grantable for any contempt, but not performing an order. *Hincheliffe v. Payne*, 1 Str. 99.] (b) If a person charged in execution in the King's Bench be turned over to the Fleet, and he escape, either a judge of the King's Bench or Common Pleas may grant an escape warrant. Pasch. 10 G. 1, *The King and Dunbar*. [And by 5 Ann. c. 9, § 2, the warrant may be granted on an affidavit made in the country before a commissioner, such affidavit being first duly filed.] 8 Mod. 240, ruled on motion. (c) If one who is no officer, by virtue of the warrant, seize a person escaping, and bring him before the sheriff, he cannot detain him; for, being illegally executed, it is the same thing as if there had been no warrant at all. 6 Mod. 154. (d) [By 5 Ann. c. 9, § 3, escape warrants may be executed on a Sunday. (e) If a person is taken upon an escape warrant at eight in the morning, and the same day obtains a day-rule, pursuant to a petition, which was not read in court till after eight, yet he shall be discharged; for as to this purpose there shall be no fraction of a day. Trin. 8 Geo. 1; *Wilkinson and Mathews*, 8 Mod. 80. (g) [By stat. 5 Ann. c. 9, § 1, persons taken by virtue of 1 Ann. c. 6, instead of being committed to the common jail of the county where they are taken, are to be committed to the prison where the sheriff keeps prisoners for debt, from which, if they escape, the sheriff shall be answerable as in other cases of escape.] (h) Cannot be discharged upon bringing the money into court. 6 Mod. 21.—Cannot come out on a day-rule. 6 Mod. 63.—[The warrant shall be superseded, if the party was entitled to his discharge at the time he escaped. *Webb v. Thompson*, 1 Str. 401.]

(F) Of the proper Remedy and Nature of the Action to be brought for an Escape.

At common law the plaintiff had no remedy against the sheriff for an

## (F) Of the proper Remedy and Nature of the Action.

escape, whether upon mesne process or in execution, but by special action upon the case.

3 Inst. 382; Show. 176; 2 Saund. 34; Hard. 30.

But now, by an equitable construction of Westm. 2, c. 11, (a) action of debt is given against sheriffs, and by the 1 Rich. 2, c. 12, against the (b) warden of the Fleet for escapes of prisoners in execution.

(a) This action being founded in *maleficio*, and also given by statute, is not within the statute of limitations of 21 Ja. 1, c. 16, which speaks of debts arising by lending or contract. Saund. 34, Jones and Pope, adjudged; Sid. 305, and Lev. 191, S. C., adjudged. (b) Extends to all jailers and keepers of prisons, though infants, or feme coverts. 2 Inst. 382. β These statutes extend to Pennsylvania. Shewell v. Fell, 3 Yeates, 17; S. C. 4 Yeates, 47.γ

Also, the plaintiff, at his election, may maintain either an action upon the case, or debt, for an escape in execution.

Cro. Ja. 288; 2 Bulst. 321; Cro. Eliz. 767. [If he adopt the latter, the jury *must* give him the whole sum, that is, the whole which he would have been entitled to have recovered against the prisoner, viz., the sum endorsed on the writ, and the legal fees of execution. Bonafous v. Walker, 2 T. R. 126; Hawkins v. Plomer, 2 Bl. Rep. 1048; Gabel v. Perchard, Anstr. 522. β Shewell v. Fell, 3 Yeates, 17; Duncan v. Klinefelter, 5 Watts, 141. But if the action be case, the jury may find such damages as they think proper. 5 Watts, 141. See Potter v. Lansing, 1 Johns. 215; Brown v. Littlefield, 7 Wend. 455; Thomas v. Weed, 14 Johns. 255; Van Slyck v. Hogeboom, 6 Johns. 270; Brown v. Genung, 1 Wend. 115.γ But see the words of Buller, J., in 5 T. R. 40. Debt lies as well where the escape is negligent as where it is voluntary. Stonehouse v. Mullins, 2 Str. 873.]

If there be judgment against baron and feme, and the feme only taken in execution, and suffered to escape, an action of debt lies against the marshal; for as the plaintiff may elect to take either the baron or feme in execution, so by his election he has made her a sole debtor within the statute of R. 2, and she only is imprisoned, although it was objected, that the sole and principal debtor did not escape; for the baron is the principal, and he remained subject to the execution.

Whiting v. Sir George Reynell, Cro. J. 657.

If a prisoner in custody upon a (c) *capias utlagatum* is suffered to escape, the plaintiff may either maintain an action *qui tam* against the sheriff, or bring an action of debt against him in his own right.

Cro. J. 361, 533, 619; Cro. Eliz. 877; 1 P. Wms. 685, S. P. adjudged. (c) So, an action on the case will lie for the escape of one taken upon a writ *de excommunicato capiendo*. Lutw. 123.

An action of escape is not a local action, and therefore (d) if one escapes out of the Marshalsea, which is in Surry, the action against the marshal may be laid in Middlesex.

(d) Dyer, 278 b, adjudged; and vide W. Jon. 144; Sid. 364, S. C.

|| If the plaintiff, in an action against a hundred, is nonsuited, and judgment entered against him for the costs, upon which he is taken in execution, and the sheriff permits him to escape; the hundred may bring debt against the sheriff for the escape.

Hundred of Lauress v. —, Fitzg. 296.

The nominal plaintiff in ejectment, in whose name the mesne profits have been recovered, may sue for an escape of the defendant in execution for such mesne profits.

Doe v. Jones, 2 M. & S. 473.||

[By 1 Ann. st. 2, c. 6, § 2, "If any person so retaken by warrant as afore-

(G) Of the Manner of laying the Action.

said, shall at any time make any escape out of the jail to which he shall be so conveyed or committed as aforesaid, the sheriff in whose custody he was, shall be liable to answer for such escape, as in the case of any other escape." By § 3, "It shall be lawful for any person or persons that shall be bail in any of her majesty's courts of record at Westminster, for any such person that shall be retaken and conveyed to such jail as aforesaid, by virtue of such warrant as aforesaid, to have and prosecute out of such of her majesty's courts where he or they shall be bail, a writ directed to the sheriff of the county, to the jail whereof such prisoner so retaken shall be committed and detained, commanding him to detain and keep such prisoner in custody in discharge of his bail; which writ, with an account whether he hath the said prisoner in his custody, shall be returned by the said sheriff into court, at a day therein to be mentioned; and the delivery of every such writ to the sheriff, or his deputy, shall be deemed and taken to be an effectual render of such prisoner to all intents and purposes whatsoever in discharge of the said bail; and in case such sheriff, his deputy, or other his inferior officer, shall thereafter suffer the person or persons so rendered in discharge of his, her, or their bail to escape, they and every of them so offending shall be liable to such action and actions as the marshal of the Queen's Bench, or warden of the Fleet prison, is or are liable to, for permitting any person to escape out of his or their custody or prison, who was committed to such custody or prison upon render in discharge of his, her, or their bail."

It is enacted by stat. 5 Ann. c. 9, § 4, "That if any person or persons shall be in custody of any sheriff, or other officer, either by virtue of the above stat. of 1 Ann. or of this present act, or otherwise, for not performing any decree of the high Court of Chancery, or Court of Exchequer, whereby any sum of money is ordered or decreed to be paid, and shall afterwards make any escape from the said sheriff or other officer, then and in such case the person and persons, their executors or administrators, to whom the money was to be paid by the said decree, (a) shall have the same remedy against the said sheriff, as if such person or persons so escaping had been in custody upon an execution at law, and shall and may recover the several sum and sums of money decreed to be paid to him, her, or them, in and by such decree, against such sheriff or other officer, together with his or their costs of suit, in any action or actions of debt, or upon the case, to be brought or commenced against such sheriff or other officer in any of her majesty's courts of record at Westminster, wherein no protection or wager of law shall be admitted, or any more than one imparlance."

(a) If, in a suit by husband and wife, it appear by the decree that the wife is interested in the case, she ought to join with her husband in the action, notwithstanding the order should appoint the money to be paid only to the husband. *Huggins v. Durham*, 2 Str. 726.

By 5 G. 2, c. 30, § 18, a penalty of 500*l.* is inflicted on jailers suffering bankrupts to escape.]

A bill could not, at common law, be filed against the warden of the Fleet for an escape in vacation; but by the 59 G. 3, c. 64, this is altered.

*Crook v. Eyles*, 2 Marsh. 49; 6 Taunt. 347; and see 2 Bro. & B. 51.

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IN this action it is not necessary to set forth all the (b) formalities required by law in other cases.

*Cro. Eliz.* 877. (b) Vide 2 Show. 424.

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Therefore if, upon a judgment obtained by the testator, the executor brings a *scire facias*, and has judgment, whereupon a *capias ad satisfaciendum* issues, and B is arrested, and suffered to escape; the plaintiff in an action against the sheriff for this escape may declare briefly upon the judgment in the *scire facias*, without showing the gradual proceedings at length, as is usually done in an action of debt upon a judgment.

Carth. 148, Gold and Strode; 3 Mod. 324, S. C.; Cro. Eliz. 877, S. P., adjudged. ¶ In an action against the marshal for an escape, the plaintiff must give the particulars of the precise day of the escape, if he is aware of it, and, if not, give such information as is in his power. Davis v. Chapman, 1 Nev. & Per. 699. *g*

But, if the plaintiff declares, that he sued out a writ of execution against J S, without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means the defendant lost the benefit of pleading *nul tiel record*, (a) which he might do, if the plaintiff had set forth the judgment.

Saund. 37, 38, Jones and Pope; Lev. 191, and 1 Sid. 306, S. C.; but the plaintiff had leave to discontinue. (a) 8 Co. 142, Drury's case.

¶ In an action for an escape, the marshal pleaded that the prisoner escaped without his knowledge, and to places unknown, and afterwards, and before the commencement of the suit, voluntarily returned in the custody of the defendant; the plea was held insufficient in not averring that the defendant had no such knowledge during any part of his absence, but leave to amend was given.

Davis v. Chapman, 5 Bing. N. S. 453; S. C. 7 Dowl. 429.

In an action for a permissive escape, the plaintiff must aver and prove that at the time of the escape the defendant in the writ was in the legal custody of the sheriff at the suit of the plaintiff under the writ.

Duffy v. White, 1 Alc. & Nap. 1.

In an action for an escape against the marshal, plea of collusion by plaintiff and others to procure the escape in order to fix the marshal, was held bad, for not clearly showing that the escape was the result of the plaintiff's act.

Merry v. Chapman, 3 Per. & D. 25; 8 Dowl. 81. *g*

If A recovers as executor against B, and has him in execution, and the sheriff suffers him to escape, the action must be brought as executor in the (b) *detinet* only, and not in the *debet* and *detinet*.

Lutw. 893, Glover and Kendal, adjudged; Comb. 114, S. C. adjudged. [But see Bonafous v. Walker, 2 T. R. 126, *contr.*] (b) For this vide 5 Co. 31, Hargrave's case; Cro. Ja. 545; Hob. 264; 3 Bulst. 119; Lan. 79; Savil, 130.

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say *prout patet per recordum*; yet, upon a general demurer, this shall be good; for the gist of the action was the escape, and the commitment only inducement.

Waites v. Briggs, 2 Salk. 565; 1 Ld. Raym. 35, S. C.; 5 Mod. 8, S. C.; and vide 3 Lev. 393, Norden v. Fox. Vide *infra*. Turner v. Eyles.

{In an action for an escape on mesne process, it is sufficient to aver in the declaration that the sheriff had not the body at the return of the writ, without negating the appearance of the defendant or his putting in bail.

2 Bos. & Pul. 561, Stoven v. Perring.}

If in escape the plaintiff declares, that he had J S and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution, (it being for a debt

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due from the wife before coverture,) and that he escaped; this is sufficient, and the plaintiff shall have judgment; (a) for the substance of the issue is found, though not pursuant to the declaration.

Sid. 5, Roberts and Herbert, adjudged. (a) As, where a man assigns for breach of a condition, that he was turned out of his house by two, and the jury found that it was done by one only. Cro. Ja. 475, Hingen and Pain, adjudged.

So, in an action on the case for the escape of A, where the jury found that A was taken by J S, the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment.

Cro. Ja. 380, King v. Andrews, adjudged; Sid. 5, S. C. cited.

|| So, where in debt for an escape against the marshal, it was alleged, that the prisoner was surrendered to him at the chief justice's chambers in the parish of St. Bride, whereas it appeared in evidence, that it was in the parish of St. Dunstan; it was holden to be well enough, this being debt, and the surrender being the only thing material; and that it differed from trespass, where every part of the declaration was descriptive.

Oates v. Machen, 1 Str. 595; at nisi prius, before Fortescue and Raymond, Justices.||

The plaintiff declared, that whereas he had good cause of action against A, and sued out a *latitat* against him; the defendant being sheriff arrested him, and suffered him to escape; upon trial at nisi prius the plaintiff was nonsuit because he could prove no cause of action against A; but Hale, C. J., said, that if the plaintiff had declared of a debt of 40s., and upon evidence could prove but 30s., it had been sufficient; but the book adds a *quare*, it being a special action upon the case.

2 Lev. 85, Gunter and Clayton. [4 T. R. 611, Alexander v. Macauley, S. P.]

{If the plaintiff aver in his declaration, that J S was arrested "under a writ endorsed for bail, by virtue of an affidavit now on record," he must produce the affidavit in evidence, though the latter part of the averment was unnecessary.

2 Esp. Rep. 671, Webb v. Herne; 1 Bos. & Pul. 281, S. C. See 5 Esp. Rep. 8, Turner v. Eyles; 3 Bos. & Pul. 456, S. C.}

[In debt against the sheriff for an escape, the endorsement of *non est inventus* upon the *capias ad satisfaciendum* is sufficient evidence of its having been delivered to him. So, the bailiff's name endorsed on the writ is sufficient evidence that he was authorized by the sheriff to arrest, without proving the warrant.

Blatch v. Archer, Cowp. 63; M'Neil v. Archer, 1 Espin. N. P. C. 263.

|| The undersheriff's confession of an escape has been admitted as evidence of the fact in an action against the sheriff; because the undersheriff gives the sheriff a bond to save him harmless, and therefore such confession goes in effect to charge himself.

Yabesley v. Doble, 1 Ld. Raym. 190. But see the remarks of Lawrence, J., upon this case in Drake v. Sykes, 7 T. R. 113.

If a prisoner in the custody of the sheriff, is brought up by *habeas corpus* before a judge and committed to the custody of the marshal of the King's Bench, who suffers him to escape, in an action against the marshal for such escape, it must be averred in the declaration, that the commitment was of record, otherwise it will be bad on a special demurrer; for the prisoner is not in point of law in the marshal's custody, until the commitment is entered of record.

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*Wightman v. Mullens*, 2 Str. 1226. It does not appear from the report, whether the commitment in this case was upon *mesne process* or in execution: if the former, its authority has been shaken by the case of *Wigley v. Jones*, *infra*.

So, in debt for an escape, where the party, who had been taken in execution by the sheriff, was afterwards brought up by *habeas corpus* before a judge of the King's Bench, the declaration alleged, that the prisoner had been so brought up before the said judge, and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears." It was holden, that the production of the writ of *habeas corpus* with the commitment of the judge endorsed thereon, which appeared to have been brought from the office of the marshal, but *had not been filed of record in the court*, was not sufficient to support this allegation; and that the above allegation (even if unnecessary) must be proved as laid.

*Turner v. Eyles*, 3 B. & P. 456.

But, where an action was brought for an escape after a commitment on a *habeas corpus* of a person arrested on *mesne process*; it was holden in that case that "the *prout patet per recordum* remaining in court" might either be rejected as surplusage, on the ground of such commitments not being of record, nor capable of becoming so; or, if considered as *quasi* of record, the allegation was sufficiently proved by the production of the writ with the *committatur* annexed by the clerk of the papers of the King's Bench prison, with whom, as servant of the marshal, such papers are usually deposited.

*Wigley v. Jones*, 5 East, 440.¶

By the 8 & 9 W. 3, c. 27, § 12, reciting, that the way of proceeding against the warden of the Fleet prison, by bill in the Courts of Common Pleas and Exchequer at Westminster, is found to be very dilatory; it is enacted, "That it shall and may be lawful to and for any person or persons, having cause of action against the warden of the Fleet prison, upon bill filed in the said Courts of Common Pleas or Exchequer against the said warden, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against the said warden of the Fleet, unless he plead to the said bill within three days after such rule is out."

In an action against the marshal for an escape, the declaration alleged that the plaintiff and W. B. had divers disputes, and by mutual bonds of submission referred them to the arbitration of C. and D.; that an award was made ordering W. B. to pay the plaintiff a certain sum on, &c., and because the award was not performed, plaintiff sued out of the C. P. a writ, commanding defendant to attach W. B. (then being in his custody,) so that he might have his body before the justices of C. P. on, &c., to answer, &c.; and W. B. being and remaining in the custody of the defendant, as such marshal, by virtue of the attachment, &c. &c., was brought before Sir S. G., a judge of C. P., at his chambers, by *habeas corpus*, and by him committed to the custody of the warden of the Fleet, and afterwards was brought before Sir J. L., a judge of K. B., at chambers, and by him committed to the custody of the defendant, charged with the attachment, and defendant afterwards suffered him to escape; it was held, that the plaintiff was bound to prove the execution of the bond of submission by himself, as well as by W. B.; but it seems he need not have done so had he alleged and proved a rule of C. B., ordering the issuing of the attachment, although proof of such rule, without a statement of it in the declaration, would not be sufficient.

*Brazier v. Jones*, 8 Barn. & C. 124.

(H) Of the Party's Defence who suffered the Escape: And herein of pleading fresh Suit.

If the prison takes fire, (a) by means whereof the prisoners escape, this shall excuse the sheriff, and he may plead it.

3 E. 6, 66, 15; Ro. Abr. 808. (a) This must mean fire by lightning; for Rolle (and Dyer, from whom he cites) say "fire which is the act of God." And Lord Loughborough, delivering the opinion of the court in *Alsept v. Eyles*, 2 H. Bl. 113, says, that "as the law stands, nothing but the act of God or the king's enemies will be an excuse."

So, if the prison is broken by the king's enemies, this shall excuse the sheriff, for he can have no remedy over against them.

4 Co. 84; Ro. Abr. 808.

But, if the prison was broken by rebels and traitors, the king's subjects, this shall not excuse him, for he may have his remedy over against them.

4 Co. 84; Ro. Abr. 808. || *Elliot v. Duke of Norfolk*, 4 T. R. 789; *O'Neil v. Marson*, 5 Burr. 2812.

|| Where B, in custody at the suit of A, in a joint action against B and C, justified bail in an action entitled by mistake against B only, and a rule so entitled was served on the marshal of the King's Bench, who thereupon discharged B out of custody; the marshal was holden liable in an action for an escape.

*White v. Jones*, 5 East, 292. ||

If a prisoner in execution escape without the assent of the sheriff, &c., and he make fresh pursuit and retake him (b) before any action brought against him, this shall excuse the sheriff.

Cro. Ja. 657; Jon. 144; Ro. Abr. 808. [And a voluntary return of the prisoner, before action brought, is equal to a retaking upon fresh pursuit. *Bonafous v. Walker*, 2 T. R. 126.] (b) But, if he retake him after the action commenced against him, this shall not excuse him; nor can it be pleaded to an action that was well attached before. Ro. Abr. 808, 809; Jon. 145; Cro. Ja. 657; *Harvey and Reynell*, adjudged. [2 Str. 873; *Stonehouse v. Mullins*, S. P.]

So, the sheriff may plead, that the prisoner escaped the sixteenth day of December, and that he made fresh suit, and retook him, the seventeenth day of December, and retained him in execution; for it is sufficient if he did all he could, though he lost sight of him in the night, or otherwise.

Ro. Abr. 809; *Dalt. Sheriff*, 562.

So, if a prisoner escapes, and several days after, but as soon as the sheriff has notice of it, he makes fresh suit, and retakes him before any action brought, this shall excuse him.

Ro. Abr. 809. See 3 Co. 52. Vide Ent. 195, 198.

If in debt upon an escape the plaintiff sets forth in his declaration a voluntary escape, the defendant may plead that he took him upon fresh pursuit, without traversing the voluntary escape; for it was impertinent for the plaintiff to allege it, and no ways necessary to his action.

Vent. 211, 217; *Sir Ralph Bovy's case*. [2 T. R. 126; *Bonafous v. Walker*, S. P. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. *Ibid.*]

It was formerly held that the sheriff, &c., might give fresh pursuit in evidence, and need not have pleaded it.

Vide Mod. 116; Sid. 13.

But now by the 8 & 9 W. 3, c. 27, § 6, it is enacted, "That no retaking on fresh pursuit shall be given in evidence on the trial of any issue in any action of escape against the marshal or warden, or their respective deputy or deputies, or against any other keeper or keepers of any other prison or pri-

(H) Of the Party's Defence who suffered the Escape.

sons, unless the same be specially pleaded; nor shall any special plea be taken, received, or allowed, unless oath be first made in writing (a) by the marshal or warden, or their respective deputy or deputies, or by such other keeper or keepers of any other prison or prisons against whom such action shall be brought, and filed in the proper office of the respective courts, that the prisoner for whose escape such action is brought did, without his consent, privy, or knowledge, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the marshal or warden, or other keeper or keepers of any other prison or prisons, shall be convicted thereof by due course of law, such marshal or warden, or other keeper or keepers of any other prison or prisons shall forfeit the sum of 500*l*."

(a) An affidavit that the escape mentioned in the declaration (if *any such escape there was*) happened without the defendant's knowledge, was allowed to be sufficient; for, if the defendant knows nothing of any escape, he is not to be bound to admit by his affidavit that an escape has actually happened. *West v. Eyles*, 2 Bl. Rep. 1059.]

If an action of escape be brought against the sheriff, and the judgment upon which it is found be reversed before such time as the defendant is forced to plead, he may plead (b) *nul tiel record*; for (c) collateral things executory are as if no judgment had ever been, when reversed.

8 Co. 142; *Dalt. Sheriff*, 563. (b) In debt for an escape of one committed on a *capias utlagatum*, the sheriff may plead *nul tiel record*. *Hob.* 209; *Brownl.* 51. (c) But if, in debt, upon escape, the plaintiff recovers, and hath execution, and after the first judgment is reversed, yet the judgment for the escape remains in force. 8 Co. 142 b; 3 Mod. 325, S. C. cited.

If a prisoner taken on a *capias ad satisfaciendum* pays the debt to the marshal for the use of the plaintiff in the original action, and is thereupon discharged, yet he cannot plead it to an action brought against him for the escape; for the marshal had no authority to receive the money, the words of the writ being *quod capias, &c., et eum salvo custodias ita quod habeas corpus ejus coram justiciariis*. *tiel jour ad satisfaciendum* the plaintiff.

*Cro. Eliz.* 404; *Mod.* 194; 2 *Jon.* 97; *Lutw.* 587; *Ld. Raym.* 399; *Slackford v. Austen*, 14 *East*, 468, S. P.

A plea to an action of escape, after stating the return of the prisoner into custody before action brought, ought to show a detention of him by the marshal down to the commencement of the suit, or his legal discharge from detention; and therefore, though if the plea only state that, after the return into custody, the marshal did detain and keep the prisoner in execution, under and by virtue of the commitment, and the replication traverse that the defendant did keep and detain him, &c., in manner and form as stated in the plea on this issue, the defendant is bound to show a detention down to the commencement of the action, or till legal discharge, and the plea is negatived by showing that the prisoner escaped a second time; the plaintiff is not bound to new assign the second escape.

*Chambers v. Jones*, 11 *East*, 406; and see *Griffiths v. Eyles*, 1 *Bos. & Pull.* 413.



## ESTATE IN FEE SIMPLE.

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§ A FEE SIMPLE is an interest which, in reference to the ownership of individuals, is not restrained to any heirs in particular, nor subject to any condition or collateral determination, except the laws of escheat and the canons of descent, by which it may be qualified, abridged, or defeated. (a) The term fee simple is sometimes used by the best writers on the law, as contrasted with estates tail; (b) in this sense it comprehends all other fees, as well as the estate, which properly, and in strict technical language, is peculiarly distinguished by this appellation. (c)

(a) 1 Co. Litt. 1; Plowd. 557. (b) 1 Co. Litt. 19. (c) Bouv. L. D. h. t. g

(d) Fee simple is an estate in (e) lands, tenements, &c., to one and his heirs forever. Also, where a corporation sole or aggregate are capable of holding in succession, and lands are given to them and their successors, they are said to have a fee simple.

(d) It was a common practice among the Northern nations that invaded the Roman empire, for the lords, who held great districts, to give lands to such persons as had behaved themselves well in the wars, sometimes for life only; and when they married their daughters to any of those soldiers who were usually their vassals or tenants, they gave the lands to them and the issue of that marriage, which brought in the notion of succession amongst us. Dig. lib. 1, tit. 1. How from this notion of succession a fee simple arose, by letting in all heirs, whether lineal or collateral, to the exclusion of the ascending line, bastards and the half-blood, and why the male line was preferred, vide title *Descents, ante*. My Lord Coke divides *fee*, which he says signifies the same with inheritance, into fee simple or absolute, conditional and qualified, or base. Co. Lit. 21 b. And this, which is the most ample estate of inheritance, may be in things (e) *real, personal or mixed*; real, as in lands or tenements; personal, as when an annuity is granted to one and his heirs; mixed, as when an earl is created of such a county. Co. Lit. 1 b, 2 a.

In fee simple we shall consider,

(A) Who may purchase or inherit such Estate.

(B) The Import of the Word *Heir* that creates the Estate.

1. *When it is a Word of Limitation.*
  2. *When it is a Word of Purchase.*
- 

(A) Who may purchase or inherit such Estate.

AN alien cannot purchase any lands in England; the reason is, because every person is presumed to have a natural and necessary allegiance to that society that first protected and preserved him; and therefore he cannot pay any allegiance to any other society, unless he be afterwards received into it.

Vau. 227, 291; 7 Co. 16, 17, 18. Dyer, 2. But for this vide head of *Aliens*. § Real estate descends according to the laws of the state where the land lies. *Stent v. M'Leod's ex'rs*, 2 M'Cord's Ch. 355; *Elliott v. Lord Minto*, 6 Madd. 16. g

All persons attainted of treason or felony are incapable of purchasing. Felony, by the ancient feudal law, was a (g) crime for which a vassal forfeited his feud to the lord, because he broke his oath of fealty in the highest manner: his body with which he had engaged to serve the lord is forfeited to the king; and his blood is said to be corrupted, because no man can

## (A) Who may purchase or inherit such Estate.

represent his person, that person itself being forfeited by the law, and the note of infamy resting upon his family ; so that no representative of his can be received to do any feudal service ; such tenant, therefore, dying without heirs, the land is in the lord by forfeiture. But, if the tenant commits treason, the lands are forfeited to the king, because there is an exception in the oath of fealty that saves his allegiance to the king ; so that if he forfeits his allegiance, even those lands held of another lord are forfeited to the king, for the lord himself cannot give out lands, but upon that condition, as appears by the reservation in the oath.

(g) Co. Litt. 8 a, of such crimes there were many by the ancient feudal law, for which vide Digest. Feudorum, lib. 2, tit. 23, 24; Vigellius, 242, 350; Spelm. Gloss. 214, 215; Co. Litt. 64.

If a man be attainted of felony, and after purchase land, and die, the king shall have it by his prerogative, and not the lord of the fee ; because his person being forfeited to the king, he cannot purchase but for the king.

Co. Litt. 2 b.

If there be grandfather, father, and son, and the father be attainted, the son cannot inherit the grandfather, because the father cannot be represented ; but, if the father be attainted, two brothers may inherit each other, because there is no disability in the one to be represented, or in the other to represent. If the father be attainted, the son may inherit the mother. If the eldest son be attainted, and the father die in the lifetime of such eldest son, the younger cannot inherit, because there is the line of the elder brother in being before him ; but, if the eldest son die in the lifetime of his father, without issue, the younger brother shall inherit ; but if he leave issue, neither the issue nor younger brother can inherit.

Noy, 158 to 170; Co. Litt. 8; 4 Leon. pl. 21; Mo. 569; Dyer, 48.

If the father be attainted and die during the life of the grandfather, yet the son shall not inherit the grandfather, because he must represent his father, who cannot be represented ; but, if the grandfather be seised in tail, and the father be attainted of treason since the 26 H. 8, c. 13, and die in the lifetime of the grandfather, the son shall inherit the grandfather ; for the son is heir *per formam doni* to the tail, which is originally not forfeitable, and by that statute the father only forfeits the land and right that he hath in him.

Co. Litt. 8; 2 Co. 10.; Dowtie's case.

If a man attainted be pardoned by act of parliament, he is totally restored and inheritable to all persons ; but, if he be pardoned by charter, he may thenceforth purchase lands, but cannot inherit his former relations ; for the king's charter cannot alter the law, or take away the right of others, or restore the relation that was lost.

Co. Litt. 8. But, if a man be attainted, and after pardoned by charter, the children born before such pardon shall not inherit ; but if they fail, the children born after such pardon may inherit him, for the pardon makes him capable of new relations as well as of new purchase, though all the old legal benefits and relations are lost. Noy, 170.

All customary estates are within this rule, unless there be some particular custom to the contrary, as in gavelkind, because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate, or to have any property in any thing ; and therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony, the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court baron to inquire of criminal matters or offences against the king, and such homage is at the will of the lord, and often influenced by

## (A) Who may purchase or inherit such Estate.

him; but, if a copyholder be convicted of felony, and presented by the homage, by special custom, the estate may be forfeited to the lord. But this is only by the special custom, since the copyholder is not disabled by the conviction to hold the estate, as he is if he were attainted; and therefore, since it is by the custom only that such forfeiture accrues, it must be in the manner in which the custom settled it, which is by presentment of the homage. But if a copyhold is granted for life, and by another copy the reversion is granted to another, *habendum* after the death of the first copyholder, or surrender, forfeiture, or other determination of the first estate, the first copyholder commits murder, and is therefore attainted, and the king pardons the murder and the attainder, and all forfeitures thereby; in this case, he in the reversion is entitled to the estate; for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he cannot be tenant to himself; therefore the particular estate of tenant for life being extinguished, the reversion immediately commences.

Pollex. 617; 2 Keb. 451, 456; 2 Vent. 38, 39; 2 Brown. 118; vide Co. Cop. § 58, *cont.*; Leon. 1; Pollex. 615 to 621.

A bastard cannot inherit; but, if he hath gotten a name by reputation, he may purchase by it, for all surnames were originally acquired by reputation.

Co. Litt. 3 b; but for this vide tit. *Bastardy*.

As to Jews, they were translated from Roan, by William the Conqueror, *ob numeratum pretium*, and were allowed by several kings following the Conqueror, because they dealt with one another chiefly in money, and so drew a great deal of money into the kingdom, which they let out to Christians on usury, and were taxable to the king at his pleasure. Richard the First erected a court where all their real and personal estates were registered; which all, upon the death of any Jew, came to the king, but was redeemable by his children, paying their fine, and all the children equally inherited; the wives sued for dower in this court, and could not sue at common law for it; and therefore if a Jew born in England took to wife a Jew also born in England, if the husband was converted to the Christian faith, and purchased lands and enfeoffed another and died, the wife could not demand dower at common law against a Christian.

Notwithstanding the charters and immunities granted to the Jews, yet their whole estates were taxable at the pleasure of the king, and might at any time be seized by him. About the 18 E. 1, when their usuries and extortions were very grievous to the people, they were banished by proclamation, and their estates seized to the king, and a statute made against their taking usury in this land, forever afterwards; but now all the records touching their courts, their immunities, and the power of the crown over them, are lost and obsolete, so that those that are born here seem inheritable at this day. But *quære* how far those old laws, of which there are footsteps in history, may be revived upon them? Hollingshead, vol. 3, p. 15; Co. Litt. 31, 32; 2 Inst. 506, 507. Vide Molloy, 397 to 410, a good account of the Jews.—[Jews, it seems, were not incapacitated from taking gifts or land, unless there was an express clause, usual in former times, in the original charter, forbidding an alienation to them. Bract. 13.]

Religious persons are prohibited to purchase in mortmain.

Vide tit. *Charitable Uses and Mortmain*.

Villeins and bondmen have power to purchase lands, but cannot retain them against their lords.

Co. Litt. 2.

As to persons who are naturally incapable to purchase or inherit, a monster not having human shape cannot purchase or inherit: but an herma-

(B) The Import of the Word *Heir*, &c.

phrodite shall inherit or purchase *secundum prævalentiam sexûs incalescentis*. One born deaf and dumb may inherit; so may any born deaf, dumb, and blind, because it is for their advantage; but they cannot contract, because they cannot understand the signs of contracting. An infant an idiot, and a person of *non sane memory* may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property. So also an infant, or a person of *non sane memory* may purchase, because it is intended for his benefit; and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor, contrary to his own act; nor can it be in abeyance, for then a stranger would not know against whom to demand his right: if at full age, or after recovery of his memory, he agree thereto, he cannot avoid it; but, if he die during minority or lunacy, the heir may avoid it; for the heir shall not be subject to the contracts of persons who wanted capacity to contract. So, if after his memory recovered, the lunatic or person *non compos* die without agreement to the purchase, his heir may avoid it.

Co. Litt. 8; Inst. 2; 2 Vent. 203, 204. Vide tit. *Infancy and Age*, and *Idiots*, &c.

A feme covert is capable of purchasing; for such an act does not make the property of the husband liable to any disadvantage, nor does it suppose a separate will or power of contracting in the wife; but here the will of the wife is supposed the mind of the husband, since no man is supposed not to assent to that which is for his benefit: but in this case the husband may disagree, and it shall avoid the purchase; for since husband and wife, according to the institution of marriage, are reckoned one person, they can have but one will, and that must be seated in the husband, as fittest to govern; therefore the supreme direction of all affairs in his family must belong to him: but, if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage. But in this case, though the husband should agree to the purchase, yet after his death she may waive it; for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it.

Inst. 3 a. But the queen consort, as she is a woman of greater dignity than any other of her sex in the kingdom, so she hath greater privileges than any of them, for she is considered by the law as a person exempt from the king, and hath ability to purchase and grant without him; which economy seems to be introduced as well for the greater ornament and grandeur of the monarchy, by enabling the queen to support and keep a court of her own, as to encourage princes to court the alliance of our princes by marriages attended with so much ease and dignity.

(B) The Import of the Word *Heir* that creates the Estate.1. *When it is a Word of Limitation.*

If land be given to J S and his heirs, J S can claim it, because he is particularly named, and whoever can make himself heir to J S, that is, can support the character of a legal representative to J S, may claim it also by the words of the gift. But, if land be *granted* to J S forever, no person can stand in his place after his death, or claim any interest, because the party that is next of kin by the law cannot bring himself within the words of the conveyance.

Co. Litt. 9. § In a will words of inheritance are not indispensable in order to give

(B) The Import of the Word *Heir*, &c.

a fee simple estate; when the intention to give a fee is discernible, it shall have that effect. *Waring v. Middleton*, 3 Desaus. 249; *Engle v. Burns*, 5 Call, 463; *Bradford v. Belfield*, 2 Sim. 264; *Jenkins v. Clement*, Harp. Eq. 72; *Whaley v. Jenkins*, 3 Desaus. 80; *Clark v. Mikell*, 3 Desaus. 168; *Goodrich v. Harding*, 3 Rand. 280.*g*

It is therefore a general rule, that nothing but the word *heir* will create a fee. But this general rule has the following exceptions:

Co. Litt. 9.

If the father enfeoff the son, to hold to him and his heirs, and the son enfeoff the father as fully as the father enfeoffed him; this conveyance passeth a fee to the father.

For when the act of disposal relates to another thing, that thing becomes in a manner part of the disposition, for in such cases the mind is carried to the notion of an heir as truly and surely as if the word had been in the instrument itself; so that there is a great difference between this case and the case where other words are substituted instead of the word *heir*; for scarce any other word can express all the notions that make up the idea of an heir; but where there is a relation to a legal heir, it is the same thing as if it were expressed in the conveyance itself, because the word is but to put us in mind of the thing which is done already by the relation; for as we say not only that is certain which is so in itself; but that also, which by some other standard is reducible to a certainty; so that not only that conveyance hath force, which hath words in it to answer the intent of the party, but that also which borrows strength from any other thing to answer the same design; and this will appear plain by the following instances:

By a fine come *ceo*, &c., a fee simple will pass without the word *heirs*, because it hath relation to a precedent feoffment, which is supposed to pass the fee.

Co. Litt. 9.

If the lord releases all his right to the tenant, the seignior is extinct without the word *heirs*; for this instrument is to discharge the estate of the tenant, and therefore hath a necessary relation to the estate, which the lord at first created, and, consequently, it refers to those words that in the original of the estate gave him a fee simple.

Co. Litt. 9.

If there be two coparceners, and one of them release all her right to the other, without the word *heirs*, this passes a fee; for each coparcener till partition is seised of the whole estate in fee, though each of them hath right or legal demand to the fee of a moiety only: when, therefore, one releases all her right, it hath a necessary relation to the estate whereof the other is seised, and to which she hath a right, which is the fee.

Co. Litt. 9.

If there be two jointenants, and one release to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee which they jointly took, and are possessed of by force of the first conveyance. But tenants in common cannot release to each other, for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which one cannot transfer to the other, without the solemnity of livery.

Co. Litt. 9, 200 b.

A common recovery is in nature of an action commenced, and judgment upon it, and therefore passeth a fee without the word *heirs*; for it hath relation to a precedent right in the recoveror, which must be supposed a right to the fee.

Co. Litt. 9.

If one coparcener grants a rent to another for owelty of partition, the

(B) The Import of the Word *Heir*, &c.

grant is good without the word *heirs*; for, coming in recompense of an inheritance, it has a plain relation to the inheritance departed with, as if the word *heirs* had been in the gift.

Co. Litt. 9.

A restitution to a person attainted and pardoned will not pass a fee without the word *heirs*; for, since the party forfeited the estate, the restitution is in nature of a *new* grant; and here are no words that create a necessary relation to that fee, which the person formerly attainted had, for he may be restored to his estate during his own life.

It is a new grant in nature of a restitution.

Where a man is called to parliament by writ, the inheritance is in him without the word *heirs*, because the writ is in nature of a citation to appear at the court of parliament, and the heir cannot be cited to appear, and therefore there is no mention made of him.

Inst. 9 b. [But the blood of the person summoned is not ennobled till he takes his seat in parliament. Ibid. 160.]

There are some species of fees that are expressed without the word *heirs*, for the words whereby they are created signify inheritance, as the word *frankmarriage* signifies an inheritance given in consideration of marriage, which, being for the peopling of the country, had several privileges annexed to it. So, *frankalmoigne* signifies an inheritance devoted to God, which was mightily favoured by the superstition of ancient times. So, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee simple without the word *successors*, because in judgment of law they never die. (a) For the same reason, if lands are given to the king by deed enrolled without the words *successors* or *heirs*, a fee simple passeth. (b)

Co. Litt. 9 b. (a) [A fee will pass to a sole corporation without words of limitation or succession, when the grant is made to the corporation by its corporate or collective name. Thus a gift *ecclesie de A.* will pass a fee, though the deed of gift contain no words of succession. 11 H. 4, 84 b; 1 Atk. 437. (b) That is, if the king takes them in his royal politic capacity, *jura coronæ*.]

There are likewise particular kinds of laws within the kingdom, that allow of the transferring of inheritances without the word *heirs*, as the law of the forest, which dependeth on the mere pleasure of the king, and not on the solemnities and forms of a contract; and therefore, if the king granted an assart at a justice-seat, *habend. et tenend. sibi in perpetuum*, the party had a fee without the word *heirs*, inasmuch as the king had signified his pleasure, that the party should have the privilege of tillage forever.

Co. Litt. 10 a; Co. Litt. 7.

In wills and testaments, where the mind of the party appears to transfer a fee; for the mind of dying persons delivered in haste ought to receive a benign interpretation.

Co. Litt. 9. But for this vide tit. *Devises*.

## 2. When it is a Word of Purchase.

The first rule to be observed is this, that where the ancestor takes an estate for life, and a limitation is afterwards made to his right heirs, there, the ancestor has the reversion executed in himself, and the right heirs are not purchasers; as, if a lease for life be made to A, remainder to B, remainder to the right heirs of A, such remainder is executed in A, and he may grant it over; but, if a lease for years be made to A, remainder to the right

(B) The Import of the Word *Heir*, &c.

heirs of A, this is a contingent remainder to the right heirs of A, and A himself takes nothing by such limitation. The reason of the difference is this: in the first case A, having an estate for life, is *feoffatus* within the statute *quia emptores*, &c., and, consequently, capable of performing the feudal services; and then to make the right heir a purchaser would be to suspend the services of the feud during the life of A, who is capable of performing them; which would apparently tend to the weakening of the tenure and state of the kingdom; and therefore such interpretation ought to be made as best supports the tenure, when the words will bear both senses. For if, after such limitation to the right heirs of tenant for life, he still continued but barely tenant for life, he would not be in the homage of the lord, nor would he be obliged to venture his life in the wars for such estate; and he in remainder would not be obliged to do the feudal services, because, during the life of the tenant for life, he has no interest in the land; for his remainder cannot execute during the particular estate, and, consequently, he is not obliged to do the services of the feud; and if such remainder was to vest in the right heirs as purchasers, it could not vest during the life of tenant for life, *quia non est hæres viventis*; and then by such construction the services of the feud would be neglected during the life of A, for there would be no one to perform them. But in the last case you cannot vest the remainder in the lessee for years, for he is not *feoffatus* within the statute; for the person that properly takes by the feoffment is the freeholder, and then, consequently, although you should construe a limitation to such right heirs, a remainder vested in the lessee for years; yet he, having not the immediate freehold in him, would not be obliged to do the feudal services till the intermediate remainder was spent; and therefore the remainder to the right heirs is not immediately vested in the lessee for years, because the heir is the first that can have the freehold as feudal tenant to the lord, and therefore by the words of the donation must be the first purchaser of such remainder. And though in the first case they admit such limitation to be a remainder executed for public convenience, viz., that the feudal services, if possible, may be answered; yet it would be ridiculous to admit such construction in the last case, since it would not make a feudal tenant to answer the services; and to run counter to the tenor of a man's grant, without a benefit to anybody, would be most absurd; for such construction would not make a feudal tenant, because the lessee for years would not hold of the lord, nor could the lord avow upon him.

Litt. § 578; 2 Ro. Abr. 415, 417; Co. 104.

But, if a feoffment be made to the use of A and B during their joint lives, and after the death of either of them, to the use of C for life, and after to the heir of the body of B, though B hath an estate of freehold, yet the remainder limited to the heirs of his body does not vest, but is in abeyance; because by this limitation the estate of freehold may determine in B during the continuance of his life; and since B is not let into the estate during his whole life, his heir cannot take as representative of him, for such representative must be of an estate of which B was seised; and since by the intention of this conveyance the feoffor hath not limited it in such a manner that B in all events should die seised of the estate, it is plain he designs only a contingent benefit to the heirs of the body of B as original purchasers, and not by derivation from him.

2 Ro. Abr. 418.

If a lease for life be made to A, remainder to the right heirs of B, this is

## Estate in Tail.

a good contingent remainder if livery be made, because such act of notoriety delivers over the freehold to A at the time it is made, and thereby creates a tenant, who is *feoffatus* within the statute to hold of the lord, who is capable of doing the feudal services, except homage, and on whom the lord may avow: and by this construction there is no inconvenience, or suspension of all the feudal services; for if A should die during the life of B, the contingent remainder would become void, because there would be no feudal tenant to attend the services; for the right heir could not take it during the life of B, and then the land would return to the donor, who would be again tenant to answer the services.

Ro. Abr. 418.

But, if A makes a lease for life, or a gift in tail, remainder to his right heirs; this is a void limitation in its original creation; for it cannot vest immediately any more than in the former case, *quia non est hæres viventis*; and to construe it a contingent remainder would be to suspend the services of the feud to no purpose; for it is not possible that it can vest during the life of the grantor, for so long as he lives he can have no representative or heirs, and therefore not like the former case, which may possibly vest the minute after the grant is made, or at least during the life of the grantor. Besides, that in this case, where the feoffor has not parted with the whole estate out of him, the feoffee does not hold of the lord within the statute *quia emptores, &c.*,\* and to construe this limitation to the right heirs a parting with the whole estate, would be an absurd construction, because the ancestor, in case he outlives the particular estate, must be in of his old reversion, since he cannot have an heir during his life; and the ancestor cannot be supposed to design the heir should take as a purchaser, since it were an absurd intention, that that estate, which would of course descend to him, should vest in him in the same manner as a purchaser; and, by consequence, since there is no alteration by the conveyance from the course in which the estate would have descended, it must be a void limitation.

And. 3; Co. Litt. 20 b; Dyer, 156; Ro. Abr. 827; 2 Ro. Abr. 415; Leon. 189; Fenwick v. Mitford, Moore, 284. \* See tit. *Remainder and Reversion*.

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## ESTATE IN TAIL.

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AN estate tail is an estate of inheritance to a man or a woman, and his or her heirs of his or her body, or the heirs of his or her body of a particular description, or to several persons and the heirs of their bodies, or the heirs generally or specially of the body or bodies of one person or several bodies.

Prest. on Estates, 355; Cruise, tit. 2, c. 1, § 12.g

Before we enter into a disquisition of estates tail, as they stand on the statute *de donis conditionalibus*, it will be necessary to take a more particular view of the conditional fee at common law, because the statute *de donis* creates no estates tail, but of such estates as were anciently conditional fees.

See this statute expounded, 2 Inst. 333. Fee tail was originally termed the *feudum novum*, in opposition to fee simple absolute, or the *feudum antiquum*, and went only to



## Estate in Tail.

the descendants, either male or female, according to the words and limitation of the feudal donation, and thence came to be distinguished into *feudum masculinum* and *femininum*.

If lands were given to a man and the heirs male of his body, the issue female were not inheritable, because the feudal donation expressing particularly what heirs of the donee were to inherit, no heir, though of the body of such feudatory, could inherit, that did not come under the words and limitation of the donation.

Co. Litt. 19 a.

And if the donee had issue two sons, and died, and the eldest died leaving a daughter, the youngest son came into the succession of the feud, and excluded the daughter; and if there had been no son, the feud (a) reverted to the donor; for the express words of the first donation, which regulated all subsequent descents, excluded all females from inheriting such feud. So, *e contra*, if the feud had been given to a man and the heirs female of his body, the descent was to be conveyed to the females only, exclusive of all males, according to the words of the first donation.

Co. Litt. 19 a; 7 Co. 35 a. (a) For the collateral heirs were excluded. Ro. Ab. 841.

But, if the limitation of the feud had been to a man and his heirs male, such donation did not exclude the females, but let them and (b) all collateral heirs in, because such donation, not limiting the feud to the descendants of anybody, could not be good as a *feudum novum*; and if it were construed a *feudum antiquum*, the course of descent cannot be altered by any man's private fancy; and since it appeared by the words of the donation, that the donor intended an estate of inheritance, his words were to be taken most strongly against himself, and should pass the most absolute state of inheritance, which is a fee simple, to which not only his lineal heirs, but also his collateral heirs, are inheritable.

Co. Litt. 13 a. (b) And therefore this at this day is a fee simple. Jon. 105.

The power of alienation was not absolute in the *feudum novum*, because such power might have been employed to disappoint the lord of his reverter; and yet they did not absolutely take away from such feudatories the power of alienation, because that would have created a perpetuity, which was against the original policy of the English law. To come therefore to a temper between these extremes, the donee was not allowed to alien till issue had, because till then he had not a descendible estate in him, and therefore could not transfer a descendible estate to others; and if he should have been allowed to have alienated whether he had issue or not, such alienations would have disappointed the limitations and restrictions in the gift, which brought it back to the lord on failure of issue; and therefore they construed the words of the feudal donation not only as a limitation, but condition, which the feudatory was obliged to perform before he had an absolute power over the estate; for such donations were generally made for the propagation of families, and therefore it best answered the design of such gifts, to suppose the power of alienation to arise on the begetting of issue, because in such cases the feudatory had the contingencies of a family; for when issue was had, they looked upon the lord's possibility to be at a great distance, and they admitted of an absolute power of alienation; therefore, if a man had alienated before issue had, the lord could not have entered for a forfeiture, because that would have been contrary to his own donation, which carried it to the feudatory and his descendants; and therefore, if descendants were afterwards born, the lord was excluded dur-

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ing the continuance of such issue, and the issue born after the alienation could not have entered, because they only claim as representatives to their ancestor, and therefore his actual alienation barred them.

Co. Litt. 19 a; Plow. 246 b; 7 Co. 34 b; Ro. Abr. 840, 841; 2 Inst. 333; 15 Ves. 137.

But, if such tenant had aliened before issue had, and afterwards had issue, and then the tenant and such issue had died, such alienation had not barred the donor of his right of reverter, because the condition was not performed at the time of the alienation, so that the tenant had not an absolute property vested in him for the purpose; wherefore, since the alienation was before the tenant had such power, it was subject to the lord's claim as if no such alienation had been, and, by consequence, the lord might have entered as in his reverter, as if the tenant had died without issue; and the subsequent birth of the issue is not a sufficient performance of the condition to make the precedent alienation valid, since that were to allow of the alienation of a person who had no power to alien.

Plow. 235; Co. Litt. 19.

But, if a gift was made to a man and the heirs of his body, and the donee had died leaving issue, such issue, without having issue, might have aliened, because, coming in by descent, he had the same power over it as he had over other estates descendible; and succeeding to his ancestor's estate, who had an absolute power of alienation, he took it in the same manner discharged of any restraint from the condition; and the rather, because otherwise the issue could not have made the necessary provisions on his own marriage by a family settlement. But, if the issue had not aliened, it had followed the limitation of the first donation, because the estate had continued in the same condition without alteration, and consequently, on failure of issue according to the first donation, the lord had been in in his feudal right of reverter.

7 Co. 34, 35; Co. Litt. 19 a.

And as the feudatory had power to alien the land after he had issue, so likewise might he have charged it with a rent, common, &c., for this power necessarily follows an absolute and entire property; for if he might have aliened the feud from his issue, it is but part of that power to transmit it to his issue under any charge or encumbrance he thought fit.

Co. Litt. 19 a; Ro. Abr. 840.

So, the feudatory, by having issue, might have forfeited the feud for treason or felony.

Co. Litt. 19 a; Ro. Abr. 840.

If there was no express reservation of services in the first feudal donation, the donee held of the donor, as he held over.

Co. Litt. 19, except where a man made a gift in frankmarriage, for in such case the donee held free from all services till the fourth degree was past; because these gifts being made by the feudatory on the marriage of his daughter, or some other relation, such promotion was thought a sufficient consideration for the gift, without an acknowledgment of an annual service; or where the tenant in grand serjeanty made a gift in tail generally, without any special reservation. Co. Litt. 23 a.

Thus the law stood till the 13 Ed. 1, c. 1, when the statute *de donis conditionalibus* was made, which deprived the feudatory of his ancient power of alienation, upon his having issue, or performing the condition. The pretence of making this statute, as appears from the preamble, was to comply with the will of the donor, who in all such grants intended that the feud should be transmitted to the descendants of the feudatory in the same

## (A) What Things may be entailed within the Statute.

plight he received it; and upon failure of the descendants, that it should revert to the donor himself: but the real design of making the statute was to introduce a perpetuity to other purposes. For, towards the end of the barons' war, the crown took up a new method of politics to break the interest of the baronage; for when any feud, that was then subsisting in large districts and territories, escheated, or was forfeited to the crown, the king divided it, and gave it out in lesser feuds, thereby to destroy the power of the peerage: this the barons saw would tend to the ruin of their body, and therefore passed this act to make all such new feuds unalienable, and by that means not forfeitable for treason, though the condition should be performed by having issue; and from the time of this statute, the donor's possibility or right of reverter was turned into a reversion; and the donee, who before had a fee simple conditional, has now but an estate tail.

6 Co. 40 a, Sir Anthony Mildmay's case; Co. Litt. 21; 2 Inst. 335; Mo. 155, 156; Vent. 299; 2 Mod. 131; Co. Litt. 392.

Under this head we shall consider,

(A) What Things may be entailed within the Statute *de donis conditionalibus*.

(B) What Words are requisite to create an Estate Tail in a Deed or Gift.

(C) Of the several Sorts of Estates Tail.

(D) How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue, though the Entail continues.

(A) What Things may be entailed within the Statute *de donis conditionalibus*.

THE statute makes use of the word *tenementum*, and therefore the estate to be entailed may be as well incorporeal as corporeal inheritances, because the word *tenementum* comprehends the one as well as the other, and, consequently, not only lands may be entailed, but all rents, commons, estovers, or other profits arising from lands.

Co. Litt. 19 b, 20 a.

But it is not necessary that the thing to be entailed should issue out of land; for if it be annexed to lands, or any ways concern or relate to them, it may be entailed within the statute; and therefore offices and dignities may be entailed; and accordingly it has been (a) resolved, that if the king creates a man earl of D to him and the heirs male of his body; this is a good entail of the dignity within the statute, because the title or dignity relates to lands; and anciently they were computed from their possessions, as a baron's fee, an earl's fee, &c.

Co. Litt. 20 a. (a) 7 Co. 33, Nevil's case.

So, offices may be entailed; as the office of earl marshal of England; or the office of a steward, bailiff, or receiver of a manor; because these are demandable in a *præcipe, ut tenementa*, and being exercisable within the manor, are therefore looked upon as members or branches of it.

Co. Litt. 20 a; 1 Ro. Abr. 638; 7 Co. 33; Plowd. 2.

An equity of redemption is entailable, because the mortgage being a pledge for money, equity looks upon the estate in the same plight as it was before.

Hard. 465.

Charters may be entailed, because they are muniments belonging to the land itself; but, if the entail be barred by collateral warranty, then the heir

## (A) What Things may be entailed within the Statute.

shall not have detinue for them, for then he cannot make title by virtue of the entail.

Co. Litt. 20.

But things merely personal, which only charge the person, and neither issue out of land nor relate to it, nor can be demanded *ut tenementa* in a *precipe*, cannot be entailed within the statute; and therefore, if I grant to B and the heirs of his body, to be master of my hawks, or keeper of my hounds, with a fee or salary annexed to it, this is no entail within the statute, because this can no way fall within the motion of *tenementum*.

Co. Litt. 20 a; Plowd. 2 b, Maxwell's case; Ro. Abr. 837.

So, if A for him and his heirs grants an annuity to B and the heirs of his body; this, having no manner of relation to land, is no entail within the statute, for such grant only affects the person of the grantor.

Plowd. 3 a; Ro. Abr. 837. Vide tit. *Annuity and Rent-charge*.

No chattels real can be entailed; and therefore though a man possessed of a term of years should devise his term to J S and the heirs of his body, yet the term would go on in its old channel to the executors, and the issue of the body of the donee has no interest in the term, and J S may sell or dispose of it as he pleases; for this being no *tenementum* within the statute, the devisee is not tied up from alienating it by that act. So it is of a trust, for a man can no more entail a term in gross by way of trust than by way of devise. But a term for years, which is created or kept on foot to attend the inheritance, is allowed in Chancery to wait upon the entail of the inheritance.

Co. Litt. 20 a; 10 Co. 87; Ro. Abr. 837; Cro. Eliz. 143; Chanc. Rep. 200; Vent. 194; 2 Chan. Rep. 233; but for this vide *plus*, tit. *Devise*. [Two things seem essential to an entail within the statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore, neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cestuy que vie*, nor *terms for years*, are entailable any more than personal chattels; because, as the latter not being interests either in things *real* or of *inheritance*, want both requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in one requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled as to answer the purposes of an entail, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. Thus, estates *pur autre vie* may be devised or limited in strict settlement, by way of *remainder*, like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue and all remainders over by *alienation* of the estate *pur autre vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*: but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur autre vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different: for in them no *remainders* can be limited; but they may be entailed by *executory devise*, or by deed of trust, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being, and twenty-one years after, and perhaps, in the case of a posthumous child, a few months more; a limitation of time not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the entail by fine or recovery for a longer space. It is also proper to observe, that in the case of terms of years and personal chattels, the *vesting* of an interest, which in reality would be an estate tail, bars the issue and all the subsequent limitations, as effectually as fine and recovery in the case of estates entailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*: and further, that if the executory limitations of personalty are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to per-

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sonality, it is at length settled, that every species of property is in *substance* equally capable of being settled in the way of entail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow. As to the entail of estates *pur autre vie*, see 2 Vern. 184, 225; 3 P. Wms. 262; 1 Atk. 524; 2 Atk. 259, 376; 3 Atk. 464; 2 Ves. 681. As to the entail of terms for years and personal chattels, see Manning's case, 8 Co. 94; Lampet's case, 10 Co. 46 b; Child and Bailey, W. Jon. 15; Duke of Norfolk's case, 3 Ch. Ca. 1; a case in Carth. 267, and one in 1 P. Wms. 1; Foley v. Burnell, 1 Br. Ch. Rep. 274; Hargr. note, Co. Litt. 20 a, b.—The doctrine upon this part of the subject is stated in the above note with such neatness, perspicuity, and succinctness, that the editor, feeling it impossible to deliver it in fewer or better words, has taken the liberty of transcribing it at length.]

As to the entail of copyholds, see tit. COPYHOLD.

## (B) What Words are requisite to create an Estate Tail in a Deed or Gift.

WHEN the notion of succession prevailed, it was necessary in feudal donations to use the word *heirs* to distinguish such descendible feud from that which was granted only for life; but as to the word *body*, it was not necessary to make use of that in the donation, but it might be expressed by any equivalent words; and (a) therefore, a gift to a man, and *hæredibus de se*, or *de carne*, *quos sibi contigerit habere*, or *procreavit*, is a good estate tail, for these sufficiently circumscribe the word *heirs* to the descendants of the feudatory.

For the words which create an entail in a will, vide tit. *Devise*. (a) Co. Litt. 20; 7 Co. 41 b: and the reason of the difference is, for that inheritances being only derived from the law, the law requires the word *heirs*, that comprehends the whole notion of such legal representation; but the limiting of the inheritance to the descendants of this or the other body, is only the particular intention of the person that forms the gift, and therefore the law leaves every man to express himself in such manner as may manifest that intention.

Therefore, if lands are given to a man *et hæredibus, quos sibi contigerit habere de uxore sua*, this is an estate tail, though the word *body* be omitted: so, if the gift had been to him *et hæredibus suis de primâ uxore sua*; for this confines the word *heirs* to the descendants of his body, since his heirs, who can inherit that gift, must be of his wife, which no collateral heir can possibly be.

7 Co. 41, 42.

A feoffment was made to the use of A for life, remainder to the use of B, and of the heirs male of the said B lawfully begotten, and for default of such issue, remainder over; A dies; this is no estate tail in B, but a fee simple, because there are no words to show from whose body the heirs male of B must proceed; for, to the creation of an estate tail it is requisite that there be words sufficient to show from what body the heirs mentioned in the gift are to proceed, though the word *body* be not expressly used; for in this case such may be heirs male of B as were never proceeding from his body, since the words of the donation leave it at large, and do not require that they should be begotten by any particular person.

Cro. Eliz. 478; Mo. 424; 7 Co. 41, S. C., between Abraham and Twigg; Lit. Rep. 344; Plowd. 541; 3 Leon. 5; Hob. 32, 37; 2 Sid. 41; but it would be otherwise in a will, which being made without the assistance of a lawyer, receives always a favourable interpretation.

So, where A, seised in fee of a copyhold, surrendered the same to the use of himself for life, and after to B and C his wife, *pro et durante termino vitarum suarum naturalium et hæred. et assignat. prædict. B et C et pro defectu talis exitus*, to the use of himself and his heirs; it was held by Holt, C. J.,

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and two judges against Gould, that B and C had a fee simple, and that *pro defectu talis exitus* imported nothing of their dying without issue, but was to be taken generally, and every heir is the issue of some body.

2 Salk. 620, *Idle v. Cook*; 2 Ld. Raym. 1144, S. C.; 1 P. Wms. 70, S. C.; Pasch. 4 Ann. in B. R.; and *per Cur.*, it is the rather a fee simple in this case, because of the word *assigns*, for an estate tail is not assignable; but Gould *cont.*, because the intent of the party was to create an estate tail.

But if A, seised in fee, makes a voluntary feoffment to the use of himself for life, remainder to the use of J S and his heirs forever; and for default of issue of the body of J S, then the use of the right heirs of A, this being in a conveyance by way of use, which is always construed like a will, and according to the intention of the party, gives J S but an estate tail.

Carth. 343; 5 Mod. 266; Ld. Raym. 101; 3 Salk. 337, S. C., adjudged between Leigh and Brace; Hil. 6 W. 3, in B. R., and same point said to have been adjudged upon this very deed in C. B. between Coke and Roberts, Hil. 2 W. 3.

If land be given to A and B, his wife, and their heirs, *et aliis hæredibus* of the said A, *si dicti hæredes de A et B exeuntes oberint sine hæredibus de se*, this is a good estate tail, though the word *body* be omitted, because there are words equivalent, which equally circumscribe the general import of the word *heirs* to the descendants of the body of A and B.

7 Co. 41.

If lands are given to a man and the heirs of his body, remainder to J S and his heirs in *formâ prædictâ*; this is a good remainder in tail to J S, for by a necessary relation the mind is carried to the words of the first gift, which circumscribe the heirs of the donee to the descendants of his body. So, if the remainder had been limited to J S in *formâ prædictâ*, this limitation, without the word *heirs*, had vested a good estate tail in him in remainder: or, if a lease for life had been made to A, the remainder to B, and the heirs of his body, remainder to J S in *eâdem formâ*, these words, having such a necessary relation to the words which immediately precede them, represent to us the intention of the donor as plainly as if he had expressed himself in all the terms of the first limitation.

Ro. Abr. 838; Co. Litt. 20 b. [A settlement was made on A for life, remainder on B and the heirs male of his body, with power of revocation to A of B's remainder.—A, reciting the settlement to be on B and his heirs male, omitting the words of *his body*, revoked the old uses, and by the new deed limited the said estate in the said deed named to B and his heir male, omitting the words of *his body*, and subjected the estate thus limited to a charge of 100*l.* It was holden, that this was a good revocation, and a good limitation of a new estate tail; for that the recital, though inaccurate, referred to the limitation in the settlement to heirs of the body: the revocation was of those uses which the recital had referred to and professed to state; and the new limitation was of the estate described in the settlement, subject only to the charge of 100*l.* *Gilmore v. Harris*, 3 Lev. 213; Carth. 292, S. C.; Skin. 325, S. C.]

But, if a gift be made to A for life, remainder to B and the heirs of his body, remainder to J S in *formâ prædictâ*, this, according to my Lord Coke, is a void limitation to J S; for, though the mind is carried to the former limitations, yet finding no necessary relation to one more than the other, it can determine nothing positively as to the intention of the donor, and therefore such limitation is void for uncertainty.\*

Co. Litt. 20 b. \*Note: Co. Litt. 385 b, says, "If a man letteth lands for life, the remainder *eâdem formâ*, this is a good estate tail, *quia idem semper refertur proximo præcedenti.*" And this seems to be law, for the reason assigned.

If lands be given to a man and his heirs, *habendum* to him and the heirs of his body; this is but an estate tail, because the *habendum* expounds the

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general word *heirs* in the premises; for though it cannot change or alter them, so as to retract the gift in the premises; yet it may well construe and explain them while such construction is consistent with the premises, and does not destroy the operation of the words mentioned in them, but only explains in what sense they are to be taken, and what heirs are comprehended. But, if the limitation in the premises had been to a man and the heirs of his body, *habendum* to him and his heirs, it had been a tail with a fee simple expectant; because this *habendum* cannot be construed an exposition, for that it comprehends all heirs in general, and doth not confine or interpret the premises, and therefore, being more comprehensive than the premises, passes the fee simple expectant.

Co. Litt. 21 a; 3 Co. 54 b; 2 Ro. Abr. 66, 68.

If lands be given to a man and his heirs, *habendum* to him and his heirs, if the donee has heirs of his body, and if he dies without heirs of his body, that the land shall revert to the donor; or *habendum* to him and his heirs, if he hath issue of his body begotten, and if he dies without heirs of his body, that the lands shall revert to the donor; this is but an estate tail in the donee; because the *habendum* plainly shows in what sense the word *heirs*, which is used generally in the premises, is to be taken: nor does such explanation retract the gift in the premises, because the word *heirs* hath still its operation, and by such construction is more conformable to the will and intention of the donor. But, if the *habendum* had been for life, that had been a void limitation, because no explication can reconcile the *habendum* to the premises; and where the last words of the donation retract the former gift, they are taken as insignificant and void, because no man is allowed to vacate his own grant.

Ro. Abr. 838; Co. Litt. 21 a; Bro. tit. *Tail*, 20.

If a feoffment be made to A and his heirs, with warranty to him and his heirs, and if it happens that he dies without heirs of his body, that it shall remain to J S in fee; this limitation of the remainder explains what heirs of the donee shall take; for it is plain that the donor intended the word *heirs* in the premises should not be taken in their most extended sense, for then they would convey an absolute estate, which would bear no limitation of a remainder over to J S, and then that part of the gift would be void, which, by an easy explication of what heirs the donor meant in the premises, is made good and consistent, without any force or violence to the premises.

Ro. Abr. 839; 2 Ro. Abr. 68.

If lands are given to a man and a woman and their heirs, *habendum* to them and the heirs of their bodies, remainder to them and the survivor of them for life, to hold of the *chief lord*; this has been adjudged an estate tail with a fee simple expectant; for though the *habendum* explains what heirs are meant in the premises, and there is no mention of the word *heirs* in the remainder; yet it is plainly the intention of the donor, that the interest in the land shall not cease upon the determination of the estate tail, because there is a remainder limited over to take effect when the tail is spent; and if the limitation of the remainder passes any thing, it must be a fee, because they had a greater estate already in them than for life; and this the rather, because the *tenendum* is expressly to be of the *chief lord*, which shows they intended to leave no estate in themselves.

Cro. Car. 476; 2 Ro. Abr. 68, Thurmau and Cooper. [2 Ro. Rep. 19, 23. In this case there was also a warranty to the grantee and his heirs. However, the court intimated, that their opinion would have been the same, if these special circumstances had not occurred.]

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If I give land to a man and his heirs, viz., the heirs of his body; this is but an estate tail; for here I restrain the general import of the word *heirs* to the descendants of the body of the donee.

Hob. 172.

A feoffment was made to A, *habendum* to him and the heirs of his body, to the use of him and his heirs and assigns forever: this is only an estate tail in A, and no fee simple; for the lands are so appropriated by the first words to the donee and his issue, that no act or limitation of the parties can take it out of them; nor does the statute 27 H. 8, c. 10, execute the possession to the use; for the statute never intended to execute any use but that which the legal tenant had been obliged to execute before the statute; but the act *de donis*, as it tied down the donee from alienating, so it would not permit the Chancery to oblige the donee to give the land away from his issue. The same law, if the use had been limited over to a stranger, for the same reason.

Cro. Ja. 400, Cooper and Franklin; 2 Co. 78; Plowd. 555; Bro. tit. *Feoffment to Uses*, 40; Co. Litt. 19 b.

Lands were given to baron and feme, *habendum* to baron and feme to the use of them and the heirs of their bodies. This was adjudged an estate tail; for though such limitation of a use to a stranger had not been a good estate tail, because the legal estate in baron and feme had only been for their lives; yet here being no feoffee distinct from the *cestui que use*, but they being all the same person, by consequence, there is no use distinct from the legal estate, and therefore, the word *use* may be very properly rejected, in order to establish the intention of the conveyance, and then the case amounts to no more than if an estate were limited to baron and feme for their lives, with remainder to them and the heirs of their bodies.

Jenkins v. Young, Cro. Car. 230; Meredith v. Jones, Ibid. 245.

[Lands were given to one for life, remainder to the heirs male of his body hereafter to be begotten. This was adjudged to be an estate tail; for the words *hereafter to be begotten* do not confine it to the issue born after, but will take in that born before, the words *procreatis et procreandis* being of the same import, according to 1 Inst. 20, and 24 E. 3, pl. 15. And this is to prevent the great confusion that would otherwise be in descents by letting in the younger before the elder.

Hebblethwaite v. Cartwright, Ca. temp. Talb. 30; Long v. Beaumont, 1 P. Wms. 231; Hewitt v. Ireland, Ibid. 427; Gore v. Gore, 2 P. Wms. 33, S. P. But it hath been holden, that where the words were *in posterum procreandis*, sons born *before* shall be excluded, on account of the peculiar force of *in posterum*. Adj. M. 26 Eliz. B. R.; 3 Leon. 87; Hargr. Co. Litt. 20 b, n. 3.

Where a settlement conveyed an estate to trustees for the use of the settlor for life, and then for the use of his wife for life, and then for the use of his first son and the heirs of such first son, and, after the determination of that estate, for the use of his second, third, and all and every other son and sons, and their several and respective heirs; and for default of such issue, then to the use of all and every his daughter and daughters, and their heirs, to take as tenants in common, and not as jointenants; and for want of such issue, then for the right heirs of the survivor of himself and his wife forever; it was held, that under these limitations the sons took successively estates tail, and the daughters an estate in fee.

Doe dem. Littledale v. Smeddle, 2 Barn. & A. 126.

Where a settlement limited the estate to the use of the first son of the



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body of J. Galley by A. S., his intended wife, and for default of *such issue*, to the use of the second, third, and other sons of the body of J. Galley by A. S., and the several heirs male of their several bodies, with further limitations to after-born children and the heirs male of their bodies; it was held, on a case sent from Chancery, that the first son of J. Galley by A. S., born during his life, took an estate tail.

Galley v. Barrington, 2 Bing. R. 387.

A devise to A, and after his death to his first and other sons, and in default of male issues then to his eldest and other daughters and their heirs male forever, gives A an estate in tail male.

Wight v. Leigh, 15 Ves. 564.

## (C) Of the several Sorts of Estate Tail.

If lands are given to a man and the heirs of *his body*, this is a *tail general*; because all his descendants may possibly come into the succession; so that if the donee has several wives, the descendants of every wife may inherit, because they fall within the words of the donation: but the donor might by particular expressions have confined the succession to any particular descendant, as to the heirs male or heirs female; and hence the distinction between estates in *tail male* and *tail female*.

Litt. § 14.

If lands are given to a man and the heirs male and female of *his body*, this is a *tail general*; because by such limitation all the descendants of the feodatory may inherit.

Co. Litt. 25 b; but great care must be taken to limit the estate to the descendants of *the body* of the donee; for if lands be given to a man and his heirs male, this is a fee simple. Co. Litt. 13. So, if the limitation had been to the donee and his heirs female, or to the donee and his heirs male or female. Litt. § 31.

If land be limited to the son and his heirs of the body of his father, this is a fee simple in the son, and no entail at all, not being limited to the son's descendants; nor is there in this case any proper limitation or restriction of the word *heirs*, because it limits it to his heirs of the body of the father. Now there is plainly a design to place the interest that is to vest it in the son; and yet it should not go merely to the son's descendants, but to all collaterals, as far as they could claim under the body of the father: but such a limitation the law will not endure, it not being an estate tail confined to the descendants only; and therefore it must be a fee simple; for to allow men to form such new sorts of estates would be very inconvenient, as it would put it in the power of private persons to make new limitations touching the course of descents, and thereby render all descents uncertain.

Co. Litt. 27.

But, if the estate were limited to the son, and to the heirs of the body of the father, though the father was dead at the time of the gift; yet it is a good entail, because here the word *heirs* is a word of purchase; and it is a good name of purchase after the father's decease; and the son, being only tenant for life by the words of the gift, by the second words takes the entail as a purchaser; but in the other case, the words *his heirs* are merely words of limitation, and therefore affect an entail, which the law will not endure.

Litt. § 30. If there had been grandfather, father, and son, and the father dies, and the limitation had been to the grandfather and to his heirs of the body of the father, this is a good entail; for it goes to the descendants only, and it limits what sort of descendants it shall go to, viz., such only as were begotten by the father. Co. Litt. 20 b; Bro. Tit. 10.

## (C) Of the several Sorts of Estate Tail.

If lands be given to husband and wife, and the heirs of the body of the survivor; this is a good donation to vest an estate tail general in the survivor; but the estate tail does not vest till one of them dies; and then, because all the descendants of the survivor may inherit the gift, it is a tail general.

Co. Litt. 26 a; 10 Co. 51; Reg. 239 b.

*Tail special* is where the estate is limited to some particular heirs of the body of the donee, as to the heirs of such a woman; as, if lands be given to a man and his wife, and the heirs of their two bodies begotten; for though all the descendants of that marriage may inherit the gift, yet all the heirs of the body of the donee cannot inherit; for if the woman should die, and the man take another wife, the issue of the donee by the second wife should not inherit, because the limitation of the gift was only to the descendants of the feudatory by the first marriage.

Litt. § 16. *β* Where an estate was conveyed by indenture to A and his heirs, to the use of B, the wife of C, for life, remainder to C for life, remainder to "the joint heirs of the bodies of B and C by them lawfully begotten," and the estate so limited to B is declared to be in trust, that in case of insolvency of C, it should not be liable for his debts; it was held that this was an estate tail special in B and C. *Davis v. Haydon*, 9 Mass. 514.*g*

If land be given to a man and a woman unmarried, and the heirs of their bodies, this is a tail special, for the possibility that they may marry, and then the descendants of that marriage can only inherit. So, if the gift be made to a man that hath a wife, and to a woman that hath a husband, and the heirs of their bodies; this is a tail special presently in them, for the possibility that they may marry; and the descendants of such marriage may inherit according to the limitation of the gift.

Co. Litt. 25 b; Bro. *Estate*, 22; *Tail*, 16.

But, if land be given to two men and their wives, and the heirs of their bodies begotten, they have a joint estate for life, and several inheritances, but no joint estate in tail; because, though the husband and the wife of the other may die, and the survivors may marry, yet the gift being made to them all, and the heirs of their bodies, it is impossible that there should be one heir or descendant of all their bodies, and therefore it can be no joint estate tail in them all; but they all four take jointly for life and each husband and his wife have a several inheritance in a moiety.

Plowd. 35 a; Co. Litt. 25 b.

If lands be given to two men, and the heirs of their bodies begotten, they have but a joint estate for life, and several inheritances; for though the gift be limited to the descendants of their bodies; yet, it being impossible there should be one descendant of both their bodies, they cannot have a joint estate tail.

Litt. § 283.

So, if lands be given to one man and two women, and the heirs of their bodies begotten, they have a joint estate for life, and several inheritances; because there can be no one issue of both the women's bodies; and if the man should marry one of them, yet it is not limited in the donation, which of them, in case of such intermarriage, should first take.

Litt. § 283; Co. Litt. 25.

If an estate be limited to husband and wife, and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life; because they shall not be presumed to intermarry after they are once legally divorced by church censures.

3 H. 6, 48; 7 H. 7, 16.

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But there are other sorts of estate tail ; as, when the donation is limited not only to the descendants of the donee by one woman, but more particularly to one sort of descendants of such marriage, exclusive of others ; as, if lands be given to a man and a woman, and the heirs male of their bodies ; this is an estate in tail male ; for the donor having expressed what heirs shall inherit, none can claim under such gift that does not come under such particular description. So, if the limitation had been to the heirs female ; for the donee being capable of taking by purchase, the donor may limit the succession of the land to which of the descendants of the donee he pleases. But, if the limitation had been to A for life, remainder to the heirs female of the body of J S, and J S has issue a son and a daughter, the daughter can take nothing by such gift ; the reason of the difference is this ; because in the first case the donation specifies what sort of descendant of the donee shall take ; but in the last case it specifies who shall take originally ; and the first purchaser must come fully up to the description in the donation, else there can be no gift, and while there is a son of J S no female can be heir, and, consequently, not a person capable of taking originally by the gift. But, if J S hath issue a son and a daughter, and the son hath issue a daughter, and dies, and a lease for life is made, remainder to the heirs female of the body of J S, the daughter of the son shall be the purchaser, because she comes within the description, being both heir and likewise a female, though she was descended from a male.

Co. Litt. 24 b ; Hob. 31.

If lands be given to a man and his wife and the heirs male of the body of the husband : this is a special tail in the husband, and but an estate for life in the wife. So, if the limitation had been to the heirs male of the body of the wife by the husband begotten, it is an estate for life in the husband, and a tail in the wife ; for to whichever body the word *heirs* inclines by the limitation, it creates a descendible estate in such person. But, if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in both of them ; as, if lands be given to husband and wife, and the heirs which the husband shall beget on the body of his wife, both of them have an estate tail, because the word *heirs*, which creates the descendible estate, is not limited to one more than the other.

Litt. § 26, 27, 28 ; Yelv. 13, *Repps v. Bonham*.

If a feoffment be made to the use of A and B, husband and wife, and the longest liver of them, and after the decease of the said A and B, then to the use of the heirs of the body of the said A begotten on the body of B, this is an estate tail in the husband ; for the word *heirs* is limited to the body of A, though to be begotten on the body of the wife.

Hob. 84, *Skeat v. Oxenbridge*.

So, if lands be given to baron and feme, and the heirs of the body of the feme, by the husband and J S engendered ; this is an estate tail in the feme, but so far enlarged by the last words, that the heirs of her body begotten by J S may inherit after the issue by the present husband.

Yelv. 131. If the limitation had been to the heirs *super corpus* of the feme by the husband begotten, whether this had been an estate tail in them both, is left a *qu.*

[Where an estate for life was limited to S, wife of L, remainder to the heirs to be begotten on the body of S by L her husband, no estate being previously limited to her husband himself ; it was holden, that the word

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*heirs* related to both their bodies, and, consequently, did not create an estate tail in S.

*Gossage v. Taylor*, Sty. 325.

Sir R. F. on the marriage of his son levied a fine, and declared the uses to himself during the joint lives of himself and his son L. F., and after the decease of either of them, to the use of S. C. for her life, and after her decease to the use of the issue male of the said S. and L. and the heirs of their bodies, and in default of such issue, to the use of the heirs to be begotten on the body of S. by the said L., remainder to the right heirs of the said Sir R. F. The marriage took effect, and S. died, leaving six daughters, but no son. Sir R. died, leaving L. his son and heir. A question arose on the estate which L. took; and the court resolved, that, if he had been jointenant with the wife for life, this had been an estate tail in both; as the word *heirs* is not applied to anybody particularly, as Litt. § 28. Secondly, that neither the husband nor wife had an estate tail; not the husband, because he had no prior estate for life; not the wife, because, though she took an estate for life, yet the heirs are not applied to her body.

*Frogmorton v. Wharley*, 2 T. R. 435; 2 Bl. Rep. 728, S. C.; 3 Wils. 125, 144, S. C.

On a marriage the husband covenanted to stand seised of lands to the use of himself and his intended wife for their lives, and the life of the longer liver, remainder to the use of the heirs of the husband *on* the body of his said intended wife *by* him lawfully to be begotten, remainder to the use of his own right heirs. The husband having survived the wife, levied a fine of the lands, and after his decease, a question arose on the operation of this fine: which depended on the point, whether the words "to the use of the heirs *on* the body of the wife *by* the husband to be begotten" gave an estate tail to the wife only, or a joint estate tail to both? It was decided, that the limitation gave an estate tail to both, as well upon the authority of the above case in *Styles*, as of the case cited by Lord Coke, from 3 E. 3, p. 32, where upon a gift *I and M uxori ejus et hæredibus quos idem I de corpore ipsius M procrearet, &c.*, it was adjudged an estate tail in both, because the estate was equally entailed to the heirs of the baron as to the heirs of the wife.

*Denn v. Gillott*, 2 T. R. 431; Co. Litt. 26.

A freehold estate was settled on husband and wife for life, and on the survivor, remainder to the use of the heirs of the husband on the body of the wife to be begotten, remainder to the right heirs of the husband. A copyhold estate in borough-english was likewise settled to the use of husband and wife and the heirs of their two bodies to be begotten, in like manner and to the same uses as the freehold was settled and conveyed. *De Grey, C. J.* This is an estate executed, and seems to be an estate tail in the husband and wife. *Blackstone, J.* I think the freehold is clearly vested in the husband only in special tail; the copyhold in both husband and wife.

*Rose v. Aistrop*, 2 Bl. Rep. 1228.]

And it is to be observed, that in all instances of such special tails, which limit the lands to one particular sort of heirs, no descendant of the donee can make himself inheritable to such gift, unless he can convey his descent through that particular sort of heir to which the succession of the land was first limited; therefore if lands be given to a man and the heirs male of his body, and he has issue a daughter, who has issue a son, this son shall never inherit that gift; for the son, being obliged to claim through the daughter, must necessarily show himself out of the words of the first donation, which

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limited the lands only to the heirs male of the donee, which the daughter cannot possibly be taken to be.

Litt. § 24.

For the same reason, if the lands be given to a man and the heirs male of his body begotten, the remainder to him and the heirs female of his body, and the donee have issue a son, who hath issue a daughter, who hath issue a son; this son can inherit neither of these gifts: not the tail male, because whoever claims as heir to such a gift, must convey his descent wholly through males, which the son cannot do in this case, because he must necessarily show himself a descendant of the daughter, before he can make himself heir to the first son. Nor can he inherit the tail female, because that limitation being to that particular sort of heir, no male, though the immediate descendant of a female, can inherit, because he is another sort of heir than is described in the donation. But, if in this case the gift had been to a man and the heirs male of his body, remainder to him and the heirs of his body; such son might claim under that gift, because every descendant of such donee may claim under the remainder, it not being limited to one sort of heir more than another.

Co. Litt. 25 b.

[Lands were settled to the use of husband and wife for their lives, remainder to the use "*of the heirs of the husband on the body of the wife lawfully begotten or to be begotten, the male to be preferred before the female, and the elder before the younger.*" The lessor of the plaintiff claimed as heir male under this settlement, that is, as son of the second son of the marriage: the defendant claimed as heir at law, that is, as the son of a daughter of the eldest son of the marriage. It was argued on behalf of the defendant, that there was nothing to hinder the descent to the heir at law, though claiming through a female; that the limitation was to *all* the heirs; and that the words of regulation were referable merely to the immediate children of the marriage, to show how they should take. But the court said, that if these words had any meaning, they described an estate tail; and it was not to be supposed that they were inserted without any meaning at all.

Denn v. Hobson, 5 Burr. 2609; 2 Bl. Rep. 695, S. C. See Preston on Estates, ch. *Estates Tail*.

If lands be given to a man to have and to hold to him and the heirs male of his body, and to him and the heirs female of his body, the estate to the heirs female is in remainder, and the daughters shall not inherit any part so long as there is issue male; for the estate to the heirs male is first limited, and shall be first served; and it is as much as to say, and after to the heirs females, and males in construction of law are to be preferred.

Co. Litt. 377 a.]

Land given to a man and his wife *et hæredi de corpore et uni hæredi tantum*, was adjudged an estate tail, though the limitation be to the heir in the singular number, because the word *heir* is *nomen collectivum*, and extends to all that descend from him.

Vent. 228.

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THE statute *de donis* affecting a perpetuity restrained the donee in tail either from alienating or charging his estate tail; and by that act the

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tenant in tail was likewise to leave the land to his heirs as he received it from the donor; and the heir in tail might have avoided any alienation or encumbrance of his ancestor; and, as the law stood upon the act, so might he in reversion, when the heirs of the donee failed, who were inheritable to the gift. The crown long struggled to break through the perpetuity which was established by this law; and in the reign of E. 4, we find the pretended recompense given against the vouchee in the common recovery to be allowed an equivalent for the estate tail; and because this recompense was to go in succession, as the land in tail should have done, therefore they allowed the recovery to bar the reversion as well as the issue in tail, because he in the reversion was to have the recompense upon failure of issue of the donee.

6 Co. 40; 10 Co. 39; Vent. 299.

The statute *de donis*, by an express clause, provides against the operation of a fine, and by that law a fine levied by tenant in tail amounted to no more than a discontinuance, like a feoffment *in pais* by tenant in tail at this day.

2 Inst. 336; Plowd. 57 b. But how these recoveries or fines affect the issue in tail, or him in reversion or remainder, vide tit. *Recoveries*, and tit. *Fines*.

At the common law the tenant in tail could not grant or alien, or make any rightful estate of freehold to another, but for term of his own life; for though a feoffment in fee, or for life, made by tenant in tail, is good against the tenant himself, because the law allows no man to avoid his own act; yet after his death the issue in tail, or those in reversion after failure of issue, may by proper actions avoid such feoffments, and recover against the feoffee.

Litt. § 613. *β* When the tenant in tail commits treason, he forfeits his life estate only. Denn v. Clark, 1 Coxe, 340.*g*

The tenant in tail is master of the inheritance, and as such has power over all the lasting improvements growing on it: so that he may cut down the timber trees, and dispose of them as he pleases, without barring the entail. But this must be understood with this restriction, that, if tenant in tail sells the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail; for if he dies before they are cut down, his heirs in tail shall have them as part of the inheritance, and the vendee, though obliged to pay the whole sum contracted for, yet shall not be allowed to cut down one tree after the death of tenant in tail. For as the tenant in tail has power over the inheritance but during his own life, so he can delegate that power to another but for the same time; and consequently, whatever remains part of the inheritance at the death of the tenant in tail, at which time his power over it ceases, must necessarily go to the heir, to whom the inheritance belongs.

Bro. *Contract*, 26; 11 Co. 50; Poph. 194.

So, if tenant in tail grants estovers to another, or the vesture of his woods, these grants determine with his death; for as they are charges on the inheritance, so they must necessarily cease when his power who granted them is determined.

Ro. Abr. 841, 842.

If tenant in tail acknowledge a statute or recognisance, upon which the land is extended, the issue may oust the conusee after the death of his ancestor; for the tenant in tail can charge the entail but during his life, because

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the statute *de donis* preserves it free from all encumbrances for the issue in tail, *ut voluntas donatoris observetur*.

Ro. Abr. 842.

But, if tenant in tail acknowledge a recognisance, and die, and the conu-see bring a *scire facias* against the heir in tail, who pleads *riens per discent* in fee simple, and pending the *scire facias* makes a lease for years to J S, and the jury find the issue in tail had land in fee simple by descent, the conu-see shall extend the land against the issue in tail, and J S cannot falsify; for after the verdict the issue shall not be allowed to say that he is tenant in tail; but the verdict, though a perverse one, shall bind him, and be in force till disproved by attain. Nor can the lessee falsify, because the lease was made after verdict given, when the issue himself was bound, and, consequently, all that claim under him must be so too.

Crawley and Marrow, 2 Bulst. 245.

Yet, if a disseisor make a gift in tail to A, and A, in consideration of a release from the disseisee of all his right to the land, grant him a rent-charge in fee, this shall bind the issue; for this turns upon the reverse of the former cases; for as the issue in tail may avoid those grants and charges, because they tend to the prejudice of the issue and destruction of the entail; so this grant to the disseisee is good to bind the issue, because it tends to the advantage of the donee and his issue by strengthening their title, and making that an indefeasible, which before was a precarious estate.

Co. Litt. 343 b; Ro. Abr. 842; Plowd. 436; 10 Co. 37.

So, where a devise was made of land in tail, upon condition that the donee should grant a rent-charge out of the land to another and his heirs; the donee granted the rent pursuant to the condition; and adjudged the rent should not determine with the death of the donee, but should bind his issue; for this is in preservation of the entail, and for the benefit of the issue, and it is not *contra formam doni*, but in compliance with the will of the donor.

Cro. Ja. 427, Dutton v. Ingram; Ro. Abr. 842.

A, seised of lands in tail, agrees with B that he and his heirs shall enjoy the entailed lands, if A and his heirs may enjoy his fee simple lands; this agreement is executed accordingly; and B has a decree against A to levy a fine, and settle it pursuant to the agreement; but A dies without doing it: though it was decreed that A himself was bound by his agreement to convey; yet since he died before he executed the fine, his issue was not bound by the agreement. But, if the issue in tail had approved of his ancestor's agreement, as he did in this case, by entering on the land of B, then it becomes his own agreement, and, consequently, in equity he shall be obliged to perform it.

Ross v. Ross, Chan. Cases, 171. || Jenkins v. Keymes, 1 Lev. 239, S. P. For the heir comes in by the statute *de donis* singly, and not as deriving from the ancestor, who contracted. Ibid.; Wharton v. Wharton, 2 Vern. 5; Weale v. Lower, cited in Fox v. Crane, Ibid. 206; Powell v. Powell, Pr. Ch. 278; Frederick v. Frederick, 1 P. Wms. 720; Cotter v. Layer, 2 P. Wms. 626; Holt v. Holt, Ibid. 652.||

||But it has been said, that where the ancestor is only equitable tenant in tail, the courts will relieve against the issue; because equitable estates tail are mere creatures of the court, and not within the statute *de donis*. But, as an equitable estate tail in freeholds (a) cannot be barred by a mere deed, but only by a fine or recovery; it would seem that the issue in tail

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could not be considered as bound by a mere agreement entered into by their ancestor.

Norcliffe v. Worsley, 1 Ch. Ca. 234; Sayle v. Freeland, 2 Ventr. 350. (a) Legate v. Sewell, 1 P. Wms. 91; Harvey v. Parker, Vin. Abr. tit. *Estate*, (X 2, pl. 6.); Kirkham v. Smith, Ambl. 318; Radford v. Wilson, 3 Atk. 815; Boteler v. Allington, 1 Br. Ch. Rep. 72; Burnaby v. Griffin, 3 Ves. 266. See Fletcher v. Tollett, 5 Ves. 12.

And the law would seem to be the same in copyhold estates; for the legal entail can only be barred according to the custom of the manor of which the copyhold estate is holden; and perhaps, the better opinion is, that the same steps must be taken to bar an equitable estate tail in copyholds, as must be pursued in the case of legal entail. Lord Hardwicke, however, seems to have thought, that a mere surrender was in every case sufficient to bar an equitable estate tail in copyholds; but the contrary opinion now prevails, and appears authorized by a case (a) in which it was holden, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were it a legal estate tail.*(b)

Sugd. Law of Vendors, 165; Radford v. Wilson, *ubi sup.*; Grayne v. Grayne, 1 Watk. Copyh. 180. See Pullen v. Lord Middleton, 9 Mod. 483. (a) Hale's case, Ch., 11th December, 1764; and see Rowe v. Lowe, 1 H. Bl. 446. (b) And see 1 Watk. Copyh. 181; 1 Prest. on Convey. 155.—The power of tenants in tail to bind their issue ought to be the same, as Mr. Sugden well observes, whether the estate be freehold or copyhold; and whether the entail be legal or equitable, the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, ought to be observed in this instance. Sugd. Law of Vendors, 166.

If tenant in tail make a conveyance, and covenant for further assurance, and then become bankrupt; such covenant will bind the lands in the hands of the assignees.

Edwards v. Applebee, 2 Br. Ch. Rep. 652; Tourler v. Rand, *Ibid.* 650; Pye v. Daubuz, 3 Br. Ch. Rep. 595. But see Beck v. Welsh, 1 Wils. 276, *contr.*

An appointment by tenant in tail under the stat. 43 Eliz. c. 4, of Charitable Uses, without levying a fine or suffering a recovery, is good both against the remainderman and the issue in tail.

Tay v. Slaughter, Pr. Ch. 16; Attorney-General v. Rye, 2 Vent. 453; 1 Eq. Ca. Abr. 172, pl. 7, S. C.

Where a tenant in tail with remainders over obtained an act of parliament enabling him to charge the estate; it was holden, that the right of those in remainder was barred, though not excepted out of the saving clause, as is usual, where the act passes upon the application of tenant for life; for the tenant in tail might have barred the remainder by a recovery.

Westby v. Kierman, Ambl. 697.

By 39 and 40 G. 3, c. 56, reciting that "by the practice of courts of equity, in cases in which money under the control of such courts is subject to be laid out in the purchase of lands to be limited to uses capable of being barred by fine, (c) the said courts direct such money to be paid to the party or parties who could by fine bar the uses to which such lands, in case the same had been purchased, would have been limited, and do not require or compel the actual investment of such money in the purchase of lands, notwithstanding other persons might take estates or interests therein, if the same were purchased, and be entitled to hold such estates or interests until such



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fine was actually levied : and that nevertheless where money under the control of the said courts is subject to be invested in the purchase of lands to be limited to uses, not capable of being barred by fine, but capable of being barred by recovery, (d) the said courts, according to the practice thereof, refuse to direct the same to be paid to the party or parties who, in case such lands had been purchased, could by recovery have barred all the uses to which the same would have been limited, and require and compel the actual investment of such money in a purchase or purchases of some lands, and such last-mentioned practice is attended with great inconvenience and expense to the party or parties who by a recovery could bar the uses to which such lands are to be limited when purchased, and the interest and benefit of others, who might take estates barrable by such recovery when suffered, is not according to such last-mentioned practice materially promoted or secured ; and it may therefore be expedient to alter such practice ; and that it may also be expedient to provide some satisfactory and summary proceeding, whereby trustees possessed of money subject to be laid out in lands, may be required in proper cases to pay such money to the parties entitled and under this act to become entitled to receive the same ; It is enacted, that in all cases where money, under the control of any court of equity, or of or to which any individuals as trustees are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, to be settled upon any person or persons, in such manner that it would be competent, in case such money had been invested in the purchase of real estates, for the person or persons who would be tenant or tenants of the first estate or estates tail therein, either alone or together with the person or persons who would be the owner or owners of the particular preceding estate or estates therein, if any, by deed, fine, or common recovery, or any of them, or other lawful act in the case of freehold hereditaments, or by surrender and recovery, or either of them, or other lawful act, in the case of copyhold hereditaments, to bar the first estate or estates tail, and the rights and interests of all persons in remainder, it shall not be necessary to have such money actually invested in lands or hereditaments, in order that such estates tail and remainders over may be so barred ; but that it shall and may be lawful to and for the High Court of Chancery, or such court of equity, under the control of which such money shall be, and in the case of trustees, to and for the said High Court of Chancery, in a summary way, upon petition of the person or persons who would be tenant or tenants of the first estate or estates tail, and of the person or persons who would be the owner or owners of the antecedent particular estate or estates, if any, in the lands and hereditaments, in case the same were purchased, such petitioners being adults, and in case where any of the parties are or is femes covert or a feme covert, she or they being first separately examined in court, or upon a commission, and consenting to order the money subjected to such trusts to be paid to the petitioners or any of them, or to be paid and applied in such manner and for such purposes as the petitioners shall appoint and the court shall approve of."

(c) *Benson v. Benson*, 1 P. Wms. 131; *Short v. Wood*, *Ibid.* 471; *Edwards v. Countess of Warwick*, 2 P. Wms. 173; *Trafford v. Boehm*, 3 Atk. 447; *Cunningham v. Moody*, 1 Ves. 176. (d) The practice seems to have been the same where a recovery was necessary, till the case of *Colwall v. Shadwell*, 1 P. Wms. 471, 485, where Lord Cowper held the remainderman should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of the tenant in tail in that case before a recovery, showed

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the remainderman's interest in so glaring a light, that it established the precedent ever afterwards. Lord King upon this principle refused to decree it so in the case of a fine. Eyre's case, 3 P. Wms. 13; Onslow's case, Ibid.

“ § 2. And in all cases where money subjected to be laid out in the purchase of hereditaments to be settled as aforesaid shall happen to be invested in government or real or other securities, all such securities shall, for the purposes of this act, be considered as money, and shall and may accordingly be transferred, assigned, and disposed of under an order of the respective courts aforesaid, made in a summary way upon the petition of such persons, and with such examination and consent, where necessary, as aforesaid, in such and the same manner as moneys subjected to be laid out in the purchase of hereditaments, to be settled as aforesaid, are herein before authorized to be paid, applied, and disposed of.”

By the 7 G. 4, c. 45, the 39 & 40 G. 3, c. 56, is repealed, except as to such proceedings under the said act as were commenced before the passing of the repealing act.

And by § 2, it is enacted, “ that from and after the passing of this act, in all cases where money under the control of any court of equity, or of or to which any individuals as trustees are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, or to be settled upon any person or persons, in such manner that it would be competent, in case such money had been invested in the purchase of real estates, for the person or persons who would be the tenant or tenants of any estate or estates tail therein, either alone or together, with the person or persons who would be the owner or owners of any particular preceding estate or estates therein, by deed, fine, or common recovery, or any of them, or other lawful act, in the case of freehold hereditaments, or by surrender and recovery, or either of them, or other lawful act, in the case of copyhold hereditaments, to bar such estate or estates tail, and the rights and interests of all persons in remainder after such estate or estates tail, it shall not be necessary to have such money actually invested in lands or hereditaments, in order that such estates tail and remainders over may be so barred, but that it shall be lawful for the High Court of Chancery, or such Court of Equity, under the control of which such money shall be, and in case of trustees, for the said High Court of Chancery or the Court of Exchequer, in a summary way, upon petition of the person or persons who would be tenant or tenants of such estate or estates tail, and of the person or persons, if any, whose concurrence would be necessary and sufficient in order to enable the person or persons who would be tenant or tenants of such estate or estates tail, to bar the same, and the rights and interests of all persons in remainder after such estate or estates tail, such petitioners being adults, and where any of the parties are or is *femes coverts* or a *feme covert*, they or she being first separately examined in court, or upon a commission, and consenting (except only in cases where the fund in which she or they shall be interested shall be less than 200*l.*, in which case such consent shall not be required) to make such orders and declarations as are hereinafter mentioned; that is to say, in case such petition shall be presented by the person or persons who would, at the time of presenting the same, be tenant or tenants in tail in possession of the hereditaments to be purchased free from encumbrances, or shall be presented by the person or persons who would, at the time of presenting such petition, be tenant or tenants of the first estate or first estates tail, together with or with the consent of the person or persons, if any, who would be owner or

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owners of the antecedent particular estate or estates, or who would be entitled to any charge or encumbrance antecedent to the estate or estates of such tenant or tenants in tail, as the case may be, to order the money subject to such trusts to be paid to the petitioner or petitioners, or any of them, or to be paid and applied in such manner and for such purposes as the petitioners shall appoint and the court shall approve of; and in case such petition shall be presented by the person or persons who would at the time of presenting the same be tenant or tenants in tail in possession of the hereditaments to be purchased, but such petition shall be presented without the concurrence of all the persons (if any) who would be entitled to any charge or encumbrance affecting the hereditaments to be purchased antecedently to the estate of such tenant or tenants in tail, or shall be presented by the person or persons who would, at the time of presenting such petition, be tenants or tenants of some estate or estates tail in the hereditaments so to be purchased, together with or with the consent of the person or persons (if any) whose concurrence would be necessary and sufficient, in order to enable the person or persons who would be tenant or tenants of such estate or estates tail, in case the said hereditaments were purchased to bar the said estate or estates tail, and the rights and interests of all persons in remainder, after such estate or estates tail, but without the concurrence of all the persons who would be entitled to particular estates in, or to charges and encumbrances upon, the said hereditaments antecedently to such estate or estates tail, to declare that such estate or estates tail, and all remainders and reversions expectant thereon, is and are absolutely barred, and to order that the hereditaments to be purchased with the money subjected to the said trusts shall, when purchased, be settled (subject to the uses, trusts, estates, and interests antecedent to such estate tail) to the use of the person or persons who would have been entitled to the use of such estate or estates tail, his, her, and their heirs and assigns; and every such declaration and order shall be binding and conclusive, not only (*sic*) the person or persons who would have been entitled to such estate or estates tail, but also upon all persons who could have claimed through or under such person or persons by force only of such entail, or in remainder or reversion after such estate or estates tail.

"And be it further enacted, that in all cases where moneys subjected to be laid out in the purchase of hereditaments, to be settled as aforesaid, shall happen to be invested in government or real or other securities, all such securities shall, for the purposes of this act, be considered as money, and shall and may accordingly be transferred, assigned, and disposed of under an order of the respective courts aforesaid, made in a summary way, upon the petition of such persons, and with such examination and consent, where necessary, as aforesaid, in such and the same manner as moneys subjected to be laid out in the purchase of hereditaments, to be settled as aforesaid, are hereinbefore authorized to be paid, applied, and disposed of; and all declarations and orders to be made as to any such securities shall be of equal force and validity with the declarations and orders hereinbefore authorized to be made, as to money subjected to be laid out in the purchase of hereditaments to be settled as aforesaid."

If tenant in tail reserves an entire rent upon a farm in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner.

*Rees v. Philips*, Wightw. 69.

An adult tenant in tail is not obliged to keep down the interest on a charge

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affecting his estate ; but, if he do so, his representatives will not be allowed it out of the estates charged.

*Redington v. Redington*, 1 Ball. & B. 143 ; and see *Bertie v. Abington*, 3 Meriv. R. 560.

But an infant tenant in tail is bound to keep down the interest of such a charge ; for the remainderman has an equity against him ; but the remainderman is in the power of an adult tenant in tail.

*Sergison v. Sealey*, 2 Atk. R. 416 ; *Burges v. Mawbey*, 1 Turn. & R. 167.

This act having directed that the application shall be by petition, the court has no jurisdiction under it by any other mode of proceeding.

*Baynes v. Baynes*, 9 Ves. 462.

The court will make no order under the act without previous reference to the master to ascertain whether the parties are entitled to the money, and under and subject to what charges and encumbrances. Nor will they hear the petition on the last day of term ; and, to obtain the order in term, the application must be made early enough in it to admit of a recovery being suffered.

*Ex parte Bennet* ; *Ex parte Dolman*, 6 Ves. 116 ; *Ex parte Hodges*, Ibid. 576 ; *Ex parte Frith*, 8 Ves. 609.

Nor will they act at all in this summary way where any serious question arises, the statute applying only to cases in which the right is clear and indisputable.

*Ex parte Sterne*, 6 Ves. 156.]

## ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

(A) Who may be tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.

(B) The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life.

(A) Who may be tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.

SUCH person is tenant in tail *apres* possibility of issue extinct, (a) as survives the person by whom, or on whom, the issue was to be begotten ; as, where lands are given to a man and his wife in special tail, if the husband dies without issue, the wife is tenant in tail after possibility, &c., because the husband, by whom the issue inheritable to such special tail was to be begotten, is dead, so that, there being no issue living at his death, there is now no possibility of any by him : so *e converso*, if the wife dies without issue, the husband is tenant in tail after possibility, because she being the person on whom the issue inheritable to the estate tail was to be begotten, when she dies without issue, there is no possibility of the husband's having any issue by her inheritable to the tail.

Litt. § 32 ; Doct. & Stud. 61. (a) ["This long periphrasis Sir William Blackstone

## (A) Who may be Tenant in Tail, &amp;c.

saith, the law makes use of as absolutely necessary to give an adequate idea of such person's estate. For had it called him barely *tenant in fee tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone." 2 Comm. 124.]

If the lands be given to a man and his heirs which he shall beget on the body of his wife; in this case, though the wife takes nothing by the gift, yet if she dies without issue of her body begotten by her husband, he is tenant in tail after possibility, because the wife, on whose body the issue was to be begotten, being now dead without issue, he can have none by her.

Litt. § 33.

If baron and feme be tenants in special tail, and one of them die, leaving issue, though the survivor cannot be tenant in tail *apres* possibility during the life of such issue; yet, if that issue dies without issue, so as that there is not any issue living which can inherit by force of such entail, then the survivor becomes tenant in tail after possibility, &c.; for since the issue inheritable to such entail was to proceed from both the bodies of the donees, upon the death of either of them without issue, it is plainly impossible the survivor should have any issue inheritable to the entail.

Litt. § 32.

But, if baron and feme, tenants in special tail, live till each of them be 100 years old without issue, yet they still continue tenants in special tail; for however improbable it may seem that they should have issue at that age, yet the law sees no impossibility of having issue, and there must be no possibility of having issue, before the donees or either of them can be tenants in tail *apres* possibility. Besides, there is not any particular and certain period of time in which the possibility of issue ceases, and therefore the law cannot make either of them tenant in tail after possibility, till after the death of one of them.

Co. Litt. 28 a.

If lands are given to baron and feme and the heirs of their two bodies, and they are divorced *causa præcontractus* or *affinitatis*; here, there is no possibility of their having issue which can inherit by force of the gift, and yet they are not tenants in tail after possibility, &c., but the inheritance is turned into a bare joint estate for life; for the impossibility of having issue must proceed from the act of God, to make them tenants in tail after possibility, &c., but in this case it proceeded from the act of the parties.

11 Co. 80 b; Co. Litt. 28 a.

So, if lands be given to a man in tail upon condition, that if he does such an act, that he shall have the land but for life; such donee, upon breach of the condition, is but barely tenant for life, and not tenant in tail *apres* possibility, &c., because here by his own act it becomes impossible to have issue inheritable to the tail, which by his own act he has destroyed and forfeited.

11 Co. 80 b.

A feoffment was made to the use of a man and his wife for their lives, remainder to the use of their next issue male to be begotten in tail, remainder

## (A) Who may be Tenant in Tail, &amp;c.

to the use of the husband and wife, and the heirs of their two bodies begotten, they having no issue male at the time of the feoffment; in this case the husband and wife are tenants in tail executed; and upon the birth of any issue male, their estate opens, and they become tenants for life, remainder to the issue male in tail, remainder to themselves in tail; and if the husband dies without having any other issue, the wife continues but tenant for life, because the estate tail, which was once executed in her and in her husband, was changed into an estate for life by their own act; yet she shall have the privilege of tenant in tail *apres* possibility, &c., for the inheritance which was once in her; for this is not like the former case, where the breach of the condition respects what was granted; for in this case the birth of issue male shall not be presumed to divest the privileges of tenant in tail, which were once legally vested in her.

11 Co. 80, 81; Co. Litt. 28 a, Lewis Bowles's case.

¶ A settlement was made before marriage by which the husband's estate was conveyed to trustees to the use of the husband for life; remainder to trustees to preserve contingent remainders; remainder to the use of the wife for life for her jointure and in bar of dower; remainder to the first and other sons in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the bodies of the husband and wife; remainder to the right heirs of the husband: the wife survived the husband, and had no issue; and held, that she became tenant in tail after possibility of issue extinct.

Williams v. Williams, 12 East, 209; 15 Ves. 419, S. C.¶

Lands were given to a man and his wife and the heirs of the body of the husband, remainder to the husband and wife and the heirs of their two bodies begotten; upon the death of the husband without issue, the feme shall not be tenant in tail *apres* possibility, &c.; for by the first limitation she took only an estate for life, and the husband an estate in tail general, and the remainder over was a void limitation, because it could never take effect; for whatever issue the husband and wife had must inherit by force of the first limitation of the tail general, because all such issue are of the body of the husband; and when the tail general is spent in him, there cannot possibly be any issue to inherit the remainder in tail special, because such issue must be of the body of the husband and wife; and while there is any issue in being of the body of the husband, it inherits by force of the general tail; so that the remainder being void in its original creation, the wife had never an estate of inheritance in her, and, consequently, cannot be tenant in tail *apres* possibility, &c., because such an estate can be carved only out of an estate tail.

Co. Litt. 28 a.

¶ In a case noticed by Atkins, upon a surrender of a copyhold estate to the husband for life, then to the wife for life, and to the heirs of the bodies of the husband and wife, remainder in fee to the use of the survivor, it is said, that the limitation did not vest an absolute estate tail in the wife who survived, but only gave her an estate tail after possibility of issue extinct, and that the estate tail vested in the person who was heir of the bodies of both husband and wife. The reasons for this opinion are not mentioned, nor is it stated that it was the resolution of the court; nor does it appear whether that point entered the question then before the court.

Sutton v. Stone, 2 Atk. 101. It is, says Mr. Fearn, no easy matter to account for this opinion, or even to reconcile it to itself in all its points. The limitation to the heirs

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of the bodies of the baron and feme, must, as he conceives, either have been executed in the baron and feme jointly as an estate tail in possession, or have vested in them jointly as a remainder, or have been a contingent limitation to the heir of both their bodies. In the first case the estate tail in possession would have survived to the wife on her husband's death. In the second, the joint remainder in tail surviving to her would have merged her estate for life, and she would thereby have become tenant in tail in possession; and in neither of these two cases could she be tenant in tail after possibility of issue extinct, so long as any issue of her body by her deceased husband was living; for neither husband nor wife tenants in special tail are tenants in tail after possibility of issue extinct, till the death of the other of them, and failure of issue of their two bodies; and if there were any such issue then living, it could not vest in such issue till her death. In the third case, she could take no estate at all, and, consequently, could not be tenant in tail after possibility of issue extinct; therefore the only cases in which she could be tenant in tail after possibility of issue extinct are those two, in which it was impossible there should be any such person at all as the heir of both their bodies. Its being a surrender of a copyhold made no difference in the construction; as it was agreed in the same case, that surrenders of copyhold should be construed as other conveyances at common law.—The resolution of this case upon common law principles, Mr. Fearn apprehends, must have been thus: the husband and wife taking distinct and successive estates for life, the joint limitation to the heirs of their bodies was not executed in them, but vested in them jointly as a remainder in tail; this remainder survived to the wife upon the decease of her husband, and merging her estate for life, made her tenant in tail in possession; but having had no issue by her deceased husband, or such issue being extinct at the time of this resolution, she thereby became only tenant in tail after possibility of issue extinct. F.'s C. R. 81, 4th edit.

(B) The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life.

If tenant in tail *apres* possibility, &c., alien in fee, it is a forfeiture of his estate; because, having no longer a descendible estate in him, he cannot transfer it to another, without the prejudice and disherison of him in remainder.

Co. Litt. 28; 11 Co. 80 b; Doct. & Stud. 60.

If tenant in tail *apres* possibility be impleaded, and make default, he in reversion shall be received, as upon the default of any other tenant for life; because he having the inheritance in him only shall be admitted to defend it.

Co. Litt. 28 a; 11 Co. 80 b; Doct. & Stud. 60.

An exchange by tenant in tail *apres* possibility, &c., with a bare tenant for life, is good, because both their estates are of equal continuance and duration only. So for the same reason, if any estate of inheritance in reversion or remainder descends upon him, the estate tail *apres* possibility, &c., is merged; because, as to its duration, it is merely an estate for life, and in these respects we may call him but tenant for life; yet in other respects he has the privilege of one who has an estate of inheritance.

Co. Litt. 28 a; 11 Co. 80 b.

For he is punishable of waste, so that he has power over the lasting improvements of the land; for since he formerly had the inheritance in him, which the act of God has stripped him of, without any default of his, the privileges and benefits of the inheritance still continue in him. Besides, to punish this tenant for waste, seems to be against the design and intention of the first donation; for by that the donor gave the inheritance and an absolute power over the lasting improvements, which are looked upon as part of the inheritance for their duration, and, consequently, it can be no injury to him in reversion, nor beside his intention in the donation, if the donee exercises the power he was intrusted with by the donor; nor can the donor revoke

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### Estate for Life and Occupancy.

it, because the authority given by the gift must continue as long as the gift to which it was annexed continues.

Doct. & Stud. 61; Co. Litt. 27 b; 11 Co. 80 a. ¶ Where an estate *ex provisione viri* was settled to the husband for life expressly without impeachment of waste, and afterwards to the wife *for her jointure*, and in bar of dower, but without the words "*without impeachment of waste*," and the leasing power given to the tenants for life was on condition that the leases should not be made dispunishable of waste; yet the wife having become tenant in tail after possibility of issue extinct, was holden to be unimpeachable for waste, and moreover to be entitled to the timber she had cut as her own property. *Williams v. Williams*, 12 East, 209, and *supr.* ¶ [But a court of equity will restrain such a tenant from committing malicious and extravagant waste. *Abraham v. Bubb*, 2 Freem. Rep. 53; 2 Eq. Ca. Abr. tit. *Waste*, (A), pl. 1, S. C.; 2 Show. 69, S. C.; Anon., 2 Freem. 278, S. P.]

He shall not have aid of him in reversion, because he having originally the inheritance by the first gift, has likewise the custody of the writings which are necessary to defend it.

Co. Litt. 27 b; 11 Co. 80 b.

For the same reason he may join the mise in a writ of right, because, the deeds belonging to the inheritance lying in his hands, he may make out his title without calling in the reversioner.

Co. Litt. 27 b; 11 Co. 8.

The writ of entry *in consimili casu* doth not lie upon his alienation, as it does for him in the reversion, upon the alienation of any other tenant for life, because this case is not *consimilis* to that of tenant in dower, because this tenant had originally the inheritance in him, which the tenant in dower never had.

Co. Litt. 27 b; 11 Co. 80 b; F. N. B. 206; Booth, 199.

If upon the death of tenant in tail after possibility, &c., a stranger intrudes, yet no writ of intrusion lies against such intruder, because this writ is given only upon an entry and intrusion after the death of a bare tenant for life, which this tenant is not.

Co. Litt. 27 b; 11 Co. 80 b; Booth, 181.

He shall not be called tenant for life in a *præcipe* brought by or against him, because his original infeudation, by which he claims, was of an estate of inheritance, not of an estate for life.

Co. Litt. 27 b; 11 Co. 80 b.

A tenant in tail after possibility having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may not only commit waste, but also convert to his own use the property wasted; she shall not be restrained in equity except for malicious waste.

*Williams v. Williams*, 15 Ves. 427.

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## ESTATE FOR LIFE AND OCCUPANCY.

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- (A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.
- (B) Who upon the Death of Tenant for Life is to enjoy the Land; and herein of Occupancy: And,



## (A) What Interest or Property in Land, &c.

1. *Of what Things a Man may make himself a Title to by Occupation.*
2. *What makes an Occupant.*
3. *The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alienation made in the Common Law by the Statute 29 Car. 2, c. 3.*

(C) How far Tenant for Life may dispose of his Estate, either singly by himself, or by joining with him in Reversion: And herein of his Forfeiture, either by Common Law or Statute.

## 2 (D) Of the Rights and Duties of Tenant for Life.

1. *Of Tenant for Life of Real Estate.*
2. *Of Tenant for Life of Personal Estate.*

(A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

If a man lets land to one for term of life of the lessee, or any other, in this case the lessee is tenant for term of life; but in common speech, he, who holdeth for term of his own life, is called tenant for term of his own life; and he, who holdeth for term of another's life, is called tenant for term of another man's life, or tenant *pur autre vie*.

Litt. § 56.

So, if a man lets land to another for term of his own life, and the lives of A and B, the lessee has a freehold determinable upon his own death, and the deaths of A and B, nor can there be any merger of the freehold during the lives of A and B into the estate that the lessee has during his own life; because, though the estate for a man's own life is greater than an estate for another man's life, yet here the lessee has not two distinct estates in him, but only one freehold circumscribed with that limitation as the measure of its continuance.

Co. Litt. 41 b; 5 Co. 13 a; Cro. Eliz. 182.

If a lease be made to a corporation aggregate for life of the lessor; this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance.

Ro. Abr. 843. But, if a lease be made to a corporation aggregate for their own lives; this is no estate for life, but a fee simple; for the lease being made to them as a body politic, which has a continued succession and never dies, a lease made to them during their lives is equal to a grant made to them while they continue a body politic, which by reason of the perpetual succession of its members is in law looked upon to be forever; and therefore, this is a good gift in fee, without the word *successors*, because the lessor cannot have the land against his own grant till the corporation is dissolved; for till their dissolution they are in being and have a continuance, which is to be alive within the words of the lease. 21 E. 4, 76; Ro. Abr. 843.

If a man leases lands to another, without saying how long the lessee shall enjoy them, he shall have them for his own life, if livery be made, because every man's gift is taken most strongly against himself, and for the benefit of the grantee, to avoid all equivocation. But there is a difference between such a lease made by tenant in fee simple and tenant in tail; for if tenant in tail makes a lease generally with livery, the lessee shall have the land but during the life of the tenant in tail, for that is the greatest estate he can lawfully make, the power to lease ceasing with his life; and where a man's act will bear different constructions, the law, for no consideration, will make that construction which must be injurious to another.

Litt. § 283; Co. Litt. 42, 183; Ro. Abr. 846.

So, if lessee for term of his own life makes a lease generally with livery:

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### (A) What Interest or Property in Land, &c.

this the law construes an estate for his own life only; for if it were to be taken an estate for the life of the lessee, the lessor, without any explicit act of his own, would not only discontinue the reversion, but also forfeit his own estate, which construction would make the conveyance useless and ineffectual; for it would be in the power of him in the reversion to enter into the land for the forfeiture; and the law will make no construction to do wrong, or in doubtful expressions presume a wrongful intention, it being also most for the benefit of the lessee, that he should have a rightful estate.

Co. Litt. 183.

So it is of things which lie in grant, as rents, reversions, commons, &c., for if a man grants these things by deed, without mentioning any particular estate, the grantee hath an estate for term of his own life, because a man's own act is taken most strongly against himself: and where the words of the deed will bear two senses without injury to any one, the purchaser who comes in upon a valuable consideration deserves the most favour; and the construction that most enlarges his interest is to be preferred: besides, being granted to him, it cannot be supposed out of him, as long as the same person continues.

Ro. Abr. 845; Co. Litt. 42 a; 8 Co. 85 b.

But, if the king grants land or rent, and limits no particular estate in the gift, the patentee has no freehold, either for his own life or the life of the king.

Ro. Abr. 845. For since the king is seldom known to make market of his titles, his grants proceeding from his own bounty, and not from any valuable consideration of the patentees, ought not to be taken in a larger sense than the words of themselves import; and therefore, where he has not explicitly set forth the extent of his bounty, the law, with reason, construes the grant in favour of the king, who is best judge of the services of his subjects, and how far he intended to reward them, where the words of the grant do not declare it; and therefore such grant, being capable of a double construction, is void for the uncertainty, and shall not pass so much as an estate at will; because most grants proceeding from the instigation and application of the subject, they ought to know what they ask; and if that does not appear, nothing shall pass from the king for the uncertainty. Ro. Abr. 845; Dav. 43, 45; Co. 43, 49.

If an estate be given to a woman *dum sola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee shall dwell in such a house, or shall pay 10*l.* yearly to the grantor; in all such cases, where there is no fixed time appointed for the determination of the estate conveyed, the grantees have estates for life, if the ceremony required by law to pass a freehold be observed; as, if livery be made in case of things corporeal, or a deed be perfected in case of things incorporeal.

Co. Litt. 43 a.

If I make a lease to another till I go to Westminster, the lessee has an estate for life. So, if A leases to B, till A makes J S bailiff of his manor, B has the freehold in him; for since there is no particular time specified, but it is left indefinitely, when I shall go to Westminster, or J S be made bailiff of the manor, and these contingencies may or may not happen during the life of the lessee, and the livery transfers the freehold to him; so he must, consequently, by the words of the gift, enjoy it during his life, if none of these contingencies happen in that time, upon which his estate is to determine.

Ro. Abr. 844.

If an office be granted to a man, to have and enjoy so long as he shall behave himself well in it, the grantee hath an estate of freehold in the office;

## ESTATE FOR LIFE AND OCCUPANCY. 455

### (A) What Interest or Property in Land, &c.

for, since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life, since it must be his own act, (which the law does not presume to foresee,) which only can make his estate of shorter continuance than his life. So, if the office had been granted to a man *quamdiu se bene gesserit tantum*, his estate had not been less for the word *tantum*; for a grant to a man for so long time as he shall behave himself well, and for so long time only as he shall behave himself well, are of equal extent, and his misbehaviour in each case determines his interest.

Co. Litt. 42 a; Ro. Abr. 844; Cases in Parl. 161, 162, 163; 4 Mod. 173.

If a man grants a manor worth 10*l.* *per annum* to J S till he has received 100*l.*, this is an estate for life, if livery be made; for though at the time of the grant the manor be worth 10*l.*, and by that computation the 100*l.* must be paid in ten years; yet since the profits are uncertain, and may rise or fall, there can be no definite time fixed for the limitation of the lessee's estate; and therefore, since livery is made, he must have a freehold in the manor determinable upon the levying of the 100*l.* But in this case, if no livery had been made, the lessee had been only tenant at will; for it cannot be a lease for years, because the determination of it is uncertain, and there can be no freehold without livery.

Co. Litt. 42 a; Ro. Abr. 845; 6 Co. 35 b.

But, if I grant a rent of 10*l.* to J S till he has received 100*l.*, this is an estate for years in the grantee, for the determinate sum, which is payable yearly, must necessarily in ten years amount to the 100*l.*, and, consequently, it is evident at the commencement of the grant, when the interest of the grantee is to determine.

Ro. Abr. 844; Co. Litt. 42 a.

If I grant to another common of turbary in my land, to dig and carry away at his will, there being no particular estate limited in the grant, it must be construed in favour of the grantee, to continue during the life of the grantee; for the words *at his will*, cannot refer to the estate in the common, but to the privilege given to the grantee to dig and carry away, which by the grant he may use at his will and pleasure.

Ro. Abr. 845.

If a man seised of land in right of his wife for life, bargains and sells it by indenture enrolled, the purchaser has an estate for his life determinable upon the coverture; for the conveyance being by bargain and sale transfers no more than the husband may lawfully pass, which is an estate during the coverture; for so long he has an estate in the freehold of his wife, and may lawfully dispose of it; and since it cannot be foreseen when the coverture will be dissolved, the lessee must, consequently, have the freehold determinable with the coverture, since the bargain and sale upon the statute is equivalent to livery at law, to transfer the freehold.

Ro. Abr. 845.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office; this is no absolute estate for life, because the rent being granted on account of the office, and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined, because it was first granted for the exercise of the office, which he is no farther concerned in.

Co. Litt. 42 a.

And here it may be proper to observe, that though, by the common law

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the investiture of livery was the only solemnity required to convey the freehold, yet now, by the statute of *frauds and perjuries*, it is enacted, *That all leases, estates, interests of freehold, &c., in any lands, tenements, or hereditaments, made or created by livery and seisin only, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect.*

29 Car. 2, c. 3.

Where a copyhold was surrendered to the use of husband and wife for their natural lives, and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor forever; it was held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor.

Doe dem. *Dormer v. Wilson*, 4 Barn. & A. 303.

(B) Who upon the Death of Tenant for Life is to enjoy the Land: And herein of Occupancy.

If a man leases to J S, and J S dies, the land returns to the lessor, because, the life being spent for which the land was granted, it must necessarily come back to the old proprietor. But, if the lease had been made to J S during the life of A, and the lessee had died living *cestui que vie*; or, if in the former case J S had granted over his estate to B, and B had died; in these cases, he that first took possession of the land was lawfully the tenant; for the reversioner could not claim in either case, because he had parted with it during the life of A in one case, and of J S in the other; and J S cannot have any right, for that were to act contrary to his own grant, and to claim an interest which he had transferred to another; and the tenant *pur autre vie* being dead, his descendants could not claim it, because they were not comprehended in the words of the feudal donation; and therefore the first occupant must be the rightful tenant, since this, like all other things which are derelict and without an owner, belongs to the first occupier or possessor.

Co. Litt. 41 b; Cro. Eliz. 182.

But, the better to understand this matter, we shall consider,

1. *What Things a Man may make himself a Title to by Occupation.*
2. *What makes an Occupant.*
3. *The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law, by the Statute 29 Car. 2, c. 3.*

### 1. *Of what Things a Man may make himself a Title to by Occupation.*

There can be no occupant (a) of things which lie in grant, and which cannot pass without deed, as rents, advowsons, commons, reversions, &c., because these things having no natural existence, but consisting purely in the agreement, and depending on the institution of the society for their being, no man can enter to possess them. Besides, as these things are framed and have their existence by the municipal laws of the nation, so those laws have established the solemnity of a deed to transfer them; from whence it follows, that, since no man can make himself a title to these things without deed,

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whoever claims them must show he is a party to the deed before he can derive himself a title to the things contained in the deed.

Vaugh. 199, 200; Co. Litt. 41 b; 2 Ro. Abr. 150; Cro. Eliz. 721, 901. (a) [That is, no *general* occupant; for Lord Coke writes in Co. Litt. 388 a, that if heirs are named in the grant of a rent *pur autre vie*, they shall take, though this was formerly doubted. Dy. 186, ed. in marg.; 1 Bulstr. 155; Mo. 625, 664; Godb. 172.]

Therefore, if a rent be granted to A during the life of B, and A die, living B, the rent is determined; because the grant being originally made to A only, when he dies, nobody can claim it as occupant, because there can be no entry into it to possess: nor by the deed, because no one was party to it but A; it must follow, therefore, that when nobody can take by the grant, it must cease as a void grant, or as if it had never been made; and, consequently, the reversion must necessarily commence.

Vaugh. 199.

If a rent be granted to A during the life of B, remainder to C, if A dies living *cestui que vie*, the remainder which was limited to C commences immediately; for the particular estate in the rent must determine, when nobody can enjoy it; and, consequently, the remainder must take place, which was to commence upon the determination of the particular estate.

Vaugh. 200; Mo. 664.

But, if a rent be granted to A and B during the life of C to the use of C, if A and B die, C shall enjoy the rent during his own life; for the rent granted to A and B to the use of C, is by the statute of uses executed in C as an estate for his own life; so that the lives of A and B are no ways material; for the estate being executed by the statute to the use which was limited to C during his own life, he must, by the grant, notwithstanding the death of A and B, enjoy the rent during his own life.

Crawley's case, Cro. Eliz. 721; Dy. 186 a, in marg., S. C.

If there be two jointenants for life, and one be a feme covert, and the baron and feme levy a fine to the other jointenant, and thereby grant *totum et quicquid* in the land, for the life of the wife; upon the death of the other jointenant, there shall be no occupant during the life of the feme, but the feoffor may enter; for the fine enured by way of release, and then the other jointenant must have claimed the whole from the first feoffment, so could have had the whole but for his own life.

2 Ro. Abr. 86, 403; Cro. Ja. 696, Eustace and Scawen; Sir Wm. Jones, 55, S. C.

But, though there be no occupancy of things which lie in grant, yet they may be occupied as appendant to things which pass by livery, and which may be occupied; as, if a manor consisting part in demesne, and part in services, be leased to A for the life of B, upon the death of A, whoever first enters and occupies the demesnes has also the services: so, the occupancy of a manor is the occupation also of the advowson appendant to the manor; for though neither the services nor the advowson are separately in their own nature capable of an occupancy, yet, as they belong and are appendant to land which is subject to occupation, the occupant of the demesnes has a right to the whole manor, because the occupancy making no severance or alteration in the manor, he that has a right to the whole manor by occupation must necessarily have a right to all its rights.

Vaugh. 196.

So, the occupant of a house shall have the estovers, or way leading to the house; for since these things pertain to the house, and the occupation of the

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house makes no severance of them, they must necessarily remain as they were before the occupant entered, and then the possessor of the house enjoyed the estovers or way also.

Vaugh. 196.

If a lease be made of lands to J S for life, *habendum* to him and A and B successively, A and B cannot take the lands in possession, because not named in the premises; nor by way of remainder, because the intent of the deed appears to give it them in possession by the copulative words, and by joining them with J S, who is to take in possession; nor can there be any occupancy upon the death of J S, because A and B are mentioned in the deed as persons to take an estate, and not to make a limitation of the lands to J S during their lives; so that the lease in effect is no more than to J S during his own life, and, consequently, upon his death it must return to the lessor, since the life is spent for which he granted it.

Cro. Eliz. 57; Hob. 313, Windamore and Hubbard.

If tenants in dower, or by the curtesy, of lands, grant over their estate, and the grantee dies during their lives, whoever first enters shall be occupant; for though their estates are created by law, yet since they are to enjoy them during their own lives, the reversioner has no right to enter till their deaths; nor can they enter upon the death of the grantee, because this were to act contrary to their own grant, which conveyed their estates during their own lives; consequently, since the possession is vacant and derelict by the death of the grantee, he that first enters to possess is the occupant, and shall enjoy the land during the life of tenants in dower, or by the curtesy, though they cannot be said to be tenants in dower, or by the curtesy.

Co Litt. 41; 2 Ro. Abr. 150; Palm. 32. Vide Cro. Eliz. 58.

If a lease be made to A and B for their lives, and the life of the longest liver of them, and they make partition, and then A dies, the lessor shall enter into his part; and there can be no occupancy; for B has no title to it, because the right of survivorship was lost by the partition which destroyed the jointenancy; nor will the words *to the longest liver* be of any use to B, because they were void at first, being no more than the law employed in the joint estate: besides, after the partition, each of the lessees has but an estate for his own life in the several moieties, and, consequently, the reversion, which is to commence when the particular estate determines, must necessarily take place, for there can be no occupant where another has right, as the reversioner has in this case upon the death of A and B.

2 Ro. Abr. 150.

There can be no occupant of any of the king's possessions; for if the king grants lands to A during the life of B, and A dies, living B, the law allows no man to gain the possession which is now vacant by the death of A, but preserves it for the king; for, he being employed in the care and business of the whole nation, ought not to suffer in his private estate and concerns: besides, no man can make himself a title to any of the king's possessions without matter of record.

Co. Litt. 41; 2 Ro. Abr. 150.

|| There can be no general occupant of a copyhold estate, because the freehold is never out of the lord: but there may be a special occupant of it, as, where the grant is to A and his heirs for the life of B, upon the death of A during the life of B, A's heir must be admitted and pay a fine.

Smartle v. Penhallow, 1 Salk. 188; 2 Ld. Raym. 1000, S. C.; 6 Mod. 63, S. C.; Gilb. Ten. 327. ||

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2. *What makes an Occupant.*

Occupancy in land being nothing else than the taking possession or appropriating of that part which every man had a right to as much as another, it follows, that a claim without an actual entry makes no occupation, because, notwithstanding the claim, the possession is still vacant, and such claim leaves no marks of an appropriation; besides that, since the occupancy in civil societies follows the natural, and a mere claim makes no natural occupancy, because a man's natural right extends no farther than possession and use, and not to what he may only wish for, by consequence, if a claim doth not remove it out of the state of nature, the occupancy, in civil societies, according to the nature of things, must be an actual possession, and not a bare claim.

Vaugh. 188.

Riding over the ground to hunt or hawk makes no occupancy: for though this be an actual entry, yet (being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider) can gain no occupancy; the intention of the person being to denominate his action according to the rule *quod affectio tua imponit nomen operi tuo*.

Co. Litt. 41 b.

If A, tenant *pur autre vie*, leases to B at will, and B enters and is possessed, and then A dies, and J S enters as occupant, yet he is no occupant, because the possession was taken up by B before, and B being found in possession, (which prevents any other occupant,) the law casts the freehold on him, not only to prevent any abeyance, but that there may be a tenant to do the services, and to answer to the *præcipe* of strangers.

Vaugh. 189, 191; Cro. Ja. 554; Co. Litt. 4.

If tenant *pur autre vie* makes a lease for years, and dies, the lessee for years being in possession shall be occupant without any act of his declaring his intention to be so; for being already in possession, the law does not put a man to claim or enter into that of which he has already possession, and in whomsoever the law finds the possession, there it casts the freehold for the former reasons: nor is the lessee for years injured by it, for he purchased his estate subject to this contingency of being merged by occupancy.

2 Ro. Abr. 151; 2 Bulstr. 12, 13; Vaugh. 194; Comp. Incum. 348; 7 Ves. 142.

But, if tenant in fee simple makes a lease for years to J S and after ousts him, and makes a lease to A for the life of B, J S re-enters, and A dies, the lessee for years is no occupant; for though he is found in possession, yet it is by a title superior to the lease for life, and since he did not purchase the term at first under the contingency of a merger by occupancy, the law will not permit the lessor by any act of his to destroy the title he himself made; nor will the law merge the term, for that were to destroy the prior title of J S, contrary to the rule of law, that *actus legis nemini facit injuriam*.

Co. Litt. 41 b; 2 Ro. Abr. 151.

If A, tenant *pur autre vie*, leases to B for years, and B makes a lease at will to C, if A dies, living *cestui que vie*, C shall be the occupant, because, being in possession, the law gives him the freehold: and though B should enter upon him and claim as occupant, yet that would make no alteration in the case, because C becomes occupant immediately on the death of A, and what one man is already possessed of, another cannot gain by occupation; for occupancy only gives a right where no man had it before; but the

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term of B is still in being, because C is to have the freehold as A enjoyed it, which was subject to the lease for years.

2 Ro. Abr. 151; Co. Litt. 41 b; 2 Bulstr. 11; Dyer, 328, in marg.; Com. Incum. 348; Cro. Ja. 554; 2 Ro. Rep. 123. Vide 1 Vern. 234.

If tenant *pur autre vie* makes a lease for twenty years to B, reserving 5*l.* rent, and B leases to C for ten years, reserving 3*l.* rent, if the tenant for life dies, C shall be occupant, because he is in possession; but yet he shall have the freehold only as a reversion on the lease of twenty years; and therefore, since the term of ten years is not merged, C must pay the 3*l.* to B, and B must pay the rent of 5*l.* to C, because C as occupant comes in the place of tenant for life in all respects, and must answer the services over, is subject to the conditions, and to all charges of tenant for life, and, consequently, ought to enjoy all the benefit and profit of it.

Hargr. Co. Litt. 41 b, note (1).

So, if tenant *pur autre vie* makes a lease for years to A, remainder to B for years, and the lessee for life dies, A shall be occupant and have the freehold, because the law finds him in possession: but his term is not merged, by reason of the intermediate interest of B, which he must preserve; because, coming in the place of the tenant *pur autre vie*, he is obliged to take the freehold under the charges he laid on it, and in the same manner he enjoyed it, which was subject to the lease for years; and therefore, though the freehold be cast on him, yet he holds it by way of reversion upon the remainder for years.

2 Bulst. 12, 13.

If tenant *pur autre vie* dies, and J S first enters, and claims in right of J D, yet J S himself shall be occupant, because the freehold, being cast on him who first takes possession, cannot be divested out of him without a solemn act of notoriety.

2 Ro. Abr. 151; Vaugh. 192; 2 Bulst. 11.

If tenant *pur autre vie* makes a lease for years to A in trust for himself for life, and after his death in trust for his wife for her life; A enters, but suffers the lessee for life to enjoy the land; the lessee for life dies, and the wife finding the possession vacant enters, she is the occupant, for though upon the death of tenant for life (whom he suffered to enter and take the profits) he had so far a possession in law before any actual entry, that he might have an action of trespass; yet that made him no occupant, because nothing but an actual possession makes an occupant, which the wife first took in this case.

Lev. 202; Sid. 346; 2 Keb. 148.

### 3. The Way to prevent the General Occupant, and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 Car. 2, c. 3.

If lands be given to the lessee and his heirs, during the life of another, the heir comes in as special occupant (a) upon the death of the tenant for life, because he is included in the words of the donation, which gave him a right to the land upon the death of the lessee, and, consequently, prevents an occupancy, which is admitted in other cases, because no man has a title to the vacant possession.

Litt. § 739; Co. Litt. 41 b, 388 a. ¶(a) Lord C. J. De Grey objects to the term "special occupant" in these cases, as a very forced and improper phrase; and thinks there is very great weight in what is said by Vaughan, 201, that the heir takes it as a *descendible freehold*. Doe v. Martin, 2 Bl. Rep. 1150. And that it is a *descendible free-*



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*hold* in a sense, Lord Eldon says, it is excessively difficult to deny upon a review of Vaughan's very learned and able argument. *Ripley v. Waterworth*, 7 Ves. 457, 458. The impropriety of the phrase "special occupant" cannot but strike us: there would seem to be a contradiction in it: a special exclusive right of entering upon that which, as being the subject of occupancy, belongs to nobody, and is open to the first person who can possess himself of it, is certainly not very easy to be understood. At the same time the term "*descendible freehold*" has been objected to: for though the estate be in a sense a freehold estate, yet the word "*descendible*" has been thought to be inaptly applied to it, inasmuch as the heir takes it, it has been said, not as heir by descent, but as heir *nominatim*, and as by way of limitation only, by force and virtue of the grant. 7 Ves. 457, 458; *Bowles v. Poore*, 1 Bulstr. 137. And Gilbert, speaking of the fine payable by the special occupant of a copyhold upon admission, says, "it seems it must be only a purchase fine, and not such a one as is paid on descent; for he doth not take by descent, but by special occupancy." *Gilb. Ten.* 327. And Lord Kenyon says, *Estates pur autre vie* have been sometimes called, though improperly, descendible freeholds. Strictly speaking, "they are not descendible freeholds, because the heir at law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded *riens per descensum*; for these estates were not liable to the debts of the ancestor before the statute of frauds." *Doe v. Luxton*, 6 T. R. 291.]

So, if lessee for his own life leases to B and the heirs of his body, during the life of the first lessee; if B dies during the life of his lessor, the heirs of his body shall be occupant.

2 Ro. Abr. 151.

So, if the lessee had made such a lease to his lessor, and the lessor had died during the life of the lessee, the heir of his body shall be occupant; for this is no surrender, because the first lessee has a possibility of reverter upon his lessor's dying without heirs of his body.

2 Ro. Abr. 150; 18 E. 3, 44 b.

Tenant *pur autre vie* may limit the term to a man and his heirs, or to the heirs of his body, and such estate shall descend, and is not within the statute *de donis*.

*Finch v. Tucker*, 2 Vern. 184; *Low v. Burron*, 3 P. Wms. 262. If tenant *pur autre vie* settles the term to the use of himself in tail, remainder to J S, equity will not support such remainder for the benefit of J S. *Baker v. Bailey*, 2 Vern. 225. In *Low v. Burron*, 3 P. Wms. 262, Lord Talbot held the remainder to be good, it being no more than a description who should take as special occupant during the lives of the *cestui que vies*; grounding himself on the case of *Wasteneys v. Chappell*, 1 Br. P. C. 457, where this was determined. And if such a limitation be admitted, it seems that any alienation by the (*quasi*) tenant in tail will be sufficient to bar the remainderman; although, if no such act be done, he will take as special occupant. *Duke of Grafton v. Hammer*, 3 P. Wms. 266, note (E); *Norton v. Fricker*, 1 Atk. 524; *Forster v. Forster*, 2 Atk. 259; *Saltern v. Saltern*, *Ibid.* 376; *Williams v. Jekyll*, 2 Ves. 681; *Blake v. Blake*, 3 P. Wms. 10, note 1; *Doe v. Luxton*, 6 T. R. 289, S. C.; *Blake v. Luxton*, *Coop. Rep.* 178, S. C.; *Grey v. Mannoek*, 6 T. R. 292.

If lands in borough-english be given to A and his heirs for the life of B, and A die in the life of B, leaving two sons, the youngest shall be the special occupant, because the heir, that is representative of the father as to land of that nature, must be the occupant, since the heir must take by descent, and not by purchase.

*Baxter v. Dowdswell*, 2 Lev. 138; 3 Keb. 475, 486, 498, S. C.; *Vaugh.* 201; *Clements v. Scudamore*, 1 Salk. 244; 2 Ld. Raym. 1028, S. C.

If a lease be made of *land* to J S, his executors and assigns, during the life of B, the executors of J S shall be the special occupants, if he dies in the life of B; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupa-

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tion of any other person, because the parties themselves, who originally had the possession, have filled it up by this appointment.

Dyer, 328; 2 Ro. Abr. 151, and it was assets in their hands before the stat. 29 Car. 2, c. 3; 2 Vern. 720. ¶ That an executor may take an estate of freehold as a special occupant has been considered by Lord Hardwicke as clear; Duke of Marlborough v. Lord Godolphin, 2 Ves. 61; Williams v. Jekyll, Ibid. 681; Westfaling v. Westfaling, 3 Atk. 460; 7 Ves. 446, S. C., cited from Lord Hardwicke's notes. And of that opinion Lord Eldon has expressed himself to be. Ripley v. Waterworth, 7 Ves. 425. But Lord Redesdale has said that the old authorities seemed the other way, and that if the case were before him, he should feel great difficulty in determining according to the apparent opinion of Lord Hardwicke. Campbell v. Sandys, 1 Sch. and Lefr. 281. But *quæ* whether the distinction taken in this and the paragraph next following between the case of a corporeal and an incorporeal hereditament has been duly attended to: and see Mr. Sugden's note (I), in his Treatise on Powers, p. 187. See also Savery v. Dyer, Amb. 140.¶

But, if a rent be granted to J S and his executors, during the life of B, by the death of J S the rent is determined, because the executors cannot take as special occupants, since the nature of the thing lying in agreement is not capable of occupation; nor can they take by the grant, because then they must take as representatives, which they cannot be of a freehold; and the law will not permit people at their pleasure to vary the course of descents.

2 Ro. Abr. 151. {But see Willes, 505; Hassell v. Gowthwaite, 7 Ves. T. 448.}

Where the tenant of lands granted to him and his heirs *pur autre vie*, devised them to A B without saying more, and A B died in the lifetime of the *cestui que vie*; it was held, that the heir of the devisor was entitled to the lands as special occupant.

Doe dem. Jeff v. Robinson, 8 Barn. & C. 296.

So, if a rent be granted to A, his executors and assigns, during the life of B, and A die intestate, the administrator cannot claim the rent: not as occupant, because no man can make himself a title to rent by way of occupancy: not by the deed, because he is not assignee within the words of the grant by the letters of administration; therefore the rent is determined, since none can claim it as occupant.

Vaugh. 199, 200; Cro. Eliz. 901; Mo. 664; Yelv. 9, Salter and Butler.

Yet, if the rent be granted to a man and his heirs during the life of another, and the grantee die, his heirs shall take as special occupants; for though in point of property the rent is not capable of occupation, yet since the heirs are included in the grant, and they are capable of taking the freehold as representatives of the grantee, which the executors are not in the former case, it is but reason the rent should not determine while any person comprised in the grant is capable of taking.

Vaugh. 201; 2 Ro. Abr. 151; Bulst. 135; Cro. Ja. 282, Bowles and Poole; Yelv. 9.

So, if an annuity be granted to A and his heirs during the life of B, if A die before B, his heirs shall have the annuity, because the heirs of A being the proper representatives to take the freehold descending from him, since they are comprised in the grant, the grant cannot cease or be void while they are in being, and the life not spent for which the grant was made.

Bulst. 135; Co. Litt. 388 a; 2 Ro. Abr. 151.

By 29 Car. 2, c. 3, § 12, it is enacted, "That any estate *pur autre vie* shall be devisable by will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor, by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable

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in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

|| By 14 G. 2, c. 20, § 9, reciting the above clause of the stat. of 29 Car. 2; reciting also that "doubts had arisen, (a) where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong; it is enacted, That such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate."

(a) In the case of *Oldham v. Pickering*, 2 Salk. 464; Carth. 376; Comb. 388, there was an estate *pur autre vie* to a man and his assigns, but of which no assignment had been made, and the Court of King's Bench determined, that it was assets in the hands of the administrator only for the payment of debts, and that it was neither distributable nor so much as assets for the payment of legacies, except such as were particularly devised thereout; and that the administrator was therefore entitled to hold it as occupant. This decision was not well received at the time it was pronounced. Comberbach says, that it was contrary to the opinion of Mr. Cheshire, the counsel for the defendant, who wondered the court should give judgment for his client so suddenly. It is this case to which the statute alludes, and recognises as not well decided, and as only raising a doubt.

There can be no general occupancy of copyholds, since the freehold is always in the lord; and the statutes 29 Car. 2, c. 3, and 14 G. 2, c. 20, appropriating estates, *pur autre vie*, where no special occupant exists, do not apply to copyholds.

*Zouch dem. Forse v. Forse*, 7 East, R. 186.

And one who was admitted tenant upon a claim as administrator *de bonis non* of a grantee of copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission as a new and substantive grant by the lord.

If an estate *pur autre vie* be limited to a man, his heirs, executors, administrators, and assigns, the heir shall take as special occupant in preference to the executor. And where the heir takes as special occupant under the statute of frauds, the estate is liable to the debts to which an estate in fee simple is liable, but to those only.

*Atkinson v. Baker*, 4 T. R. 230.

If an estate *pur autre vie* be limited to a man, his executors, administrators, and assigns, it becomes personal estate in the hands of the executors or administrators; it is subject to the same debts and clothed with the same trusts with personality of any other description; title may be made to it under a will sufficient to pass personal estate; and, where there is no will, it is distributable. For though the executors or administrators take as special occupants under this limitation, yet they take also as executors and administrators; and that character still remaining in them, the equity, which attaches upon it, must remain also. Hence, though an estate so limited, being an estate of freehold, be devisable as to the legal interest only by an instrument attested by three witnesses; yet, where it is not so devised, devolving upon the executor, it devolves upon him in trust for those who are entitled to the personal estate.

*Id. Ibid.*; *Ripley v. Waterworth*, 7 Ves. 425; *Williams v. Jekyll*, 2 Ves. 683.

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Whether an estate *pur autre vie*, not devised, be real or personal assets, does not depend upon there being or not being a special occupant; (a) for the assets may be personal, though there be a special occupant, as, where the occupancy is in the executor or administrator; to make them real the special occupancy must be in the heir.

(a) Fonbl. Eq. Tr. 396.

Again, an estate *pur autre vie*, where there is no special occupant named, is not, if devised, therefore real assets; but is, by the statute of frauds, assets in the hands of the executor to pay debts generally; for that statute has in effect made the executor a special occupant in all such grants, as if inserted therein.

Id. Ibid.; Ripley v. Waterworth, *ubi supr.*; Westfaling v. Westfaling, 3 Atk. 466; Duke of Devon v. Kinton, 2 Vern. 719; 2 P. Wms. 380, S. C., by the name of Duke of Devon v. Atkins.

A devise of an estate *pur autre vie* is, as against creditors, fraudulent and void within the statute 3 & 4 W. & M. c. 14.

Westfaling v. Westfaling, *ubi supr.*]

(C) How far Tenant for Life may dispose of his Estate, either singly by himself or by joining with him in Reversion: And herein of his Forfeiture, either by Common Law or Statute.

By the ancient feudal law no man could alien without license from the lord of the fee; but any alienation or disposition was then a forfeiture; but in England, where the allodial property prevailed in the Saxon times, they were allowed to alien in (b) some cases, which privilege was not only confirmed, but also enlarged and made general by *magna charta*; so that by that act the feudatory might alien to whom he pleased, provided he left sufficient to answer the lord's services, which seems to have been a privilege mightily contended for.

Digest. Feud. lib. 2, tit. 26, fol. 523; Vigellius, lib. 5; Cause, 32, f. 287; Staunf. Prær. 28 a. (b) 1st, In *remunerationem servitii*, that is, for services done to the feud, as for services done in the wars by the feudal tenant, or in peace, by ploughing the feud at home; both these being either for the profit or honour of the feudal lord, they formerly valuing themselves upon the number and honour of their tenants. 2dly, In frank-marriage with the daughter of the feudatory, or some other of his blood, because this multiplied tenants to the lord. 3dly, In *frankalmoigne* or free alms, the superstition of the times allowing it for the good of the soul. Glanvil, lib. 7, cap. 1, 44; Staunf. Prær. 27, 28.

Yet notwithstanding this law, if tenant for life aliens in fee, this is still a forfeiture, for that statute only permits a lawful disposition, but does not allow any alienation to the prejudice of him in reversion, and therefore where tenant for life takes upon him to transfer the fee simple, it is a renunciation of the feud, and contrary to his oath of fidelity. So, if tenant for life aliens to another for the life of the alienee, this is a forfeiture, for it can be no lawful alienation within *Magna Charta*, because it is palpably to the prejudice of him in the reversion.

2 Inst. 65; Ro. Abr. 854; Co. Litt. 251.

If A, lessee for life, leases to B for the life of B, if A lives so long; this is a forfeiture of A's estate, because B has an estate for his own life, though under a contingency, which must necessarily divest the reversion.

Ro. Abr. 854.

But, if A, lessee for life, levies a fine to B for the life of A to the use of B for his own life, this is no forfeiture; for the estate granted by the fine

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was only for the life of A, and the limitation of a greater use can be no forfeiture, for the estate out of which the use arises is only during the life of A.

Cro. Ja. 100, *Castle v. Dod*; Ro. Abr. 854.

Husband seised of lands in right of his wife for life, and they both by deed of feoffment convey the land to J S and his heirs, *habend.* to him and his heirs, to the use of him and his heirs, for the life of the wife; this is a forfeiture of her estate; for there being a fee simple conveyed to J S by the deed and livery, the words of restraint for the life of the wife refer only to the limitation of the use, so that the fee simple remains still in the feoffee; but this it seems is a forfeiture only during the coverture.

Cro. Eliz. 131, *Piers and How*. So, if baron and feme be tenants for life, and they both join in a feoffment, or the husband alone; these are forfeitures, but they affect the wife only during the coverture; for she can be bound by no act of hers without examination in the court of record. Ro. Abr. 851; 8 Co. 44.

If tenant for life makes a lease for years, this was never looked upon to be a forfeiture, because the lessee for years was originally but a bailiff to the freeholder, and the tenant for life only had the freehold, and was to answer the services, and he in reversion was nowise affected by it, because there was no investiture or other act of notoriety done to dispossess him of his reversion. But upon the death of tenant for life the termor's interest ceased, because the person from whom he derived his authority as bailiff being dead, the authority must necessarily cease with the person that granted it. And in this case, if tenant for life enters upon his lessee, and makes a feoffment to another, this is a forfeiture of his whole estate, but the term for years continues, because the wrongful act of tenant for life shall not prejudice a stranger's interest; and if he in reversion enters, he must take it subject to the charges he had power by law to lay on it; yet in this case, if tenant for life had entered and committed waste, this had been a forfeiture of his estate, and the term had been lost too; but this is by the express words of the statute of Gloucester, which gives the place wasted as a penalty to him in reversion, and cannot be done if the term continues notwithstanding the waste.

8 Co. 45; Co. Litt. 233 b. But for this vide tit. *Waste*.

Of things which may be transferred without the notoriety of livery and seisin, such as rents, advowsons, &c., which lie in grant, a man cannot by any disposition or act *in pais* forfeit them; and therefore, if a man seised of a rent, advowson, or common for life, grants them by deed to another in fee, this is no forfeiture, for this can be no way prejudicial to him in reversion, because, should the grantee claim an estate in fee, he can make no title without the original grant made to his grantor; by which it must appear what interest he had, and, consequently, what estate he could convey; and so the grantee, notwithstanding the grant in fee, can claim no larger estate than his grantor had power to make, and so he in reversion can receive no prejudice.

Co. Litt. 251; Ro. Abr. 854.

So, if tenant for life of lands, by indenture enrolled, bargains and sells them to J S and his heirs, this is no forfeiture, but the bargainor passes only what he may lawfully pass; for though by the statute 27 H. 8, c. 10, deeds enrolled grew a common conveyance for the transferring of lands, which could not pass at common law without the investiture of livery; yet being a

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manner of conveyance known before at common law, it was construed to have no new effect given it by the statute, but what the statute expressed.

6 Co. 14 b. {So of a lease and release. Co. Litt. 328 a; Willes, 383, Grills v. Mannell; 1 Wash. 388, Pendleton v. Vandevier. See 3 Dall. 486, M'Kee's Lessee v. Pfoot.}

But, if a man be seised of a manor for life, to which an advowson is appendant, and he alien one acre, or the whole manor, with the advowson in fee, this is a forfeiture of the advowson; for as it is a forfeiture of the acre or manor to which it is appendant, so it must be also of the advowson, since the alienation makes no severance of them.

Ro. Abr. 854.

If lessee for life of lands aliens in fee upon condition, and enters for the condition broken, yet the lessor may enter for the forfeiture.

Ro. Abr. 856; Co. Litt. 252; Palm. 202. So, if tenant for life aliens upon condition, that if he himself pays 10*l.* that he shall re-enter, and that if he fails in payment, that then the alienee shall have the fee simple; though he pays the money, yet the reversioner may enter for the forfeiture, because the fee was transferred immediately upon the alienation, which was a renunciation of the feud, and consequently a forfeiture. Ro. Abr. 856.

If tenant for life levies a fine, by which the reversion is divested, this is a forfeiture; because it is a more solemn renunciation of the feud than any alienation *in pais* can be.

Co. Litt. 251 b. ¶ If a tenant for life suffer a common recovery, this shall work a forfeiture. Stump v. Findlay, 2 Rawle, 168.*g*

So it is of a rent, advowson, or any thing else that lies in grant: for if tenant for life of them levies a fine, it is a forfeiture: for though the fine being of a rent, &c., passes no more than it may lawfully pass, yet, being a public and solemn renunciation of the estate for life in a court of record, this amounts to a forfeiture, and so differs from a grant *in pais*.

Ro. Abr. 852; Co. Litt. 251.

Another way of forfeiture in a court of record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture. Now this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges the reversion to be in a stranger; for in all these cases he denies that he holds the feud from the lord: but, as by the feudal law the vassal was to be convicted of this denial, so in our law these acts, which plainly amount to a denial, must be done in a court of record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause: but the denial of the tenure upon record could never be counterfeited, or be abused to any injustice; and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law.

Vigellius, Cause, 32 f, 287, 288.

And therefore, if tenant for life be disseised, and bring a writ of right, this is a forfeiture of his estate; because, by suing a writ of right, he admits the reversion in fee to be in himself, and, in consequence, denies that he holds

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over. So it is, if, in a writ of right brought against him, he should join the mise on the mere right; for by taking upon him the privileges of tenant in fee, he admits the inheritance in him, which is a denial of the tenure.

7 Co. 55; Co. Litt. 251 b. So, if in a *quid juris clamat* brought against him, he claims the fee simple; this is a forfeiture. Ro. Abr. 853; 2 Co. 68 b.

If tenant for life accepts a fine *come ceo*, &c., of a stranger, this is a forfeiture of his estate; for this is a denial of the tenure on two accounts: 1st, In admitting the reversion to have been in the stranger to convey. 2dly, In accepting it himself to the prejudice of him in reversion.

Dyer 148; Co. Litt. 252; Ro. Abr. 852; 9 Co. 106.

If A be tenant for life, remainder to B for life, and A levy a fine to B and his heirs *sur conusans de droit come ceo*, this is a forfeiture of both their estates; for by their own act on record, they have denied the reversion to be in the lord, the first by giving, and the last by accepting such an estate.

Smith v. Abell, 2 Lev. 202. Levinz says, that this was so determined without argument: but Sir T. Jones, in his report of this case, p. 65, says, it seemed to the court, that the acceptance of the fine is a forfeiture of the remainder; but adds, *quære*, whether any judgment was given. See Lane v. Lady Vane, Sir T. Jon. 98, where this case is referred to.

If tenant for life be disseised, and the disseisor make a lease at will, and tenant for life levy a fine *come ceo*, &c., to the lessee; this is a forfeiture, and he in the reversion, though he had but a right, may take advantage of it.

2 Co. 55; Moore, 423, Buckler's case; Co. Litt. 252 a.

If a stranger bring an action of waste against tenant for life, and the lessee plead *nul waste fait*, in bar to the action; this is a forfeiture, because by his plea he admits the stranger to be the proper person to punish the waste, if there had been any committed.

Co. Litt. 252; Ro. Abr. 853.

If the demandant in a real action recovers against the tenant for life by default or *nient dedire*, or by pleading covenously to the disherison of him in the reversion; these are forfeitures of his estate; for tenant for life is entrusted with the freehold, and is to answer to strangers *præcipes*, and defend his own as well as the reversioner's interest; but when he gives way to the demandant's action, he admits the right of reversion to be in him, and, by consequence, denies any tenure of his reversioner, which is a forfeiture.

Co. Litt. 252 a; Ro. Abr. 853.

If tenant for life prays in aid of him in reversion, and has it granted him, and J S comes into court without process, and says, he is the person of whom aid is prayed, and that he is ready to join in aid; but tenant for life denies him to be the person, and is adjudged to answer sole; if this be the person that has the reversion, tenant for life has forfeited his estate by his denial of him, because the prayer in aid being always of him in reversion, and the tenant denying him to be the person of whom he prayed in aid, he has denied the reversion to be in him, and, consequently, has denied to hold of him. So it is, if he had at first prayed in aid of a stranger: this had been a forfeiture for the same reason.

Ro. Abr. 853; Co. Litt. 252.

If a stranger grants the reversion by fine, and the conusee brings a *quid juris clamat* against the lessee, who attorns to the grant; this is a forfeiture, because he thereby admits the reversion to be in a stranger; but if he be erroneously adjudged by the court to attorn, and he does it in obedience to the

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court, this is no forfeiture, because he was bound by the judgment to attorn, and did nothing wilfully to the prejudice of him in reversion.

Co. Litt. 352 a; Ro. Abr. 853.

Where he in reversion is party to the conveyance, there, tenant for life may by solemn investiture convey a greater estate than he had by the first feudal contract; as, if A tenant for life makes a lease to B, who is in reversion, for the life of B, this is neither a surrender nor forfeiture; not the first, because A has not wholly parted with his own estate, but hath left a reversion in himself after the death of B, who may possibly die first; and therefore if B takes a wife, she shall not be endowed of such estate, because B is but tenant for life by the conveyance; a forfeiture it cannot be, because he in reversion is party, who cannot take advantage of it as a forfeiture, contrary to his own concurrence and approbation, for that were to render his own act void and ineffectual.

Co. Litt. 42 a.

If A, tenant for life, enfeoff B in remainder for life; this is a surrender; for a forfeiture it cannot be, because B in remainder was party, and A can have no reversion, because he conveyed the whole estate.

Co. 76 b; Co. Litt. 42 a, S. P.

But, if A be tenant for life, remainder to B in tail, remainder to C in fee, and A make a feoffment to B and his wife, and their heirs, and then B die without issue, C may enter for the forfeiture; for this could be no surrender, because the feme, who had no interest in the land, was party to the feoffment, and she must claim under the feoffment, which, being made to a stranger, must necessarily divest the remainder, which is a forfeiture of A's estate, and, consequently, C may enter, since the estates of A and B, which hindered him, are spent and determined.

41 Ass. pl. 2; Co. 76 b; Co. Litt. 42 a; Ro. Abr. 855.

Therefore, if tenant for life, remainder in tail, remainder in fee, and the tenant for life enfeoffs him in the last remainder, the mean remainderman may enter, because this divested his remainder, and, by consequence, was a forfeiture.

Ro. Abr. 857; 1 Co. 140.

If tenant for life makes a feoffment in fee to baron and feme, seised of the reversion in right of the feme; this can be no surrender; for whatever vests in the husband by the feoffment, must necessarily be divested out of the wife, and when she enters into the land she is remitted to her former right.

Ro. Abr. 855.

If baron and feme, seised in right of the feme for life, lease for life by indenture to him in reversion, being within age, for the life of the husband; this is a forfeiture: for though he in reversion be party to the lease, yet being an infant, he is not bound by the contract to his own prejudice; but, if he in reversion had been of full age, the lease had been good, because he had dispensed with the advantage of the forfeiture by his acceptance of the lease.

Ro. Abr. 855; Co. Litt. 42 a.

The next thing to be considered is, where tenant for life and he in reversion join in the conveyance; and this has a different operation, as the feoffment is with or without deed; for if it be without deed, then this is construed to be a surrender of the estate for life, and the feoffment of him in reversion, for no other interpretation can make the feoffment effectual; for if the estate



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passes from the tenant for life to the feoffee, it will be a forfeiture of his estate, whereof he in reversion may take advantage, notwithstanding his joining; for he having only the reversion, had nothing to do with the freehold, and, by consequence, could make no feoffment or livery; and it cannot be a grant or confirmation of him in reversion for want of a deed: therefore, to make it effectual, it is construed the surrender of the tenant for life, and the feoffment of him in reversion.

Co. 76; 6 Co. 15 a; Plow. 140.

But, if tenant for life and he in reversion join in a feoffment by deed, then each passes only his own estate; the tenant for life the freehold in possession, and he in reversion his reversion: and this cannot be a forfeiture, because he in reversion joined in a proper conveyance to transfer his reversion; and having passed it to another, has no interest left to entitle him to take advantage of the forfeiture, if it was one.

Co. 76; Plow. 140.

So, if tenant for life, remainder in tail, join in a feoffment by deed; this is no discontinuance, but each gives only his own; and upon the death of tenant for life and him in remainder in tail, the issue, or those in reversion may lawfully enter, because then the estate that passed is determined; but, if such feoffment had been by parol, then it had been the surrender of the tenant for life, and the feoffment of him in remainder, which would have made a discontinuance.

Co. 76 b, 77 a.

A, tenant for life, remainder in tail to B, remainder in tail to C, A and B join in a fine *come ceo*, &c., to a stranger; this is neither a discontinuance nor forfeiture, for each gives what he may lawfully dispose of; the tenant for life his estate, and B a fee determinable on his estate tail; and to prevent any discontinuance or forfeiture, it shall be first construed to be the grant of B in remainder, and then of A, the tenant for life.

Co. 76, Bredon's case; Cro. Eliz. 827; Mo. 634; Vent. 160

But, if A, tenant for life, and B, in remainder for life, join in a feoffment, this is a forfeiture of both their estates, and he in remainder or reversion may enter presently; because this feoffment passed a greater estate than both of them could lawfully make, and, consequently, must divest the reversion or remainder in fee, and so amount to a forfeiture. So it would be, if a remainder had been to C in tail, remainder to the right heirs of B, for the feoffment conveying a fee in possession, which B had not in him, must necessarily divest the remainder to C, and, consequently, be a forfeiture, whereof he may take advantage.

Dyer, 339; Ro. Abr. 855; 1 Co. 76.

So, if B in remainder for life, with such last remainder to his right heirs, levy a fine *come ceo*, &c., to a stranger: this is a forfeiture of his remainder for life, because the fine conveys a fee simple in possession by estoppel, against which he can make no averment: for by making fractions of the estate, say, he only passed an estate for life *in presenti*, with a fee simple expectant on the death of C without issue: because the fine supposes a precedent gift in fee simple, which he could not lawfully make whilst the estate for life of A and the intermediate remainder of C in tail were subsisting; and therefore such fine is a forfeiture, though during the life of A, C can take no advantage of it.

[Between Garret v. Blizard, Ro. Abr. 855; Sty. 192, S. C., the court divided; and 2 R

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the reporter says, *Qu.* What judgment was given? S. C. cited in Sir Wm. Jon. 65, 70. 3 Keb. 733.

Tenant for life, the reversion in fee being an infant, they both join in a fine, which is afterwards reversed by the infant for his nonage: yet the conu-see shall hold during the life of tenant for life, because distinct interests passed from each of them, and the defect in one shall give no advantage to the other.

Co. 76 b; Vent. 160.

If tenant for life and he in reversion join in a gift in tail, reserving rent; this can be no forfeiture; because he in the reversion joined, and the tenant for life shall have the rent during his life, because the rent comes in lieu of the land, and therefore shall go according to the estates they had respectively in the land.

6 Co. 15 a.

Tenant for life and he in reversion join in a lease for life; the lessee commits waste: they both shall join in an action of waste, and the tenant for life shall recover the place wasted, because he in reversion by joining hath admitted a reversion to be in the tenant for life, and, consequently, the forfeiture to belong immediately to him: but he in the reversion shall have the treble damages, because they are given for the waste and destruction done to the inheritance wherewith the tenant for life has nothing to do.

Co. Litt. 42 a.

If A and B, jointenants, and to the heirs of B, join in a lease for life, A has a reversion, and shall join in an action of waste; but the writ must be *ad exhereditationem* of B, because he only hath the inheritance.

Co. Litt. 42 a.

If A, tenant for life, and B, in remainder in fee, join in a lease for years by deed; this, upon the delivery of the deed, is the lease of A during his life, and the confirmation of B, for A being tenant in possession, the possession could only pass from him; and the lease being made by deed, carries the approbation of the reversioner, and therefore is construed his confirmation; and therefore, where the lessee declared of a joint demise by A and B, it was adjudged he had failed of his title, because during the life of A it was only his demise, and B having only an interest in reversion, could give the lessee no interest in possession.

6 Co. 14 b, Treport's case; Mo. 72; Co. Litt. 45 a.

But in this case, upon the death of A, it becomes the sole demise of B, for it can be no longer the demise of A, who is not in being, and whose interest in the land determined with his life; but the lease does not determine on the death of A, because, though A could transfer the land only during his own life, yet the term having the approbation of B, who has the absolute property, such joining and approbation has made the lessee's interest absolute and indefeasible during the term; and therefore upon the death of A it becomes the demise of B, for B has the sole and absolute interest in the land, and the lessee can hold of none else; and therefore it seems, that if B brings an action of waste against the lessee, he may declare of a demise by himself, without taking notice of A, because upon the death of A it becomes the sole lease of B.

Dyer, 234 b, 235; Mo. 72, Newdigate's case; 6 Co. 15 a; Co. Litt. 45 a.

[By marriage settlement lands were conveyed to trustees and their heirs to the use of husband for life, remainder to the use of trustees to preserve

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contingent remainders, remainder to the use of the wife for life, remainder to the first, &c., son of the marriage in tail male. The husband and wife levied a fine, (they having then a son an infant,) and mortgaged the land to J S. The husband died; J S brought a bill against the wife and son, then of age. The son pleaded the settlement, and insisted that his mother's estate was forfeited, and equity ought not to relieve. The lord chancellor upon argument allowed the plea. But the cause coming on to be heard by the master of the rolls, he observed, that the use and the legal estate were vested in the trustees: and the limitations to the husband, wife, and sons, were but trusts; and a trust for life is not forfeited by a fine,<sup>(a)</sup> and so the plea false, not being warranted by the settlement. He therefore decreed the plaintiff to hold and enjoy during the life of the wife.

*Lady Whetstone v. Saintsbury*, 9 P. Wms. 147; Pr. Ch. 591, S. C. (a) *So, Le-theuillier v. Tracey*, 3 Atk. 738.

### § (D) Of the Rights and Duties of Tenant for Life.

#### 1. Of Tenant for Life of Real Estate.

Testator devises to three persons equally a life estate in a house and lot, subject and under a mortgage given by testator; the life tenants must keep down the interest equally out of the rents, so that when the life estate falls in, the mortgage will remain to be a charge to those in fee.

*Cogswell v. Cogswell*, 2 Edw. 231.

A life tenant cannot compel an executor to apply the personal estate of testator to the improvement of vacant lots.

*Cogswell v. Cogswell*, 2 Edw. 231.

The widow, who is devisee of the dwelling-house for life, is bound to pay one-third of the taxes, and the remainder is chargeable to the estate.

*Cochran v. Cochran*, 2 Desaus. 522.

A devisee for life was decreed to contribute one-fourth part of the expenses for repairing buildings.

*Smith v. Poyas*, 2 Desaus. 65.

#### 2. Of Tenant of Personal Estate for Life.

A tenant for life of personal estate and his privies are trustees for the remainderman,<sup>(b)</sup> and when a case of danger arises to the property, the tenant for life will be required to give security to have it forthcoming and uninjured at the termination of the life estate,<sup>(c)</sup> particularly when the tenant for life has made declarations that he would carry off the property in dispute.<sup>(d)</sup>

(b) *Smith v. Daniel*, 2 M'Cord, Ch. R. 149; *Swan v. Ligan*, 1 M'Cord, Ch. R. 227; *Cordes v. Ardrian*, 1 Hill's Ch. 157. (c) 1 M'Cord's Ch. 227; 1 Hill, Ch. 157.

(d) *Latimer v. Elgin*, 4 Desaus. 26, 29; *Aide v. Cornwell*, 3 Monr. 277; *Hinson v. Pickett*, 1 Hill, Ch. 44; *Clark v. Saxon*, 1 Hill, Ch. 74; *Bellamy v. Ballard*, 2 Hayw. 361.

Where specific chattels, not necessarily consumed in the use, are bequeathed for life, with a limitation over, the tenant for life is required to make an inventory of the goods, and no security will be required from him, in the first instance, unless there is danger that the goods will be wasted or otherwise lost to the remainderman.

*Covenhaven v. Shuler*, 2 Paige, 122.g

## EVIDENCE.

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**EVIDENCE** is that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue; or it is that which is legally submitted to a court and jury, or to either of them, to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings, and distinguished from all comments or arguments.

As in public judicatures it is necessary to search into the truth of facts as they really are; hence, whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty concerning the truth of any matter in dispute, whether such matter relates to a person's life, liberty, or property, is called evidence.

As the discovery of truth is of the utmost consequence to the good of society, so it lays men under the strongest obligations, when called upon to give their evidence, to adhere inviolably to truth; and this is a matter not only enjoined by the precepts of religion, but also by those of reason; the violation of truth being a sin against human society, as it breaks in upon that correspondence that is necessary to social creatures, by destroying the end of language, which is the common tie and band of society; and as raising a different idea in the mind of the hearer from that which is formed in the mind of the speaker, destroys all intercourse between mankind; so it prevents that trust from being reposed in them which is so necessary to their own preservation and the good of others.

From the importance therefore of this matter, the wisdom of our laws has laid down several rules relating to evidence, which we shall consider under the following heads.

(A) Who may be a Witness: And herein,

1. *Whether a Husband or Wife may be Witness for or against each other.*
2. *Whether a Judge or a Juror may be a Witness.*
3. *Whether a Counsel, Attorney, or Solicitor, may be a Witness against his Client.*
4. *Whether Plaintiffs or Defendants in the Cause may be Witnesses.*
5. *Whether an Accomplice in a Crime may be a Witness for or against his Companion.*
6. *How far a Person is disabled from being a Witness in respect of his having been attainted or convicted of a Crime.*

(B) How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.

(C) Of the Number of Witnesses required in our Laws.

(D) Of compelling a Witness to appear and give Evidence.

(E) Of the Manner of giving Evidence: And herein,

1. *Where the Examination is in open Court, and herein of such Questions as may be asked a Witness.*
2. *Of Examinations and Proofs in Chancery.*
3. *Of Depositions taken under the act of Congress.*

(F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c., in Evidence.

(G) Whether Parol Evidence is to be admitted to explain what appears on the face of a Deed or Will.

## (A) Who may be a Witness.

## (H) Of Presumptive Proof.

(I) Where the Law requires the highest Proof the Nature of the Thing is capable of.

## (K) Of Hearsay Evidence.

## (L) Of the Party's Confession.

## (M) Of Similitude of Hands.

(N) Whether the Depositions of Witnesses in another Cause may be given in Evidence.

## β(O) Of the Res Gestæ.g

What evidence will maintain the plaintiff's action, vide under the titles of the several actions; and what the defendant must plead, and cannot give in evidence, vide also under the titles of the several actions and head of PLEADINGS.

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ALL persons may be witnesses who appear to have sufficient (a) discretion, and who from their (b) principles must be presumed to have a right sense of the sanctity of an oath, (c) and of the obligations it lays them under to depose the whole truth, and nothing but the truth; therefore infants, aliens, villeins, bondmen, &c., may be witnesses.

Co. Litt. 6. β As to the inability of slaves to be witnesses, see 4 Dall. 145, note (1); *The State v. Barrow*, 3 Murph. 191; *Gray v. The State*, 4 Hamm. 353; *Williams v. Blincoe*, 5 Litt. 171; *Turney v. Knox*, 7 Monr. 91. A free black man may testify to facts happening while he was a slave; *Gurnee v. Dessies*, 1 Johns. 508; and when he has been manumitted by an infant, he may still be examined. *Rogers' Ex'rs. v. Berry*, 10 Johns. 132. In Maryland, *Rusk v. Sowerwine*, 3 Harr. & Johns. 97; and in South Carolina, *White v. Helmes*, 1 M'Cord, 430, a free black man is an incompetent witness in a suit between two free white Christians.g (a) An infant of the age of nine years has been allowed to give evidence. H. P. C. 263. [An infant under the age of seven years may be a witness in a criminal prosecution, provided such infant appears upon examination to possess a sufficient knowledge of the nature and consequences of an oath; there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court. But, if they are found incompetent to take an oath, their testimony cannot be received. *Rex v. Brasier*, Leach's cases, 180; *Powell's case*, Ibid. 104.—Mr. J. Rooke, in a criminal prosecution that was coming on to be tried before him at Gloucester, finding that the principal witness was an infant, who was wholly incompetent to take an oath, postponed the trial till the following assizes, and ordered the child to be instructed in the mean time by a clergyman in the principles of her duty, and the nature and obligation of an oath. At the next assizes the prisoner was put upon his trial, and the child was produced as a witness, and being found by the court, upon examination, to have a proper sense of the nature of an oath, was sworn, and upon her testimony, the prisoner was convicted, and afterwards executed. Mr. J. Rooke mentioned this at the Old Bailey, in 1795, in the case of Patrick Murphy, who was indicted for a rape on a child of seven years old; and the learned judge added, that upon a conference with the other judges upon his return from the circuit, they had unanimously approved of what he had done.] β The rule is, that a child of any age may be examined as a witness, if he is capable of distinguishing between good and evil, and his examination must be upon oath or affirmation. When the child is fourteen years of age, he is presumed competent; when under fourteen, he is presumed incapable until his capacity be shown. *Commonwealth v. Hutchinson*, 10 Mass. 25; *The King v. Rose Kelly*, Macnally, 154; *Jackson v. Gridley*, 18 Johns. 98; *Den v. Van Cleve*, 2 South. 589; *State v. Doherty*, 2 Tenn. R. 80; *Van Pelt v. Van Pelt*, 2 Penning. 657; *State v. Le Blanc*, 1 Const. R. 354; *Rex v. Pike*, 2 Car. & Payne, 598; 1 Phil. Ev. 19; *Swift's Ev.* 46; *Bouv. L. D. Witness*; *Jenner's case*, 2 C. H. Rec. 147; *The People v. M'Nair*, 21 Wend. 608.g (b) But an infidel cannot be a witness, i. e. such a one as neither believes the Old or New Testament to be the word of God, on one of which our laws require the oath should be administered. 2 Keb. 314;

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2 Hawk. P. C. c. 46, § 26. *§* The term infidel is not very accurately defined. According to Lord Coke, Jews and heathen are infidels. 2 Inst. 506; 3 Inst. 165; and Hawkins includes among infidels such as do not believe either the Old or New Testament. Hawk. P. C. b. 2, c. 46, § 148. An infidel is one who does not believe in the existence of a God, who will reward or punish in this world or that which is to come. Bouv. L. D. h. t. *g* [All that the law of England requires is, that the witness should profess a belief in a Supreme Being, and his moral providence, and appeal to his omniscience for the truth of his attestation. The form of the oath is not of the essence of it. 2 Sid. 6. It is immaterial what may be its external form, provided it affect the conscience of the party. An infidel, therefore, that is, one not believing in revealed religion, is, in general, an admissible witness, if sworn according to the ceremonies of his religion. *Omychund v. Barker*, 1 Atk. 21; 1 Wils. 84. But men wholly without religion shall not be permitted to bear testimony in any case whatsoever. 1 Atk. 45. *§* See *Jackson v. Gridley*, 18 Johns. 103; *Butts v. Swartwood*, 2 Cowen, 431; *Hunscomb v. Hunscomb*, 15 Mass. 184; *Wakefield v. Ross*, 5 Mason, R. 16, 18, 19, note; *State v. Doherty*; 2 Tenn. R. 80; *State v. Cooper*, 2 Tenn. R. 96. In Connecticut, *Curtis v. Strong*, 4 Day, 51, and Tennessee, 2 Tenn. R. 80, 96; a person who does not believe in the obligation of an oath, and in a future state of rewards and punishments, or any accountability after death, is inadmissible as a witness. Under this rule a universalist is incompetent. *Attwood v. Wetton*, 7 Conn. R. 66. *§* Neither shall a person excommunicated be a witness, because being excluded out of the church, he is supposed not to be under the influence of any religion. Bull. N. P. 292; 3 Bl. Comm. 102. *¶* But see *st. 53 G. 3, c. 127, § 3*, which enacts, that no person pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever. *¶*—A man deaf and dumb, with whom communication could be held by means of signs, &c., was admitted to give material evidence against a prisoner at the Old Bailey, January Sessions, 1786, by Mr. J. Heath, after an argument against his competency. *§* See *State of Connecticut v. De Wolf*, 8 Conn. 93, 101. *(c)* The solemnity of an oath is required from all persons. Lords of Parliament, when they give their testimony, must be sworn. Their privilege to protest upon honour only is confined to their answers in courts as defendants. *Sir W. Jon.* 153, 154, 155; *Cro. Car.* 64; 2 *Mod.* 99; 2 *Salk.* 513; 1 *P. Wms.* 146. In the case of the king, his testimony has in one instance been admitted without oath. This was in the reign of James the First, whose certificate under his sign manual was received as evidence in a Chancery suit without exception. *Abignye v. Clifton*, Hob. 213. But the legality of admitting this evidence, was justly questioned by a great contemporary authority. 2 *Ro. Abr.* 686. In one case the law dispenseth with the formal manner of being sworn in favour of certain sects of our own people, and allows their affirmation to have the force and effect of an oath. But this indulgence it confines to civil actions. *Stat. 7 & 8 W. 3, c. 34*; 22 *G. 2, c. 30*. *§* This distinction has been abolished by *stat. 9 Geo. 4, c. 32, § 1. g* Perhaps the affirmation of one of these sectaries may be read in defence of a criminal charge against the sectary himself, but not where his evidence is collateral, and in exculpation of a third person, the sectary himself not being charged at all. 2 *Burr.* 1117.] *§* A witness who believes in Christianity may be allowed to swear on the Old Testament, if he declines to swear on the New, and if he considers that mode binding on his conscience. *Edmonds v. Rowe*, Ryan & Mo. N. P. Rep. 77. In Massachusetts, one, not a quaker, who refused to take an oath on the ground of conscientious excuses, arising from a declaration he had previously made, that he would not take an oath, was held to be in contempt, the liberty to affirm being then confined to quakers. *United States v. Coolidge*, 2 *Gallis.* 364. *g*

[In the second year of Charles the First, the House of Lords referred it to the judges generally, whether, in case of treason and felony, the king's testimony is to be admitted: but the king prohibited them from giving their opinion. As to appearing personally, and being sworn in court, that seems wholly inconsistent with the royal dignity.

7 *Parl. Hist.* 43; 3 *Wooddes.* 276; *Com. Dig. tit. Testimoigne*, (A. 1.)

Lunatics may be witnesses in *lucidis intervallis*.]

*§* A person who is sane at the time of giving his testimony is a competent and credible witness, although subject to fits of derangement. *Evans v. Hettick*, 7 *Wheat.* 453; *James v. Stonebanks*, *Coxe*, 227. A person in a state of intoxication is not a competent witness. *Hartford v. Palmer*, 16 *Johns.* 143. *g*

If a witness, without objecting, takes the oath in the usual form, he may

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be afterwards asked, whether he thinks the oath binding; but it is unnecessary and irrelevant to ask him if he considers any other form of oath *more* binding.

The Queen's case, 2 Bro. & Bing. 284.

On an application for a new trial, it appeared that a witness who gave himself a false name at the trial, and was sworn on the Gospels, was at that time a Jew; held, that the objection came too late, and that the oath, as taken, subjected the witness to the consequences of perjury if he had sworn falsely.

Sells v. Hoare, 3 Bro. & Bing. 232.

On an indictment against the wife of W S and others, for a conspiracy in procuring W S to marry; it was held, that W S was not a competent witness in support of the prosecution. In all cases where husband and wife are admissible against each other, they are admissible for each other.

Rex v. Serjeant, 1 Ry. & Moo. 352.

On an appeal against a removal of a pauper woman to her place of maiden settlement, the question was, whether her marriage with A B was good, or whether it was invalid by reason of his being married to another woman; the respondents called the first wife to prove her marriage with A B, and the quarter sessions admitted her evidence. The respondents then proved the pauper's settlement in the appellant parish, and her marriage with the second husband. The counsel for the appellants then contended, that the evidence of the first wife ought to be struck out; but the quarter sessions overruled the objection and stated the case for the opinion of the King's Bench. The court held, that (even admitting the authority of *The King v. Claviger* to its utmost extent) the evidence was admissible at the time it was offered; for the wife did not contradict the husband, as he had not been examined. She did not directly criminate him, as the proceeding applied to other matters, and not to any criminal charge against him, and her evidence could not be made the groundwork of any criminal proceeding. The court also expressed an opinion that the rule of *The King v. Claviger*, that a wife cannot give evidence *tending to criminate* her husband, was too large and general, and that the former wife would have been competent to prove her marriage, though the second marriage had been first proved by the respondents.

Rex v. Inhab. of All-Saints, Worcester, 1 Phill. on Evidence, 74; 2 Term R. 263.

If an order of *nisi prius* authorizes an arbitrator to examine the parties to a suit, he may examine a party in support of his own case.

Warne v. Bryant, 3 Barn. & C. 590; and see 2 Taunt. 324.

By the 9 G. 4, c. 32, the evidence of a Quaker or Moravian on affirmation is made receivable in criminal as well as civil cases; and for false and corrupt affirmation they incur the penalties of perjury.

But, as our law has disabled several persons from being witnesses, who may be supposed so far biassed as to be induced to go beyond the truth, I shall consider this matter,

1. In relation to Husband and Wife, and whether they may be Witnesses for or against each other.

Husband and wife are considered as one and the same person in law, and to have the same affections and interest; from whence it has been established as (a) a general rule, that the husband cannot be a witness for or against the

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wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case.

Co. Litt. 6 b; 2 Ro. Abr. 686, pl. 4; H. P. C. 263; Brownl. 47; Hutton, 116; Raym. 1; 2 Keb. 403; 2 Hawk. P. C. c. 46, § 16. [2 T. R. 265, 262; 4 T. R. 678.] {1 Hen. & Mun. 154, Baring v. Reeder. See 6 East, 188, Aveson v. Lord Kinnaird.} [The husband cannot be a witness for the wife, even on a question touching her separate estate. 1 Burr. 424.] β In action by the wife's trustee, to recover money in trust for her separate use, the husband was admitted a witness for the trustee. Richardson v. Learned, 10 Pick. 261. γ {Though the wife has been divorced, she is not a witness as to transactions during the existence of the marriage. The confidence which subsisted between them at that time shall not be violated in consequence of any future separation. Peake's Ev. 174; App. 44, (Ed. of 1804,) Monroe v. Twistleton; 6 East, 192, Aveson v. Lord Kinnaird. If two persons are jointly indicted and tried for an assault or a conspiracy, the wife of one is not a competent witness for the other. 2 Str. 1095, Rex v. Frederick and Tracy; 5 Esp. Rep. 107, Rex v. Locker and others; 1 Mass. T. Rep. 15, Commonwealth v. Eastland et al.} (α) And holds as well in the courts of equity as in the common law courts. 2 Ch. Ca. 39; 2 Vern. 79.—But where, from the nature and difficulty of the case, the wife's evidence, being corroborated by other circumstances, was admitted to be read against the husband, vide Abr. Eq. 236, 237. β See Fitch v. Hill, 11 Mass. 286; City Bank v. Banks, 3 Paige, 36; 5 C. H. Rep. 141, 153; People v. Colborn, 1 Wheel. Cr. Cas. 479. A wife cannot be examined for the plaintiff, though the defendant married her after she had been subpoenaed to give testimony in the cause. Pedley v. Wellesley, 3 Carr. & Payne, 558. γ {Where a wife acts for her husband in any business by his authority, he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her respecting that business. 1 Esp. Rep. 142, Emerson v. Blonden; 2 Esp. Rep. 511 n., Palethorp v. Furnish. This is the case in general with regard to domestic concerns, which are usually intrusted to the wife. 1 Str. 527, Anonymous; 6 East, 192. See 5 Ves. J. 322, Le Texier v. The Margrave of Anspach. In civil actions between other parties, the wife is a competent witness, though the facts proved by her may eventually charge the husband; he having, however, no interest in the event of the cause. 1 Str. 504, Williams v. Johnson; 1 Hen. & Mun. 154, Baring v. Reeder.}

Hence it hath been adjudged, that the husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage, on an indictment on the statute of 1 Ja. 1, c. 11, for a second marriage; but the second husband or wife may be allowed to give evidence, such second marriage being void; and therefore they were never husband and wife.

Raym. 1; State Trials, vol. 4, fol. 754, S. P., admitted in Fielding's trial; and 3 Keb. 490, S. P., admitted in Sir John Savil's case, who was convicted of marrying a second wife. [Broughton v. Harper, 2 Ld. Raym. 752, S. P.; 2 T. R. 263, S. P.]

|| So, in an action brought by a woman as feme sole, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her.

Bentley v. Cook, cited in 2 T. R. 265.

So, where an action is brought by or against the husband, or by the husband and wife jointly in right of the wife, the declarations of the wife are not evidence against him.

Winsmore v. Greenbank, Willes, 577; Alban v. Pritchett, 6 T. R. 680; Hall v. Hill, 2 Str. 1094. In an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence to affect the husband. *Per Cur.* in Denn v. White, 7 T. R. 112.

In an action for criminal conversation with the wife, the wife's letters to the defendant are not evidence for the defendant against the husband, nor is her confession evidence for the husband against the defendant: but conversations between her and the defendant are evidence against him.

Bull. N. P. 28; Willes, 577. β A wife cannot be witness when her testimony would by any possibility criminate her husband: for example, on an indictment against a



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woman for fornication with witness's husband, she cannot be examined to prove the fact. *Comm. v. Shriver*, Quarter Sessions, Philad., 1820, MS.; Whart. Dig. tit. *Evidence*, pl. 1089.g

In an action by a trustee in a marriage settlement against a sheriff to recover the value of certain goods sold by him under an execution against a third person, that person was not admitted to prove on the part of the plaintiff, that the goods had been conveyed to the use of his (the witness's) wife.

*Davis v. Dinwoody*, 4 T. R. 678.

In trover by a carrier for a box, which had been delivered to the defendant by mistake, the plaintiff called the owner's wife to prove what the box contained. But Holt, C. J., refused to hear her testimony, on the ground that the verdict in that action, with oath of what the carrier's witness swore, might be given in evidence to prove the value of the goods in a subsequent action brought by the husband against the carrier.

*Tiley v. Cowling*, 1 Ld. Raym. 744; Bull. N. P. 243.

On a prosecution against several persons for a conspiracy, Lord Ellenborough refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband.

*R. v. Lecker*, 5 Esp. 107; *R. v. Frederick*, 2 Str. 1094, S. P.  $\beta$  Five defendants were jointly indicted and tried for an assault and battery; the wife of one of them was held not to be a competent witness for the others. *Commonwealth v. Eastland*, 1 Mass. 15; and see *The People v. Colbern*, 1 Wheel. Cr. Cas. 479. When two men are indicted jointly for murder, and they are tried separately, the wife of one of them may be a witness for the other. *State v. Anthony*, 1 M'Cord, 285.g

The husband and wife are not allowed to give any evidence that may directly criminate, or even tend to criminate, each other. Thus, if an actual marriage has been proved between two persons, a woman cannot be suffered to prove an antecedent marriage between herself and one of the parties, the consequence of which might be a prosecution for bigamy. And it has been laid down by Ashhurst, J., (a) that if a witness has been examined to a material fact in a cause, which from its nature must have been known to him, (as, for example, to his own marriage,) his wife cannot be called by the same party to contradict him, as such evidence might lead to a charge of perjury, and cause the husband to be apprehended.

*Mary Grigg's case*, Sir T. Raym. 1; *Broughton v. Harper*, 2 Ld. Raym. 752; *R. v. Cliviger*, 2 T. R. 263. (a) *R. v. Cliviger*, *ubi sup.*

Even after a dissolution of the marriage for adultery, the wife is not admitted to give any evidence which would have been excluded, if the marriage had continued.

*Monroe v. Twistleton*, cited in *Aveson v. Lord Kinnaird*, 6 East, 192.

But some exceptions have been allowed to this general rule, especially in cases of (b) evident necessity; and therefore it hath been (c) adjudged, and is the constant practice at this day, that on an indictment for a forcible marriage grounded on the 3 H. 7, c. 2, the wife may be a witness against the husband. So, where (d) husband or wife has cause to demand sureties of the peace against the other.

(b) Vide Sid. 431. {10 Ves. J. 56. On indictment for forcible entry, the wife of the prosecutor may be a witness to prove the force. 1 Dall. 68, *Repubblica v. Shryber*.} (c) *Cro. Car.* 488, *Fulwood's case*; Vent. 243, 244; 4 Mod. 8; Stra. 633. (d) 2 Hawk. P. C. c. 46, § 16.

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Also, in Lord Audley's case, who held his wife's hands and legs, while his servant, by his command, ravished her, the wife was admitted an evidence.

Hutt. 116; 2 Hawk. P. C. 132. But in Raym. 1, this case is denied to be law; and in Vent. 244, it is doubted of by my Lord Ch. Just. Hale, because here is a wife *de jure*, and so not like the case where a woman is admitted to prove a forcible marriage.  $\beta$  See 3 Gilb. Ev. by Lofft, 1271. The evidence of a wife was admitted against the husband on a criminal prosecution against him for inciting a third person to administer a certain deadly poison to the wife, with intent to murder her. Wiggins's case, 2 N. Y. City Hall Rec. 156. See Jarvis, Karr, and Trenor's cases, 1 N. Y. City Hall Rec. 105, 107.*g*

Also, in (a) Raym. 1, it is said, that a husband and wife may be witnesses against each other in treason: but the contrary is adjudged in (b) 1 Brownl.

(a) Raym. 1. (b) Brownl. 47; and with this last book, 2 Hawk. P. C. c. 46, § 16, note, seems to agree.

[And by stat. 21 J. 1, c. 19, § 6, the wife of a bankrupt may be examined by the commissioners for the discovery of his estate: the contrary whereof was holden to be law before the passing of that act of parliament.

1 Brownl. 47.]

||Upon an appeal against an order of bastardy in the case of a married woman, she was admitted to be a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the cause, because a fact so secret in its nature can scarcely ever be proved by other evidence. But this is only (c) from the necessity of the thing: she is not competent to prove any other fact, as, non-access, which other witnesses may be supposed capable of proving.

R. v. Reading, Ca. temp. Hardw. 82; R. v. Bedell, Andr. 8; R. v. Luffe, 8 East, 193. (c) Ibid., R. v. Brooke, 1 Wils. 340; R. v. Kea, 11 East, 132.  $\beta$  See 1 P. A. Bro. R. Appx. xlviii.; Bull. N. P. 113; Cowp. 592; 2 Munf. 232; 3 Munf. 599; 7 N. S. 553; 4 Hayw. 221; 3 Hawks, 623; 1 Ashm. 269; 6 Binn. 283; 3 Paige, 139; Shelf. on Mar. & Div. 711; Bouv. L. D. voc. *Access*.*g*

Upon an appeal against the removal of a woman as the widow of A B, deceased, *prima facie* evidence of the marriage having been produced on the part of the respondents, the woman was holden to be a competent witness on the part of the appellants, to disprove the marriage.

R. v. Bramley, 6 T. R. 330.  $\beta$  A widow is competent to prove facts which happened during the coverture, to which it would have been competent for her husband, if living, to testify. Coffin v. Jones, 13 Pick. 441.*g*

On a motion to set aside an award, one of the grounds of the application was, that the arbitrator had rejected the evidence of a woman called on the part of the plaintiff, who had cohabited with him for several years, and passed as his wife, but who would have stated, that she had never been married to him. The point was much argued at the bar. The Court, considering it as a doubtful question, declined giving any opinion, as it was unnecessary for the determination of the case; and they refused the motion on the ground that the opinion of the arbitrator was final and conclusive, all matters both of law and fact having been left to his discretion. Richards, B., cited a case before Lord Kenyon on the Chester Circuit in the year 1782, where, on a trial for forgery, the prisoner called a woman as his witness, whom he had himself in court represented to be his wife, but, afterwards, on hearing an objection taken to her competency, denied that she was married to him, and Lord Kenyon refused to admit her evidence.

Campbell v. Twemlow, 1 Price, 81.

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A wife has been allowed to be a witness in an action between third persons not immediately affecting the husband's interest, though her evidence might expose him to a legal demand; as, in an action between third persons for goods sold and delivered, to prove the goods sold not on the credit of the defendant, but on that of her husband.

*Williams v. Johnson*, 1 Str. 504; Bull. N. P. 287, S. C.]

[But no other relation is excluded, because no other relation is absolutely the same in interest: therefore in *Pendrel and Pendrel*, before Lord Raymond, which was an issue out of Chancery to try whether the plaintiff were heir to T O, the marriage and birth being admitted by order, the mother was admitted to prove the father had access to her. So, in *Lomax and Lomax*, before Lord Hardwicke, the mother was admitted to prove the marriage; and in an ejectment against Sarah Brodie at Hereford, 1744, Mr. J. Wright admitted the father to prove the daughter legitimate; her title being as heir to her mother.

Salk. 289; Str. 925, 940.

In Lord Valentia's case, in the House of Lords, where the question was, whether the Earl of Anglesea was married to the Countess Dowager of Anglesea, on 15th of September, 1741, prior to the birth of Lord Valentia, their son, who was born in 1744, the countess dowager, having no interest, was admitted to prove the fact of the marriage. So, where the question was, whether the lesser of the plaintiff was the legitimate son of Francis and Mary Stephens, or was born of Mary before their marriage; the court determined, that general declarations by the parents, and the answer of the mother in Chancery, were good evidence, after the death of such parents, to prove that the lesser of the plaintiff was born before marriage. But they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious, more especially the mother, who is the offending party. But the wife, as we have seen above, may be permitted to prove the fact of adultery with her, though not to prove the baron had no access.

April 22d, 1771; *Goodright v. Moss*, Cowp. 591; *Rex v. Rook*, 1 Wils. 340; *Rex v. Reeding*, 8 G. 2, *per* Lord Hardwicke. *β* *The King v. Luffe*, 8 East, 193.*g*

A father who was a freeman of a borough by servitude, was admitted to prove the custom whereby his son was entitled to his freedom as eldest son of a freeman.—If a legacy be given to a son, a father may be a witness to prove the will. *Per Cur.* *ibid.*

1 Wils. 332.

2. Whether a Judge or a Juror may be a Witness.

It seems (a) agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the (b) judges who is to try him; and therefore in the case of (c) Hacker, two of the persons in the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench again during his trial.

(a) 2 Hawk. P. C. c. 46, § 17. (b) A commissioner, by virtue of a commission out of Chancery, may himself be examined as a witness at the commission, but then he must be examined first by the other commissioners, after which he may proceed in the execution of the commission. 2 Ch. Ca. 79. *β* *Quære*, whether when a single judge constitutes the court, he can be a witness. 2 N. S. 312.*g* (c) Kelynge, 12; Sid. 133; Style, 233.

Nor is it any exception to a witness, that he is one of the jurors; but

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then he is, if called upon, to give his evidence on oath openly in court, and not to be examined privately by his companions.

§ A juror is incompetent to prove the misconduct of his fellow-jurors, in order to impeach the verdict. *State v. Freeman*, 5 Conn. R. 348. But a juror may be admitted to prove improper influence, by a party, to influence the minds of the jury. *Denn v. Driver*, Coxe, 166.

The testimony of a juror, who tried the cause, is admissible upon the hearing of a petition for a review.

*Ferrill v. Simpson*, 8 Pick. 359.*g*

3. *Whether a Counsel, Attorney, or Solicitor, may be a Witness against his Client.*

It seems agreed, that (a) counsellors, attorneys, or solicitors are not obliged (b) to give evidence, or to discover such matters as come to their knowledge in the way of their profession; for by the duty of their offices they are obliged to conceal their clients' secrets; and every thing that they are intrusted with is (c) *sub sigillo confessoris*: for were it otherwise, no person could ever with safety employ a counsel, &c.

*Style*, 449; *Keb.* 505; *Vent.* 197. (a) That the same rule extends to a scrivener who has acted as counsel or attorney. *Skin.* 404. [And to a person who acts as interpreter between the attorney and client. *Madame du Barre's case*, 4 T. R. 756. § *Jackson v. French*, 3 Wend. 337.*g* (b) In 1 Ves. 63, Lord Chancellor Hardwicke is made to say, "that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness; yet if he consents, the court will not refuse the reading of his depositions: that the objection had been often made; and though some particular judges had doubted, it was always overruled." It should seem from hence as if the right to object were the privilege of the attorney, not of the client; whereas nothing is clearer than that the obligation to silence is for the sake of the latter, not of the former. *Bull. N. P.* 284. So far from the right to object being in the attorney, the court takes upon itself to stop the witness, whenever it discovers an anxiety in him to reveal the confidential communications of his client. 4 T. R. 759; 2 Ves. jun. 189. Nor is it true, that a court of equity will not refuse the reading of the depositions in such case; it will not indeed at once and without examination, merely upon this ground, suppress the whole of the deposition; but it will direct a reference to the master, and will expunge such part as he shall find to be matter of that sort, which from the confidence between attorney and client ought not to be disclosed. *Sandford v. Remington*, 2 Ves. jun. 189.] (c) From the trust and confidence reposed in counsellors, &c., it has been established as a rule in the courts of equity, that if an attorney or solicitor, at the time that he is treating for his client about the purchase or mortgage, has notice of a prior title, such notice shall not affect his client, though notice before, or in another transaction shall. 2 Vern. 474. [But it seems now to be settled, that such notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself. *Merry v. Abney*, 1 Ch. Ca. 38; *Brotherton v. Hatt*, 2 Vern. 574; *Jennings v. Moore*, *Ibid.* 609; 1 Br. P. C. 244, S. C.; *Le Neve v. Le Neve*, 3 Atk. 646; *Sheldon v. Cox*, *Ambl.* 624. The notice, however, must be in the same transaction. The examination of a title by a counsel or solicitor, on a former occasion, shall not be such a constructive notice, as to affect a client in a subsequent transaction. *Fitzgerald v. Falconberg*, *Fitzg.* 207; *Warrick v. Warrick*, 3 Atk. 291; *Ashley v. Bailie*, 2 Ves. 368; *Steed v. Whitaker*, *Barnard. Ch. Rep.* 220.]

But, as the inconveniency would be very great, if a counsel, &c., were not at all to be made use of as a witness; (for by this means every such person's evidence may be taken off by giving him a fee;) so the courts have come to this mean, viz., upon every question, to ask him if he knew it of his own knowledge, or from his client, &c., for though the oath is general, to swear the whole truth: yet the intention thereof, and of the law, is only, that he should declare what he knew of his own knowledge, and not reveal what he was intrusted with by his client. [Collateral facts, and acts done by his client in the course of the business in which he has been employed, he is bound to give evidence of: nay, an attorney has been obliged to prove his

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client's having sworn and signed the answer upon which he was indicted for perjury. (a)

Vent. 197; Skin. 404, pl. 40; Doe v. Andrews, Cowp. 845; Sandford v. Remington, 2 Ves. jun. 189; Lord Say and Seal's case, Bull. N. P. 284. (a) Rex v. Watkinson, 2 Str. 1122, *contr.* § Secrecy is the privilege of the party or client, and not of the attorney. Rhoads v. Selin, 4 Wash. C. C. R. 718; Heister v. Davis, 3 Yeates, 4; Clairac v. Reichner, 11 Wheat. 280; Parker v. Carter, 4 Munf. 273; Crawford v. McKissack, 1 Porter, 433; Jordan v. Hess, 13 Johns. 492; Rogers v. Dare, Wright, 136. And the secrecy is not confined to facts disclosed in relation to suits actually, but it extends to all cases where an attorney or counsellor is consulted in the line of his profession, and the facts are communicated to him in that capacity. Parker v. Carter, 4 Munf. 273. But extraneous or impertinent communications are not privileged. Riggs v. Denniston, 3 Johns. Cas. 198; Hatton v. Robinson, 14 Pick. 416; Gower v. Emery, 6 Shepl. 79; Reeves v. Burton, 6 N. S. 283; see Johnson v. Daverno, 19 Johns. 134. And if after the relation of attorney and client has ceased, the latter voluntarily repeat what he had confidentially communicated while the relation existed, the attorney is not privileged from disclosing it. Yordan v. Hess, 13 Johns. 492. § {The privilege extends only to confidential communications to the attorney from his client, and not to communications to him from other quarters, though made in consequence of his being attorney. Therefore he may be compelled to prove the contents of a notice served on him to produce a paper in the hands of his client. 7 East, 357, Spenceley v. Sheulenburg.}

A communication by a client to an attorney, not to obtain advice as an attorney, but merely to get information as to a fact, may be disclosed by the attorney.

Bramwell v. Lucas, 2 Barn. & Cres. 745.

If an attorney is applied to to prepare a deed, and refuse, he cannot be called on to prove this fact as evidence against the party applying to him; for it is a confidential communication.

Cromack v. Heathcote, 2 Bro. & B. 4; 4 Moo. 357.

A steward is not a person, like an attorney, whose communications are privileged from disclosure.

Falmouth v. Moss, 11 Price, 455.

|| So, the attorney of one of the parties may be examined as to the contents of a written notice, which has been received by him in the course of the cause, calling upon him to produce papers.

Spenceley v. Schulenburg, 7 East, 357. § An attorney may be compelled to testify that a deed delivered to him as attorney is in existence and in his possession, in order to let in secondary evidence of its contents, under a notice to produce it. Brandt v. Klein, 17 Johns. 335; Eickle v. Nokes, 1 Mood. & Malk. 303; and he may be examined as to whether a note put into his hands for collection was endorsed or not. Baker v. Arnold, 1 Caines, R. 258. See Bevan v. Waters, 1 Mood. & Malk. 235; Jackson v. McVey, 18 Johns. 330; Rhoades v. Selin, 4 Wash. C. C. R. 715, 718. But an attorney is not bound to produce a paper intrusted to him by his client in the cause. Anon., 8 Mass. 370; State v. Squires, 1 Tyl. 147; Jackson v. Burtis, 14 Johns. 391; 4 C. H. Rec. 168. §

In debt upon bond the plaintiff's attorney has been admitted to prove that the bond had been given upon an usurious consideration.

Duffin v. Smith, Peake's N. P. C. 108. ||

[It hath been adjudged, too, that an attorney was at liberty to give evidence of a conversation between him and his client touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to be made by way of instruction for conducting the cause.

Cobden v. Kendrick, 4 T. R. 431. In this case the communication was made after the  
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suit was at an end, and it was *that* which the judgment of the court turned upon. Had he acquired his information, pending the suit, during the time he acted as attorney, he would not have been permitted to disclose it; for in that case, the obligation to secrecy continues after the determination of the suit, and indeed ceaseth at no period of time. 4 T. R. 759. ¶ In Louisiana an attorney is admissible to prove a fact which he was directed by his client to plead, such fact not having been communicated as a secret, but to be spread upon the record. *Cornier v. Richard*, 7 N. S. 179.¶

So, where it appeared that the attorney proposed to be examined, *though confidentially and professionally* consulted with by one of the parties, in parts of the business which constituted the subject-matter of the suit, was yet not actually employed as his attorney in that particular cause, it was adjudged, that he ought to be examined, for that the privilege of a client only extends to the case of the acting attorney for him.

*Wilson v. Rastall*, 4 T. R. 753. ¶ *Naffie's case*, 4 C. H. Rec. 168. But when the fact has been communicated to the attorney professionally, it is not requisite the latter should have received a fee to create the relation of attorney and client. *Baily v. Robles*, 4 N. S. 361.¶

This privilege is confined to the cases of counsel, solicitor, and attorney, and does not extend to any other professions.

*Duchess of Kingston's case*, 11 St. Tr. 243; 4 T. R. 758, 759.] ¶ It extends to an interpreter employed to translate between attorney and client. *Andrews v. Soloman*, 1 Pet. C. C. R. 356; and see *Parker v. Carter*, 4 Munf. 273; *Jackson v. French*, 3 Wend. 337. But the privilege does not extend to a confidential clerk in a mercantile house, *Corps v. Robinson*, 2 Wash. C. C. R. 388; *Holmes v. Comegys*, 1 Dall. 439; nor to a banker, who is bound to disclose what his customer's balance was on a given day, *Lloyd v. Heshfield*, 2 C. & P. 325; nor to a physician, *Sherman v. Sherman*, 1 Root, 486; *Hewitt v. Prime*, 21 Wend. 79; nor to a protestant divine, who will be compelled to disclose confessions made to him. *Smith's case*, 2 C. H. Rec. 77; *Broad v. Pitt*, 3 Carr. & Payne, 518. Confidential communications made by a man to a member of the same church of which he was a member, must be disclosed. *Commonwealth v. Drake*, 15 Mass. 161. And a clerk or student of an attorney or counsel is not privileged. 1 Pet. C. C. R. 356; but see *Power v. Kent*, 1 Cowen, 179; 3 Wend. 337; 2 Carr. & Payne, 195; 8 Dowl. & Ry. 726; 9 Barn. & Cr. 288; *Beam v. Quimby*, 5 N. H. Rep. 94.¶

¶ The attorney of the party is a competent witness in his favour. In a case where an attorney was interrogated on his *voir dire*, swore "that he had not stipulated any particular fee, but expected to be paid for his legal services, and that it was his habit, when he had not stipulated for his fee, to charge less, should he fail in the cause, than if he were to succeed, and that he would feel bound by his rule of conduct to apply it to this case;" he was held to be a competent witness for his client.(b) And when he has been merely employed to draw up a mortgage, he may be examined.(c)

(a) *Menandez v. Syndics of Lorivanda*, 3 Mart. R. 256; *Newman v. Bradley*, 1 Dall. 241. (b) *Sprigg v. Beaman*, 6 Lo. R. 64; *Miles v. O'Hara*, 1 S. & R. 32. (c) *Hatton v. Robinson*, 14 Pick. 416.¶

## 4. Whether Plaintiffs or Defendants in the Cause may be Witnesses.

¶ A party in interest cannot be compelled to give testimony in the cause; it depends on his own consent.

*The People v. Irving*, 1 Wend. 20. See *Stoddert's Lessee v. Manning*, 2 Har. & Gill, 147.¶

¶ Where one of several coplaintiffs comes voluntarily forward to disprove the defendant's liability to the demand made upon him, he may be admitted, with the consent of the adverse party, though at the same time he defeats the claim of those who jointly sue with him. For if such plaintiff were to make a declaration against his interest out of court, evidence of that declaration

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would be admissible, (a) and the proof is not the less credible, if, with the defendant's consent, he declares the same thing upon oath at the time of the trial.

Norden v. Williamson, 1 Taunt. 378. ¶ In general a party on the record is not a competent witness for himself, and cannot be compelled to testify against his interest. Sharp v. Thatcher, 2 Dall. 77; Haswell v. Bussing, 10 Johns. 128; Supervisors, &c., v. Birdsall, 4 Wend. 453; Kimball v. Lamson, 2 Verm. 143; Nason v. Thatcher, 7 Mass. 398; Fox v. Whitney, 16 Mass. 118; Sears v. Dillingham, 12 Mass. 358; Adams v. Leland, 7 Pick. 62; Commonwealth v. Marsh, 10 Pick. 57; Shaw v. Levy, 17 S. & R. 99; Butler's ex'r. v. Brown, 4 M'Cord, 24; Thomas v. Ferqueman, 2 J. J. Marsh. 28; Lampton v. Lampton's ex'rs, 6 Monr. 616; Robinson v. Neal, 5 Monr. 212; Hunter v. Hunter, Charl. 303; Worrall v. Jones, 7 Bing. 395. When the party is an executor, administrator, trustee, guardian, *prochein amy*, or otherwise stands in *auter droit*, he is not competent to testify in favour of the interest he represents, because, on a failure, he is liable for costs. 12 Mass. 358; 16 Mass. 118; Durant v. Starr, 11 Mass. 527; Van Sant v. Boileau, 1 Binn. 144; Heckert v. Haine, 6 Binn. 16; Beard v. Cowman, 2 Har. & M'H. 152; 4 M'Cord, 24; 7 Pick. 62; 2 Day, 404. In New York, a mere nominal party cannot be a witness, as where a suit is brought by the assignee of a chose in action in the name of the assignor. Frear v. Everton, 20 Johns. 142; The People, ex rel. M'Call v. Irving, 1 Wend. 20; and see 4 Wend. 453; Maura v. Lamb, 7 Cowen, 174; Hopkins v. Banks, 7 Cowen, 650; 16 Mass. 118; De Wolf v. Johnson, 12 Wheat. 367, 384. The reason why a party on the record cannot be a witness is, that he has an interest; but when the interest is removed, both as to the subject-matter of the suit and to costs, the objection ceases to exist. Willing v. Consequa, 1 Pet. C. C. R. 301; Steele v. Phoenix Insurance Co., 3 Binn. 306; Browne v. Weir, 5 S. & R. 401; Hart v. Heilner, 3 Rawle, 407; Spencer's Syndic v. Lee et al., 2 L. R. 473; Clement v. Bixler, 3 Watts, 248; in South Carolina, a nominal party may be examined, Cauty v. Sumter, 2 Bay, 93, but this is denied in Knight v. Packard, 3 M'Cord, 71. In New York and Massachusetts, when there are several defendants, one of them cannot be sworn as a witness, even with his own consent, without the consent of his co-defendants, the rule resting on policy. 4 Wend. 453, 456; Schermerhorn v. Schermerhorn, 1 Wend. 119; Commonwealth v. Marsh, 10 Pick. 58. (a) R. v. Hardwick, 11 East, 579; R. v. Whitley, Lower, 1 M. & S. 636.

In an action of trespass against several persons, one of them, whom the plaintiff designed to make use of as a witness, was by mistake made a defendant; and on motion the court gave him leave to omit him, and have his name struck out of the record, though after issue joined, in order to have the benefit of his testimony.

Sid. 441; but for this vide Style, 401, 404; Savil, 34; 2 Ro. Abr. 685; Sid. 237.

[And therefore, where in an information for a misdemeanor, the attorney-general (Trevor) offered to examine a defendant for the king, which the court would not permit, he entered a *noli prosequi*, and then examined him.

Bull. Ni. Pri. 285.

So, where two were indicted for an assault, and one submitted and was fined one shilling, the chief justice admitted him as a witness for the other.

Rex v. Fletcher, 1 Str. 633.] {Vide 2 Esp. Rep. 552, Ward v. Haydon and Ventom; 3 Esp. Rep. 25, Raven v. Dunning; 5 Esp. Rep. 154, Rex v. Lafone.}

¶ But on a joint indictment against several for a misdemeanor, a defendant, who suffers judgment to go by default, cannot be a witness either for the others or against them. So on a joint contract. *Secus* in trover, as he is not liable to the costs of the issue tried against the other, and is not himself released, whatever may be the event of the suit. (b)

R. v. Lafone, 5 Esp. N. P. C. 155; Bull. N. P. 285; Chapman v. Graves, 2 Campb. N. P. C. 333, n.; Brown v. Fox, Exeter Summ. Ass. 1789, *coram* Lord Kenyon, Phil. Ev. 62; Brown v. Brown, 4 Taunt. 752. (b) Ward v. Haydon, 2 Esp. N. P. C. 553. See 2 Campb. N. P. C. 331.

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[If any person be arbitrarily made a defendant to prevent his testimony, it is said, that if nothing be proved against him, he shall be sworn, for he does not swear in his own justification, but in justification of another. But *quare*, whether a verdict should not be first taken for him?]

Bull. Ni. Pri. 285. || If no evidence has been given against him, a co-defendant, it is true, is entitled to his discharge as soon as the plaintiff has closed his case, and may then be a witness for the others. But, if there is any, the slightest, evidence against him, he cannot be discharged before the rest, and the case must go altogether to the jury. Gilb. Ev. 117; *Raven v. Dunning*, 3 Esp. N. P. C. 25. || *Pennsylvania v. Leech*, Addis. 352. See *Sawyer v. Merrill*, 10 Pick. 16; *Wynne v. Anderson*, 3 Carr. & Payne, 596; 1 Mood. & Malk. 198; *Wilmarth v. Mountford*, 4 Wash. C. C. R. 79; *Lanning's Lessee v. Case*, 4 Wash. C. C. R. 169; *Van Deusen v. Van Slyck*, 15 Johns. 223; *Schermerhorn v. Schermerhorn*, 1 Wend. 119.*g*

|| Trespass against A and B for two horses: evidence against A as to one; and the question is, whether he may be a witness against B in relation to the other: and it seems, that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself. But, if it were not the same fact, but two distinct trespasses at different times and places, arbitrarily joined in the same declaration, then they may be witnesses one for the other, because the oath of one of them has no influence on the fact laid to his charge, but merely goes in discharge of the other.

Gilb. Ev. 118. || See *Franklin's curator v. Soward*, 3 L. R. 272; *Row v. Richardson*, 4 L. R. 553.*g*

If a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default: but, if he plead, and by that mean admit himself to be tenant in possession, the court will not afterward, upon motion, strike out his name. But in such case, if he consent to let a verdict be given against him for as much as he is proved to be in possession of, there seems to be no reason why he should not be a witness for another defendant.

*Dorner and Fortescue*, M. 9 G. 2, Gilb. Ev. 118.

In trespass, the defendant pleaded in bar of the action that R M, named in the *simul cum*, paid the plaintiff a guinea in satisfaction, and issue was joined thereon: the defendant produced R M, and, *per Eyre*, C. J., he may be examined, for what he is now to prove cannot be given in evidence in another action, and in effect he makes himself liable by swearing he was concerned in the trespass.

*Poplet v. James*, Tr. 5 G. 2, Ibid.

But, if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, which must be by producing the original or process against them, and proving an ineffectual endeavour to serve them, or that the process was lost, the defendant shall not have the benefit of their testimony.

*Reason v. Ewbank*, H. 1 G. 1, *per omnes just.*, Ibid.; *Hill v. Fleming*, Ca. temp. Hardw. 264; *Lloyd v. Williams*, Ibid. 123.

{The plaintiff is competent to prove the death of the subscribing witness to a deed, in order to let in proof of his handwriting.

2 Dall. 116, *Douglas's Lessee v. Sanderson*.}

According to the law and practice in the courts of equity, defendants in a cause may be witnesses, for they are forced into the cause; and if their being made parties should absolutely invalidate their testimony, it would be in the power of any one who had a mind to oppress another, to deprive him



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of his defence, by making the most material witnesses defendants in the suit; and therefore any of the defendants to a suit may be examined as witnesses, saving just exceptions to their credit.

2 Chan. Ca. 214; Vern. 230. *β* When defendants are properly joined in equity, who have an interest in the subject-matter, and must be affected by the same evidence, they cannot be witnesses for each other. *Chambers v. Chalmers*, 4 Gill & Johns. 421. But when his interest is not affected by his testimony, one defendant may be a witness for or against the other. *Wright v. Wright*, 2 M'Cord, Ch. 205; see *M'Donald v. Neilson*, 2 Cowen, 139; *Warren v. Sproule*, 2 A. K. Marsh. 539; *Van Reimsdyke v. Kane*, 1 Gall. 630; *De Wolf v. Johnson*, 10 Wheat. 367; *Whipple v. Lansing*, 3 Johns. Ch. R. 612; *Templeman v. Fountleroy*, 3 Rand. 434; *Simms v. Kirtley*, 1 Monr. 81; *Benson v. Le Roy*, 1 Paige, 122; *Harvey v. Alexander*, 1 Rand. 219; *Sharp v. Runk*, Halst. Dig. 173; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 515; *Bradley v. Root*, 5 Paige, 633; *Armsley v. Wood*, Hopk. 229.*g*

But plaintiffs cannot examine each other as witnesses in the cause; because, if the cause miscarries, the plaintiffs will be liable to costs, and therefore their swearing is to exempt themselves.

Vern. 230; Abr. Eq. 225.

And the practice is, that if a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition for that purpose. This order is of course, and must be served on the adverse party's clerk in court. The defendant too may obtain the like order to examine a co-defendant as a witness for him. But all these orders are upon a suggestion, that the defendant is not concerned in point of interest in the matters in question, and they are never granted but with a clause of *saving just exceptions to the other side*; and these must be made at the hearing of the cause. The order for examining a defendant must be produced at the commission-office, or in the examiner's, when the defendant attends to be examined, for without it he cannot be examined, as it is by virtue of that order, and the authority given them by the court, that they are empowered to examine him, and they cannot do it otherwise.

|| An order may be made on the motion of the defendant to examine a plaintiff, saving just exceptions; the plaintiff consenting to be examined.

*Walker v. Wingfield*, 15 Ves. 178.||

5. *Whether an Accomplice in a Crime may be a Witness for or against his Companion.*

As to this, the following particulars are laid down as law by Mr. Serjeant (a) *Hawkins*: 1st, That it hath been long settled, that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders.

(a) 2 Hawk. P. C. c. 46, § 18.

Also, it hath been often ruled, That accomplices, who are indicted, are good witnesses for the king, until they be convicted.

[It was at one time doubted, whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, were sufficient to warrant a conviction. But it is now settled, that an accomplice is a competent witness; and that a conviction, supported by his testimony alone, is perfectly legal. *Atwood's case*, *Leach's Cases*, 365.] *β* *The People v. Whipple*, 9 Cowen, 707; *Churchill v. Suter*, 4 Mass. 156; *Bean v. Bean*, 12 Mass. 20; *United States v. Henry*, 4 Wash. C. C. R. 428; *State v. Weir*, 1 Dev. 363. See also *Major v. Deer*, 4 J. J. Marsh. 586; *Glenn v. Von Kapff*, 2 Gill & Johns. 132. In Vermont, on the trial of an indictment for adultery, a *particeps criminis* is not a competent witness, on the ground that no person

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shall be allowed to testify his own guilt or turpitude to convict another. *State v. Annice*, N. Chap. 9.*g*

Also it hath been adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the others.

It hath also been adjudged, that where A, B, and C are sued in three several actions on the statute, for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another.

§ It is a technical rule of evidence that a party charged in the same indictment cannot be a witness for his codefendant, until he has been acquitted or convicted. See *The People v. Williams*, 19 Wend. 377; *The People v. Bill*, 10 Johns. 95; *Campbell v. Commonwealth*, 2 Virg. Cas. 314; *The State v. Alexander*, 2 Const. Ct. R. 171; *State v. Carr*, Coxe, 1; *State v. Blannerhassetts*, Walker, 7, 16; *State v. Mills*, 2 Dev. 420; *State v. Mooney*, 1 Verg. 431; *Pennsylvania v. Leach*, Addis. 352; *Commonwealth v. Marsh*, 10 Pick. 57; *Van Orden's case*, 1 City Hall Rec. 62; *Bowerhan's case*, 4 City Hall Rec. 136.*g*

[It hath been adjudged, that a *particeps criminis* is a good witness for the plaintiff in trespass; though he is left out on purpose to make him a witness, and a recovery against the defendants in the action is a good bar as to him.]

Bull. Ni. Pri. 286. Say. Rep. 290. {So if separate actions are brought against joint trespassers, one of them is a competent witness in either of the other actions. 1 Wash. 187, *Johnson v. Bourn*.}

In an information for bribery at an election on the stat. 2 G. 2, the person bribed, and who had taken the bribery oath, was called as a witness. He was objected to as a *particeps criminis*, and on the ground that the tendency of his evidence was to discharge himself, as the statute exempts from the penalty any person discovering another guilty of the offence. But it was holden that a *particeps criminis* was in many cases a good witness even to obtain a reward or pardon for himself: that unless a *particeps criminis* was admitted as a witness, the statute would be of no avail, as such transactions are generally matters of secrecy; and *Dennison, J.*, cited a case, wherein *C. J. Eyre* admitted such a witness.

*Bush v. Rawling*, Say. Rep. 209, cited also by *Lord Mansfield*, Cowp. 199; *Snead v. Robinson*, Willes, 423. §4 East, 180; he is a good witness, though an action for bribery is then depending against him. See *Edwards v. Evans*, 3 East, 451.*g*

So, where a clerk had embezzled money and notes, the property of his master, which he had laid out with the defendant in illegal insurances in the lottery; on an action brought by the master to recover the money and notes, the clerk was allowed, on receiving a release, to be a good witness to prove that they had been so disposed of by him.

*Clerk v. Shee*, Cowp. 197.] § See *Stockham v. Jones*, 10 Johns. 21; *Rose v. Oliver*, 2 Johns. 365; *Wakely v. Hart*, 6 Binn. 316; *Van Norden v. Striker*, 9 Wend. 286; *Robinson v. Neal*, 5 Monr. 214; *Dougherty v. Dorsey*, 4 Bibb, 207.*g*

|| A person, who has set his name as a subscribing witness to a deed or will, may be a witness to prove the instrument a forgery.

7 T. R. 604, 611; 6 East, 195; 3 Burr. 1255. || § *Major v. Deer*, 4 J. J. Marsh. 587; *Hadduck v. Wilmarth*, 5 N. H. Rep. 181, 187; an attesting witness may disclose fraud. *Churchill v. Suter*, 4 Mass. 161; and see *Hampton v. Garland*, 2 Hayw. 147; *Pool v. Richardson*, 3 Mass. 330.*g*

#### 6. How far a Person is disabled from being a Witness in respect of his having been attained or convicted of a Crime.

It seems now agreed, that a conviction, and therefore *a fortiori* an attainder or judgment of treason, felony, piracy, *præmunire*, or perjury, or of

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forgery on 5 Eliz. c. 14, and also a judgment in attain for giving a false verdict, or in conspiracy at the suit of the king,<sup>(a)</sup> and also judgment for any crime whatsoever to stand in the pillory, or to be whipped or branded, <sup>(b)</sup> being in a court which had a jurisdiction, are good causes of exception against a witness, while they continue in force.

2 Hawk. P. C. c. 46, § 19, and several authorities there cited. (a) [A conviction of any crime which amounts to the *crimen falsi*, incapacitates a man from being a witness: therefore conspiracy, barratry, &c. Priddle's case, Leach's Cases, 349. (b) It is now settled, that it is the infamy of the crime which destroys the competency of a witness, and not the nature or mode of the punishment. Pendock v. Mackender, 2 Wils. 18.] 2 People v. Whipple, 9 Cowen, 707; People v. Herrick, 13 Johns. 82; Cushman v. Loker, 2 Mass. 108; United States v. Brockius, 3 Wash. C. C. R. 99; Willes, 665.g

But no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court.<sup>(c)</sup> Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime, and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes whereof he never was convicted.

2 Hawk. P. C. c. 46, § 20. β A person convicted of an infamous crime in one state was held incompetent in another state. State v. Chandler, 3 Hawks, 393; State v. Ridgely, 2 Harr. & M.H. 120; Clark's Lessee v. Hall, Ibid. 378; Cole's Lessee v. Cole, 1 Harr. & Johns. 378. See Commonwealth v. Green, 17 Mass. 514; Castellano v. Peillon, 2 N. S. 466.g {The witness himself cannot be examined to prove it; for a man is not bound to answer any question which either criminales him, or tends directly to disgrace or degrade him. 4 Esp. Rep. 225, Rex v. Lewis; Ibid. 242, Macbride v. Macbride; 1 Penn. 415, The State v. Bailly; contrary to the King v. Edwards, 4 Term. 440 (see Peake Er. 92,) in which bail was permitted to be asked whether he had not stood in the pillory for perjury, on the ground that the answer could not subject him to any punishment.—And though the witness should admit the fact, the party may insist on the production of the record. 8 East, 77, The King v. Inh. of Castell Careinion.} (c) [And it is not sufficient to produce the conviction alone; it must be followed up by the judgment to consummate the incapacity. Cowp. 3.]

It is also agreed, that outlawry in a personal action is not a good exception against a witness, as it is against a juror; and that a person convicted of felony, who is admitted to his clergy and burnt in the hand,<sup>(d)</sup> is thereby re-enabled to be a witness.

2 Hawk. P. C. c. 46, § 21. (d) [In the case of Earl of Warwick, one French, who had been convicted of manslaughter and allowed his clergy, but not burnt in the hand, was holden by the judges not to be a competent witness; for that though the statute operates as a pardon; yet the words are, that the offender, after the allowance of his clergy and burning in the hand, shall be enlarged out of prison; and therefore both conditions are precedent, and until they are complied with, the party remains convict of felony, and, consequently, his testimony cannot be received. 3 P. Wms. 456. The stat. 19 Geo. 3, c. 74, § 3, substitutes a discretionary power of fining, or ordering to be whipped, felons convicted, and liable to be burnt in the hand, in lieu of the latter punishment; and ordains, that such fine or whipping shall have the same effect in restoring them to their credit. But felons convicted of petty larceny were never subject to burning in the hand, as they were never in need of praying their clergy. There was therefore this inconsistency; convicts of grand larceny, who had undergone the sentence of the law, were competent witnesses; convicts of petty larceny, who had also undergone the sentence of the law, were incompetent. This is rectified by stat. 31 Geo. 3, c. 35, which provides, that no person shall be an incompetent witness by reason of a conviction for petty larceny. 3 Wooddes. 286, note.]

Also, it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder, restores the party to his credit. And it was holden by Chief Justice Holt, that the king's pardon will remove a man's disability to be a witness in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the

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judgment, as it is in conspiracy at the suit of the king, and in perjury on the statute.

2 Hawk. P. C. c. 46, § 22. ¶ If the pardon is conditional, the performance of the condition ought to be shown; for on that depends all its efficacy. 2 Hawk. P. C. c. 37, § 45; Burrigge's case, 3 P. Wms. 485. The pardon itself under the great seal must be produced. A warrant under the privy seal, or sign manual, is not sufficient, as it is not of itself a complete irrevocable pardon. Gully's case, Leach's Cr. Ca. 116. ¶ As to the form of a pardon, see Hoffman v. Coster, 2 Whart. 453, 468, 469; The People v. Pease, 3 Johns. Cas. 333. The effect of a pardon is to acquit and discharge the offender of all the penalties annexed to the conviction, and to give him a new credit and capacity. 7 Pet. S. C. Rep. 160, 162; United States v. Wilson and Porter, 1 Balw. 78. See The People v. James, 2 Caines, 57. §

It hath been ruled that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment.

2 Hawk. P. C. c. 46, § 23. § Skinner v. Perot, 1 Ashm. 57; Davis v. Carter, 2 Salk. 461. §

A person admitting himself to have sworn falsely on a former occasion, is not *incompetent* on that account, but it goes strongly to his credit; and he cannot give evidence in direct opposition to his former swearing.

Rex v. Teal, 11 East, 309; and see Rands v. Thomas, 5 Maul. & S. 244.

Though a witness admits his having been convicted of felony, yet if this is insisted on to exclude his evidence, the record must be produced.

Rex v. Castell Careinion, 8 East, 77.

A party cannot avail himself in a civil suit of a conviction for perjury obtained on his own testimony against the other party to the suit.

Burdon v. Browning, 1 Taunt. R. 520; and see Rex v. Boston, 4 East, 572; Bartlett v. Pickersgill, *Ibid.*; Smith v. Rummens, 1 Camp. R. 9.

## (B) How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.

It has been always (a) held a sacred and inviolable rule of evidence in all cases (b) whatsoever, not to admit the testimony of a witness, who is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only.

Co. Litt. 6; Sid. 237. § But in summary inquiries, such as questions of bail, the testimony of parties interested in the event of the suit has always been admitted. And it has been adjudged that an interested witness was competent to prove a collateral fact, such as the identity of blocks taken from marked trees in a question of survey. Cox v. Ewing, 4 Yeates, 429; Davis v. Houston, 2 Yeates, 289. When it is doubtful whether the witness has any interest, the objection to him goes to his credit, not to his competency. Gist v. Rogers, 1 Rice, 79. § (a) And this rule has been so strictly adhered to, that it is said, that though a witness is examined an hour together; yet, if in any part of his evidence it appears that he was a party interested, the court will direct the jury, that he is no witness, nor his evidence to be regarded. 2 Vern. 463. § The interest must be a legal and fixed interest. Stockholm v. Jones, 10 Johns. 21; Marquand v. Webb, 16 Johns. 89. A remote or contingent interest affects the witness's credit, but he is competent. 5 Johns. 256; Falls v. Belknap, 1 Johns. 491; 1 Caines, 276; Peterson v. Willing, 3 Dall. 508; Carman v. Foster, 1 Ashm. 133; Ten Eyck v. Bill, 5 Wend. 55; M'Call v. Smith, 2 M'Cord, 376; Pratt v. Flower, 2 N. S. 333, 334. § {But the party calling him is not permitted afterwards to discredit him either by showing that he is interested or by giving evidence of his character; such party may, however, examine other witnesses, to contradict him as to the facts stated. Peake Ev. 89; 7 Ves. J. 290; 8 Ves. J. 327; 2 Cain. 131; 2 Cain. Er. 159; Taylor, 14. See 1 Dall. 63.} [The incompetency of a witness by reason of his being interested, may be ascertained, either by examining the witness himself on a *voir dire*, or bringing other proof, whether he is interested in the event of the suit; but a party, it is said, cannot have recourse to both these methods. 10 Mod. 151; Ambl. 593; Ca. temp. Hartw.

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368. {1 Mass. T. Rep. 219, *Bridge v. Wellington*; 1 Dall. 275, *Miffin v. Bingham*. If, on the *voire dire*, the witness admits that he was interested, he may in the same manner prove facts showing that his interest has been destroyed, though better evidence of it exists. But if his interest is established by other proof, then the best evidence will be required to restore his competency. 1 Esp. Rep. 160, *Butchers' Company v. Jones*; *Ibid.* 164, *Botham v. Swingler*; *Peake, N. P.* 218, S. C.} It was formerly the rule to disallow objections to the competency of a witness, as too late, after he was sworn in chief: and though this rule is in some measure relaxed; still the objections must be taken at the trial. 1 T. R. 719, 720; 4 Burr. 2256. *Stone v. Blackburn*, 1 Esp. R. 37. See *Miffin v. Bingham*, 1 Dall. 272.<sup>g</sup> (d) Hence, he who is bail for another cannot be a witness for him, for he is directly and immediately interested; for if a verdict be given against the principal, he becomes immediately liable. 2 Hawk. P. C. c. 46, § 24; 1 T. R. 164. *Piesley v. Van Esch*, 2 Esp. R. 605.<sup>g</sup> So, a *prochein ami*, by whom an infant sues, cannot be a witness, because liable to the costs. *Hopkins v. Neal*, 2 Str. 1026. *Clutterbuck v. Lord Huntingtower*, 1 Str. 506.] {See 12 Ves. J. 493, *Wilts v. Campbell*. So parties on the record, if responsible for costs, are incompetent, though not otherwise interested; 1 Bin. 444, *Vansan v. Boileau*; and though they are mere trustees, and entitled to be reimbursed out of a public fund which will come into their own hands; because they are liable in the first instance. 8 East, 5, *The King v. Governors, &c., of St. Mary Magdalen Bermondsey*, 2 Day, 404; 2 Hen. & Mun. 488, S. C., cited. Vide 3 East, 8, n., *Rex v. Woodland*. And *quere* whether the objection arising from liability to the costs can be removed by a deposit with the clerk of the court, either by the witness or the party, of money sufficient to cover them. 2 Hen. & Mun. 467, 479, *Cogbill v. Cogbill*, and *Halden v. Fisher*, cited 2 Dall. 172, n. A plaintiff, when he has become a bankrupt, and the suit is continued in his name by the assignees who give security for the costs, may be examined as a witness on giving a release after he has obtained his certificate. *McClenachan v. Scott*, cited 2 Dall. 172, n.; *McEuen v. Gibbs*, 4 Dall. 137. But a distinction is said to have been taken between a voluntary assignment and a compulsive one by operation of law. See 2 Dall. 172, n., *Field v. Oxley*; 1 Bin. 496, *Canby v. Ridgway*.}

From this general rule several doubts and difficulties have arisen with regard to those cases where the party may be said to have an interest, and from the extreme difficulty attending certain particular cases, this matter seems in several instances to be very unsettled, and any information upon it can only be collected from the nature and circumstances of the cases themselves.

It has been held, that an heir apparent may be a witness concerning the title of the land, for the heirship of the heir is a mere contingency; but, if there be a tenant in tail, remainder in tail, he in remainder cannot be a witness concerning the title of those lands; for he hath an estate, such as it is.

*Salk.* 283; *Ld. Raym.* 724, ruled by Treby, C. J. [For the bare possibility of an interest in the witness will not exclude his testimony. *Doe v. Green*, 4 Esp. R. 198.<sup>g</sup> Hence, a liability to be rated to the poor is no objection to a witness in questions touching an existing rate, or the settlement of a pauper. *Rex v. Prosser*, 4 T. R. 17; *Rex v. South Lynn*, 5 T. R. 664. {1 Esp. Rep. 175, *Chivers v. Brand*; 6 Term, 157, *The King v. Inh. of Little Lumley*; 1 John. Rep. 486, *Falls and Smith v. Bellmap*; *Ibid.* 577; though he is omitted to be rated for the very purpose of making him a witness. 2 East, 559, *The King v. Inh. of Kindford*.} So, a co-obligor in a bond to the ordinary, under 22 & 23 Car. 2, c. 10, may be admitted to prove a tender by the administratrix. *Carter v. Pearce*, 1 T. R. 163. So, a creditor of the administratrix is admissible for the same purpose. *Ibid.*] {For the interest to disqualify a witness must be a present, vested, or certain interest, and not a remote, possible, or contingent interest. 1 John. Rep. 556, 577. Devise of land to A, provided that if he alien to any other person than his brother's children, he shall pay one-fourth of the purchase-money to B. In an action between A and a third person claiming the land by title paramount the testator's, B is a competent witness for A. 2 Dall. 95, *Galbraith's Lessee v. Scott*. Vide 1 Esp. Rep. 95, 169; *Peake, N. P.* 217. And it must be an interest in the event of the cause, and not in the question on which the witness testifies. See the cases referred to *post*, p. 588, 589, as to the competency of persons injured by perjury, forgery, &c., and 1 Day, 266, *Fairchild v. Beach*; *Ibid.* 269, *Phelps v. Winchel*; 2 Day, 531, *Bulkley v. Storer*;

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5 Esp. Rep. 99, *Briggs v. Crick*. For this reason, in an action on a bond given to obtain the liberties of a prison-yard, the sheriff or jailer is a competent witness to prove that the defendant was discharged by him by the verbal directions of the plaintiff; though the sheriff is exposed to an action for an escape, which will depend on the same question. 2 Mass. T. R. 520, *Bridge v. M'Lane*. If the interest of the witness in one event of the cause is balanced by an equal interest in the other event, he must be admitted, as where he is in every event liable, and his testimony is only to determine to which of the parties he shall be so. See 1 Esp. Rep. 332, *Staples v. Okines*; *Peake, Ev.* 107, 154, S. C.; 7 Term, 480, *Ilderton v. Atkinson*; *Ibid.* 481, n., *Evans v. Williams*; 2 East, 458, *Birt v. Kirshaw*; 5 Bos. & Pul. 331, *Bland v. Ansley*; 2 Mass. T. Rep. 106, *Cushman v. Loker*; 2 Cain. 77, *Milward v. Hallet*; 2 Johns. Rep. 394, *Jackson v. Hollenback*; 3 Johns. Rep. 399, 420, *Bailey and Bogert v. Ogdens*; 4 Johns. Rep. 126, *M'Leod v. Johnston*; *Addis.* 144, *Nessly v. Swearingen*; 1 Hen. & Mun. 164. But any inequality of interest will prevent his admission. Thus, in an ejectment, the defendant claimed title to the premises under B, to whom he had given his note for the purchase-money. B had endorsed this note to C, who, after the ejectment was brought, applied to the defendant for payment, which was made under an agreement that C should retain the note, and, if judgment should be rendered against the defendant, should refund the money and resort to B (who was a man of property) on his endorsement: and C was held to be an incompetent witness for the defendant, because, if judgment was given against the defendant, he would be obliged immediately to refund the money, while his demand on B might be long postponed, sought after with great expense, or eventually fail through B's insolvency: his obligation to refund was certain; his reimbursement contingent; and his situation similar to that of bail. 2 Day, 399, *Owen v. Mann*. See *Buckland v. Tankard*, 5 Term, 578, and *Lord Ellenborough's* observation on it in 2 East, 461. Though a witness is interested to diminish certain items in an account, he is competent to disprove other items. 4 Cran. 62, *Smith v. Carrington*. See 4 John. Rep. 293, *Gage v. Stewart*. And he may testify *against* his interest, but is not compellable to do so.}

It seems to be agreed, that one commoner (a) cannot be a witness to prove the right of common in an action brought by another; for the right being entire, his swearing tends to entitle himself.

*Skin.* 174. *β* *Jebb v. Povey*, 2 Esp. R. 679. *α* [If the issue be on a right of common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends on a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right. But the same reason does not hold where common is claimed by prescription in right of a particular estate; for it does not follow, that if A has a prescriptive right of common belonging to his estate, that B, who has another estate in the same manor, must have the same right; neither would the judgment for A be evidence for B. *Per* Buller, J., 1 T. R. 302, 303. So, by Lord Holt, in *Ld. Raym.* 731. If A, B, C, D, and E, claim common exclusively of all others, and A's right be disputed, B may be a witness for him, for it tends to narrow his own right. But, if there be a custom that all the inhabitants of Blackacre ought to have common there, one of the inhabitants in that case cannot be a witness.] *β* So in an action on the case by a commoner against the defendant for not repairing his fences contiguous to a common, where one of the points in issue was, whether the defendant was liable to repair by reason of his occupation, it was determined, that other persons, who claimed a right of pasture over the same common, were not competent witnesses for the plaintiff, because the record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence; and though the plaintiff in that case claimed a right of common by prescription, in right of a particular messuage, still the other commoners, in whatever right they might claim, would have a common interest in casting the burden of the repair of this individual fence upon the occupier of the adjacent land. *Ansecomb v. Shore*, 1 Taunt. 261. *β* An interest in the question merely does not disqualify a witness. *Wakely v. Hart*, 6 Binn. 316; *Miles v. O'Hara*, 1 S. & R. 32, 36; *Van Nuys v. Terhune*, 3 Johns. Cas. 83; *Pettingal v. Brown*, 1 Caines, 171; *Baker v. Arnold*, 1 Caines, 376; *The People v. Howell*, 4 Johns. 302; *Steward v. Kip*, 5 Johns. 256; *Phelps v. Winchel*, 1 Day, 270; *Fairchild v. Beach*, 1 Day, 266; *Bulkley v. Storer*, 2 Day, 531; *Farrell v. Perry*, 1 Hayw. 2; *Porter v. McClure*, 1 Hayw. 360; *Baring v. Reeder*, 1 H. & M. 165; *State Treasurer v. Nall*, Tayl. 5; *Dean v. —*, Tayl. 9. *α*

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[So, where the question respected the rights of lords of customary manors, the lords of other manors were deemed incompetent witnesses, because the question concerned a general right.

Duke of Somerset v. France, 1 Str. 658.]

{ For the same reason, in an action of trespass, brought against an inhabitant of a particular place for fishing on lands claimed and possessed by the plaintiff, another inhabitant is not a competent witness, on behalf of the defendant, to prove a general right of all the inhabitants to the fishery in question.

2 John. Rep. 170, Jacobson v. Fountain. And his release to the plaintiff would not render him competent, for it would not destroy his interest. Ibid.} β An inhabitant of a state is a competent witness where the state is a party, notwithstanding any interest he may have as such. The State of Connecticut v. Bradish, 14 Mass. 296; and see Gould v. James, 6 Cowen, 369; Falls v. Belknap, 1 Johns. 486; Corwein v. Humes, 11 Johns. 76; Bloodgood v. Overseers of Jamaica, 12 Johns. 285.g

|| So, where the question is, whether in a particular parish or vill certain things are generally exempted from tithes, or subject only to a modus, no persons, who would be subject to tithes, if the parson's claim were to be allowed, can give evidence in support of the modus or exemption.

Lord Clanricard v. Lady Denton, 1 Gwill. 360; Gilb. Ev. 113.]]

[A tenant in possession is not an admissible witness to prove the estate of his landlord, for this would be to uphold his own possession. So, (a) where a motion was made to admit the landlord a defendant in ejectment, instead of the tenant, upon an affidavit that the tenant was a material witness, the court refused it: because the tenant was liable to answer for the mesne profits, and therefore could not be a competent witness.

Doe v. Williams, Cowp. 621. {1 John. Rep. 159, Jackson v. Vredenburg; Ibid. 340, Waring v. Warren. So a person cannot be a witness to prove that he and not the defendant in an ejectment was the tenant in possession. 1 Johns. Ca. 275, Brant v. Dyckman.} (a) Bourne v. Turner, 1 Str. 632.]

|| But, where the plaintiff in ejectment had made out a *prima facie* case against the defendant as tenant in possession, it was holden that a witness called on the part of the defendant was not competent to prove himself the real tenant, and the defendant only his bailiff; for the verdict would have the effect of turning him out immediately; which, being an immediate interest, outweighed the more remote effect of his subjecting himself by his testimony to an action for mesne profits.

Doe v. Wilde, 5 Taunt. 183.]]

[If two persons are contending for the possession, who are to pay rent in different rights, the landlord cannot, in that case, be admitted as a witness to prove the demise in the ejectment. But, where the question is merely touching the settlement of the tenant, the landlord may be received to explain the terms of his demise. So, where in an action of covenant for rent upon a lease by A to B, the point in issue was, whether C (whose title both admitted) demised first to A or to another person, C was allowed to be a competent witness to prove that point: for the verdict could not be given in evidence in any future action by or against him, being a record between other parties; and it appeared to be indifferent to him whether he had the one or the other for his tenant.

Bell v. Harwood, 3 T. R. 308; Rex v. Woodlands, 1 T. R. 262.]

|| On this principle, where one partner drew a bill in the partnership firm, and gave it in payment to a separate creditor in discharge of his own debt,

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it was holden, that in an action by such creditor against the acceptor, either of the partners might be called on the part of the defendant to prove, that the partner, who drew the bill, had no authority to draw it in the name of the firm; and that the bankruptcy of the partners would not vary the question as to the competency of the witness.

Ridley v. Taylor, 13 East, 175.

Where the question in assumpsit was, whether A B, who had received money due from the defendant to the plaintiff, received it in the character of agent for the plaintiff, it was holden that A B might be called for the defendant to prove his agency, as he was liable either to pay the money received or to refund it to the defendant; and though it was objected, that he had a stronger interest to give evidence in favour of the defendant than of the plaintiff, (since, if he had received the money under a misrepresentation of his own character, the defendant might recover from him the costs of the action then depending, as well as the money,) yet it was holden, that the possibility of such a remote interest did not make the witness incompetent.

Ilderton v. Atkinson, 7 T. R. 480; Birt v. Kirkshaw, 2 East, 458, ruled accordingly. But see Jones v. Brooke, 4 Taunt. 464, and *infra*. 219.  $\beta$  In general, an agent may prove his agency as well as his acts. Covington v. Bussey, 4 M'Cord, 412; Lowbee v. Shaw, 5 Mason, 241; Cox's adm's. v. Hill, 3 Ohio, 412; Baldwin v. Milderberger, 2 Hall, 176.

A witness, who might have a remedy by action whether the plaintiff or defendant had a verdict, was considered as interested, because under the particular circumstances he would have a greater difficulty in the one case than in the other to enforce the remedy. But *qu*.

Buckland v. Tankard, 5 T. R. 579.]

[It hath been usual, in actions on policies of insurance, not to admit underwriters on the same policy to be witnesses for each other. But this is now treated rather as an objection to the credit than the competency of the witness.

Ridout v. Johnson, Bull. Ni. Pri. 283; Bent v. Baker, 3 T. R. 27.]  $\beta$  A mere interest in the question does not of itself in general disqualify a witness. Miles v. O'Hara, 1 S. & R. 32, 36; Wakely v. Hart, 6 Binn. 316; Pettingal v. Brown, 1 Caines, 171; Baker v. Arnold, 1 Caines, 376; Van Nuys v. Terhune, 3 Johns. Cas. 83; The People v. Howell, 4 Johns. 302; Stewart v. Kip, 5 Johns. 256; Farrell v. Perry, 1 Hayw. 2; Porter v. McClure, 1 Hayw. 360; State Treasurer v. Nall, Tayl. 5; Dean, ex dem. Beatty, v. —, Tayl. 9; Philips v. Winchel, 1 Day, 270; Fairchild v. Beach, 1 Day, 266; Bulkley v. Storer, 2 Day, 531.]

So, where the master of a ship brought an action against the custom-house officers for refusing to clear his ship and redeliver his cockets; it was held, that the owners of the goods on board could not be admitted as witnesses to prove him master, &c., for that they were all concerned in (a) one bottom, and in one adventure.

Skin. 174, Sands v. the Custom-house Officers.  $\beta$  See 1 Dall. 7. (a) But one mariner may be admitted as a witness to prove wages due to another, for there the contracts are several. Skin. 174, seems to be admitted. And this is certainly law, and every day's practice.

In an action against the master of a ship for so negligently managing the ship, that it ran over the plaintiff's barge; it was held, that the pilot could not be a witness, because he was answerable, if faulty in steering, to the master. (b)

Salk. 287, ruled by Holt, C. J.; Ld. Raym. 1007. (b) But he might have been released by the master and owner, and made a good witness.—On an action brought



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against a master for a carman's driving his cart negligently, *per quod*, &c., the carman was admitted witness for his master on showing a release from him. *Jarvis v. Hayes*, Str. 1083. *β* *Spitty v. Bowens*, Peake, N. P. 53.*g* [But without a release, the testimony of the servant in such case is not admissible. *Green v. The New River Company*, 4 T. R. 559.] {So the captain of a ship is not admissible to disprove barratry without a release from the underwriters; for he will be responsible to them, in case of a recovery against them for that cause. 1 Esp. Rep. 339, *Bird v. Thompson*. The witness, in these cases, comes to exonerate himself from the action which the party producing him will have against him if that party should fail; and is therefore directly interested in the event. *Peake, N. P. 84*, *Rotheroe v. Elton*; *Ibid. 85, n.*, *Fox v. Lushington*; *Ibid. 98*, *New v. Chidgey*.}

The master of a ship took a prize, and disposed of 100 chests of lemons to A, for which he brought his action, and a mariner was allowed to be sworn as a witness, though it appeared, that by the admiralty law he was to have a share of the prize; for the master is accountable to the mariners for their share, which they shall recover from him, whether he recovers in this action or not.

*Skin. 403, pl. 38*. [But there are many cases where servants and sailors, though parties interested, will be admitted *ex necessitate*. In actions by informers for selling coals without measuring by the bushel, the servants are witnesses for their master, notwithstanding 3 Geo. 2 inflicts a penalty upon them for not doing it; though *Eyre, C. J.*, did on that account, in two or three instances, refuse to receive them. *Per Lee, C. J.*, in *E. I. Company v. Goeling*, Bull. N. P. 289. So, where the question was, whether the master had deserted the ship without sufficient necessity, a sailor, who had given a bond to the master (as a trustee for the company) not to desert the ship during the voyage, was admitted evidence for the master, it appearing all the sailors entered into such bonds. *Ibid.* So, if a man pays money by his servant, the servant may be a witness from the necessity of the thing. *Tybbald v. Tregott*, 4 Mod. 26. So, where a son having a general authority to receive money for his father, received a sum, and gave it to the defendant; the son was admitted as a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money. 1 Salk. 289. *β* See 1 Hen. & Munf. 540.*g* So, in trover against a pawnbroker, the servant, embezzling his master's goods and pawning them, will be admitted to prove the fact. *Mich. 1752, C. B.* at Westminster, Bull. N. P. 290. So, in an action to recover money from a lottery-office keeper, which the plaintiff's clerk had embezzled and paid to the defendant upon the chances of the coming up of tickets in the state-lottery, contrary to the lottery act, the clerk was admitted as a witness to that fact. *Clark v. Shee*, Cowp. 197. In this case indeed the clerk had a release from the plaintiff and his sureties: but *qu.* if he would not have been admissible without a release? So, in actions by masters for assaulting a servant, *per quod servitium*, &c., it is every day's practice to admit the servant as a witness for the master. *Duel v. Harding*, 1 Str. 595; *Lewis v. Fog*, 2 Str. 944; *Cock v. Wartham*, *Ibid. 1054*; *Tullidge v. Wade*, 3 Wils. 18. See *Dunsley v. Westbrowne*, 1 Str. 414. *β* See *Foster v. Scofield*, 1 Johns. 297.*g* *contr.*—So, for the sake of trade and the common usage of business, an interested servant will be admitted. As a porter is evidence to prove a delivery of goods; a banker's apprentice to prove the receipt of money. Bull. N. P. 289. *β* 2 Esp. 509; 3 Esp. 48; *Peake, N. P. 129*; 2 Johns. 189.*g* So, a factor, who made the agreement between the parties, was allowed to be a witness to prove the contract, though he was to have a shilling in the pound; for, as factor he was concerned both for vendor and vendee, was a mere *go-between*, and might be a witness for either. *Dixon v. Cooper*, 3 Wils. 407.] *β* *Benjamin v. Porteus*, 2 H. Black. An agent may in general prove his agency as well as his acts. *Covington v. Bussey*, 4 M'Cord, 412; *Lowber v. Shaw*, 5 Mason, 241; *Cox's adm'rs. v. Hill*, 3 Ohio, 411, 424; *Martineau v. Woodland*, 2 Carr. & Payne, 65. See 1 Dall. 300; 1 Johns. Cas. 408.*g*

It seems agreed clearly, that a legatee in a will cannot be a witness to (a) prove the (b) will, because he is (c) presumed to be partial in swearing for his own (d) interest.

Hard. 331; 2 Salk. 691, pl. 5. (a) But he may be a witness against the will, for when he swears against the will, he swears against his own interest, and is therefore the strongest witness. 2 Salk. 691.—So, freemen of a corporation were allowed witnesses against the corporation. 2 Show. 146. (b) Yet he may be examined as a

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witness to prove a deed or other thing which has no relation to the will. *Style*, 370. —So, if the parson sues one of his parishioners for tithes, who pleads a *modus*, the other parishioners, though they cannot be witnesses as to the custom, yet they may be witnesses as to the value of the tithes. (c) But, if the legacy be so inconsiderable, as that he cannot be presumed to be biassed by it; as, if it be 5s. to a private person, or 5l. to a nobleman, it is said that he may be a witness for the will. *Vern.* 254. But it is settled, that the minuteness of the interest is no answer to the objection, and that therefore where the party is concerned in interest, though never so small, he cannot be a witness. 2 *Vern.* 317; 4 *Burn's E. L.* 95; *Vent.* 351. (d) Where a witness hath a legacy by the will, by a release of the legacy, though at the trial, he becomes disinterested, and so is a good witness. *Sid.* 315. [See tit. "*Wills and Testaments*," (D), and 25 *Geo.* 2, c. 6.] —So, a bankrupt, who has assigned and released all his estate and right to the assignees, may be examined as a witness for them. 2 *Vern.* 637. —[But in a *qui tam* action on the statute of usury, against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from this debt in particular, and all claim to allowance and surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission. *Masters v. Drayton*, 2 *T. R.* 496.] β Where the effect of a witness's testimony is to create or increase a fund in which he may be entitled to participate, he is incompetent. *Stebbins v. Sackett*, 5 *Conn.* 262; *Clark v. Hoskins*, 6 *Conn.* 262; *Innis v. Miller*, 2 *Dall.* 50; *Austin v. Bradley*, 2 *Day*, 466; *Boynton v. Turner*, 13 *Mass.* 391; *Temple's ex'r. v. Ellett's ex'r.*, 2 *Munf.* 452; *White v. Darby*, 1 *Mass.* 237; *Vultee v. Rayner*, 2 *Hall*, 376; *Donalds v. Plumb*, 8 *Conn.* 447; *Lampton v. Lampton's ex'rs.*, 6 *Monr.* 620.γ *Vide infr.*, 219, *Smith v. Prager*.

So, if J S devises lands to A, and the will is signed, sealed, and published in the presence of the said A and B, and C, who attested the same; yet this is no good will to pass *those* lands; for the statute of frauds requires three or more competent witnesses, which A cannot be, being concerned in interest as devisee of the lands.

*Carth.* 514, *Hilliard and Jennings*, vide tit. *Wills*. *Ld. Raym.* 507.

It is said by Hale, C. J., that he knew it to have been adjudged, that an executor in a cause (a) concerning the testator's estate, if he hath not the surplusage given to him by the will, may be a witness for the will.

*Mod.* 107. {1 *Penn.* 43.} [An executor in trust is a good witness for the will. And though, in the case of a trustee, it hath been usual to have a release, yet that is not necessary, for such person has in fact no interest to release. Nor is it any objection to an executor's testimony, that he may be liable to actions as executor *de son tort*. *Lowe v. Joliffe*, 1 *Bl. Rep.* 365; *Holt v. Tyrrell*, 1 *Barnardist.* 12; *Goodtitle v. Wellford*, *Dougl.* 139; *Baillie v. Wilson*, 4 *Burr.* 2254. In *Goss v. Tracy*, *Canc. M.* 1715, Lord Cowper determined, that a grantee, where he appears to be a bare trustee, is a good evidence to prove the execution of the deed to himself. 1 *P. Wms.* 287.] {1 *Esp. R.* 324, *Westmell v. Gartham*.} β Trustees are competent witnesses in Chancery, though parties to the suit. *Hawkins v. Hawkins*, 2 *N. Car. Law Rep.* 627; the trustee and agent of an incorporated village is a good witness for the village in a suit relating to its property. *Trustees of Watertown v. Cowen*, 4 *Paige*, 510. So are the trustees of a savings bank. *Middletown Savings Bank v. Bates*, 11 *Conn.* 519.γ (a) That the children of an intestate cannot, by reason of their interest, under the statute of distributions, be witnesses in any thing relating to the intestate's estate. *Skin.* 223. β *White v. Derby*, 1 *Mass.* 239. See *Austin v. Bradley*, 2 *Day*, 466; *West v. Randall*, 2 *Mason*, 181; *Randall v. Phillips*, 3 *Mason*, 378; a residuary legatee is not a competent witness either to increase or protect the residuary fund. 2 *Day*, 466; *Campbell v. Tousey*, 7 *Cowen*, 64.γ

[An informer under a penal statute, who is entitled to part of the penalty, cannot be admitted a witness against the offender.

*Rex v. Stone*, 2 *Ld. Raym.* 1545; *Rex v. Piercy*, *Andr.* 18; *Rex v. Blaney*, *Ibid.* 240; *Rex v. Tilly*, 1 *Str.* 316. {1 *Dall.* 63, *Rapp v. Le Blanc*. See 1 *Esp. Rep.* 95, *The King v. Blackman*; *Ibid.* 169, *Rex v. Cole*; *Peake N. P.* 217, *S. C.*; 3 *Esp. Rep.* 68, *Rex v. Teasdale*; *Willes*, 425, n., *Rex v. Johnson*.} But some modern statutes

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declare the informer to be a competent witness; as the act of 32 Geo. 3, c. 56, § 7, for preventing the counterfeiting of certificates of the characters of servants; and the act of 33 G. 3, c. 75, § 17, which regulates hackney coaches. Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed; for the statute must not be rendered ineffectual by the impossibility of proof. *Gilb. Ev.* 114. Thus by 2 G. 2, c. 24, § 8, against bribery at elections, the legislature, in giving an indemnity and discharge to any person offending against the act, who shall discover any other offender so that he may be convicted, must also have intended that he should be competent to give evidence at the trial; and therefore in an action for the penalties he has been admitted. *Bush v. Ralling*, Say. 289; *Mead v. Robinson*, Willes, 425; *Heward v. Shipley*, 4 East, 182. So, in a prosecution on 21 G. 3, c. 37, against exporting machinery, the informer is competent. *R. v. Teasdale*, 3 Esp. N. P. C. 68. So, on a prosecution for penalties under 9 Ann. c. 14, § 5, the loser of money won at cards may prove the loss. *R. v. Luckup*, Willes, 425. So, on a prosecution under 23 G. 2, c. 13, § 1, for enticing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty. *R. v. Johnson*, *Id.* *Ibid.*

¶ The informer, under the statutes of 17 G. 2, c. 40, and 9 & 10 W. 3, c. 41, against any person for having naval stores in his possession, is a competent witness to prove the fact; for his interest is precarious, the court, on conviction, having a power to inflict at their discretion a corporeal punishment, or to impose a fine.

*R. v. Cole*, Espin. N. P. C. 169.

[The plaintiff had been appointed husband of a ship by a deed executed by all the joint owners; by which deed he was empowered generally to lend or advance money, &c. He insured for all the owners; and brought separate actions of covenant against two of them: they were each of them charged for the amount of the whole sum paid. It was agreed that a direction to insure given by one part owner did not bind the rest, without an express or implied authority for that purpose from the rest. The plaintiff did not pretend that any express general direction to insure had been given by all the owners; but insisted that they were all informed of it, and acquiesced in it, and called a witness to prove it. This the defendant denied, and offered to disprove it by calling the defendant in the other cause, insisting, that he was a competent witness, because he was not interested in the event of this suit, for that each of the two causes was to stand on its own evidence. But Lord Mansfield, at the trial, and afterwards the Court of K. B. rejected this witness as incompetent; for unless there was a general direction to insure, the plaintiff could not recover in this action; and a verdict against one of these jointowners would affect the other of them; because that other would be obliged to contribute.(a)]

*French v. Backhouse*, 5 Burr. 2727. {See 1 Esp. Rep. 103, *Young v. Pairner*; 4 Esp. Rep. 112, *Cheyne v. Koops*.} (a) According to this statement, the court considered the witness as interested in the event of the cause; though Buller, J., in the case of *Walton v. Shelley*, 1 T. R. 303, treats the decision as having proceeded upon the ground merely of an interest in the question. His words are, "In that case, the second defendant was certainly not interested to support the defence in the first cause; for if the plaintiff had recovered in that, the second defendant, who was offered as the witness, could not have been charged with any part of the damages recovered in the first action."

A gave a general bond to B for the payment of a sum of money. It appeared upon examining A on a *voir dire*, that it was understood between them that this money was to be applied towards indemnifying B from the expenses of an election in which B was a candidate. In an action brought by C against D, an active member of a committee for carrying on B's election, for money advanced and services performed in supporting the interest

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of B at the request of D, it was holden that A was not a competent witness ; for he was interested in the event of the cause, inasmuch as by procuring the plaintiff to be nonsuited, or a verdict against him, he would save himself from the consequences of this action, since, if he succeeded, as the defendant would call upon B to be reimbursed the damages and costs, A would be liable by his engagements to B ; and if the plaintiff, having failed in this action, should bring another against B, A might tender to B the amount of the plaintiff's demand, and thereby escape the costs ; for if B should proceed against him on the security, he would be restrained in equity from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered.

Trelawney v. Thomas, 1 H. Bl. 303.]

|| In trover for three South Sea bonds, the case was this : Ball had delivered to Lechmere, a broker, these bonds to sell, and they were picked out of his pocket. Notice being given at the South Sea house, they were stopped by Henry, one of the clerks, upon Bostock's bringing them to receive the interest. Upon this Bostock brought trover against Henry, who at the trial offered to prove the property being in Ball, and called Lechmere for that purpose. But it appearing that Lechmere had given bond to indemnify the company in stopping the bonds, King, C. J., refused to let him be examined, saying, that though there are many instances where a party shall be a witness, though he is concerned in the event of the cause ; yet there never was a case of allowing one who had made himself liable to pay costs on the action.

Ball v. Bostock, 1 Str. 575.

The defendant's bail are not competent to give evidence for their principal, because they are immediately answerable in case of a verdict against him.

1 T. R. 164.

So, in an action against the sheriff for a false return, the sheriff's officer, who has given security for the due execution of process, is not a competent witness to prove that he endeavoured to make the arrest.

Powell v. Hord, 2 Ld. Raym. 1411 ; 1 Str. 650, S. C.

So, in an action against the sheriff for an improper return to a writ of *fiery facias*, which stated (*inter al.*) that he had paid a sum of money to the landlord of the premises for arrears of rent, the landlord is not a competent witness to prove the rent due ; because, if this action should succeed, he would be liable to an action at the suit of the sheriff, in which this judgment would be evidence of special damage.

Knightley v. Birop, 3 Campb. 521.

So, in an action by an infant plaintiff, neither his *prochein amy* nor guardian is a competent witness for him, because each is liable for costs.

James v. Hatfield, 1 Str. 548 ; Hopkins v. Neal, 2 Str. 1026 ; Gilb. Ev. 107. See Fonda v. Van Horne, 15 Wend. 631 ; Newton v. Ayres, 1 Green, 153.

So, in an action against a master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence ; for the verdict may be given in evidence in a subsequent action against him, as to the *quantum* of the damages, though not as to the fact of the injury.

Green v. The New River Company, 4 T. R. 589 ; Martin v. Henrickson, 2 Ld. Raym. 1007 ; Miller v. Falconer, 1 Campb. 251.

So, in an action by an endorsee against the acceptor of a bill of exchange,

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which has been accepted for the accommodation of the drawer, the drawer is not a competent witness for the defendant to prove that the holder took the bill for a usurious consideration; for if the holder should succeed against the acceptor, the acceptor would not only have a right of action against the drawer for the principal sum, but also for all damages which, as acceptor, he might sustain in being sued upon the bill; the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of his acceptance.

*Jones v. Brooke*, 4 Taunt. 464; *Maundrel v. Kennet*, 1 Campb. 408.]]

He who borrows money upon a usurious contract, cannot be a witness upon an information for the usury (unless he hath paid the money,) (a) whether such information be brought by himself or any other; for if in such case a man might be a witness, he would in effect swear for himself, by proving a matter which may avoid his own contract.

Co. Litt. 6 b; 2 Ro. Abr. 685; Raym. 191; 2 Hawk. P. C. c. 46, § 24. [*Shank, q. t. v. Payne*, 1 Str. 633, S. P. (a) In which case he is a competent witness, though the fact of payment should be proved by no other person but himself. *Abrahams v. Bunn*, 4 Burr. 2251.] || Whether he has or has not repaid the money lent does not appear to make any essential difference, at least as far as his competency is affected, for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. *Smith v. Prager*, 7 T. R. 60; *Jordaine v. Ladbroke*, *Ibid.* 601.]] § See *Banner v. Gregg*, 1 Harring. 523; *Commonwealth v. Frost*, 5 Mass. 53; *Pettingall v. Brown*, 1 Caines, 168. §

Hence, also it hath been held, that he, who by a slight has been imposed upon to set his hand to a note for more money than he intended, is no good witness on an information for the cheat; because a conviction may be the means to avoid the note, by being made use of by the party when sued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be no evidence.

*Rex v. Whiting*, Salk. 283; *Ld. Raym.* 396; *Rex v. Nunez*, 2 Str. 1043, S. P.; *Rex v. Ellis*, *Ibid.* 1104, S. P.; *Rex v. Parris*, Sid. 431; Vent. 49; 2 Keb. 572. [*Rex v. Broughton*, 2 Str. 1229, *contr*; {Also *Chapman's case*, cited 1 Dall. 111.} In the case of the *King v. Bray*, Ca. temp. Hardw. 359, || Lord Hardwicke reviewed his own opinion in the case of the *King v. Nunez*, and that of Lord Holt in the principal case, and decided, that the objection went only to the credit, not the competency of the witness; and with respect to the probability that the jury might hear of the verdict, he said, that, sitting as a judge, he could only hear of it judicially. Thus, A having brought an action against B, the latter filed a bill in equity against him for a discovery and injunction, and for an account, to which A having put in his answer, denying the allegations of B, which involved the merits of the suit at law, the injunction was dissolved. On this answer B indicted A for perjury, and the indictment and action coming on to be tried at the same assizes, the indictment standing first, it was holden, that B was a competent witness to prove the perjury, as he could not avail himself of the conviction of A in any civil proceeding between them, either at law or in equity. *R. v. Boston*, 4 East, 572.]]

Also, it seems generally agreed, that he, whose property may be prejudiced by a (b) forgery, is no evidence to prove it on an indictment or information.

Salk. 283; *Ld. Raym.* 396. {5 Bos. & Pul. 87, *Rex v. Crocker*. See 4 East, 582, *The King v. Boston*. The law is otherwise in Massachusetts; 1 Mass. T. Rep. 7, *Commonwealth v. Hutchinson*; 3 Mass. T. Rep. 82, *Commonwealth v. Snell*; and in Pennsylvania, 1 Dall. 110, *Republica v. Keating*; Addis, 246, *Pennsylvania v. Farrell*; 2 Dall. 239, *Republica v. Ross*. See Mr. Day's note (2) to the *King v. Eden*, 1 Esp. Rep. 97; 2 East's Pl. Cr. 993, *et seq.*, and 4 Johns. Rep. 296, *The people v. Howell*.} [*Shank q. t. v. Payne*, 1 Str. 633, S. P.; *Rex v. Rhodes*, 2 Str. 728, S. P.; *Rex v. Boston*, 4 East, 582. Though a person, as it is said, whose hand is forged, is not admissible to prove the forgery, yet, under many circumstances, he may be admitted, where he is not directly interested in the question; as in *Well's case*, who was indicted

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for forging a receipt from a mercer at Oxford, the mercer having before recovered the money in an action against Wells, was admitted by Willes, C. J., to prove the forgery. Bull. Ni. Pri. 289. So, where Newland forged a bank note in the name of William Lander, one of the cashiers; Lander was admitted, *without a release*, to prove that it was not his signature; because the interest and liability to pay must be immediate and apparent either upon the face of the instrument forged, or on a *voir dire*; and Lander, the cashier, was only *mediately* liable over the bank upon his security. O. B. 1784. —A bond was forged by Dr. Dodd in the name of Lord Chesterfield, and the obligees executed a release; upon which his lordship was admitted to prove that the signature was not his handwriting. Leach's Hawk. 2 vol. c. 46, § 24, note. But on an indictment for forging a seaman's will, a person named executor in a will of a subsequent date, was holden an incompetent witness to prove that the name of the testator to the first will was a forgery; for that went to establish the second will, in which he was named executor. Rhode's case, Leach's Cr. Cas. 25.] (b) And if it be a forgery within 5 Eliz. c. 14, a farther reason is given in 2 Hawk. P. C. c. 46, § 24, why such person cannot be an evidence, because he may have an action on the statute. β The American courts have not been uniform in their decision on this subject. See Day, note to 2 N. R. 96; State v. Brunson, 1 Root, 307; Same v. Blodget, 1 Root, 534; State v. A. W. 1 Tyl. 260; State v. Hamilton, 2 Hayw. 288; Furber v. Hilliard, 2 N. H. Rep. 481; Pennsylvania v. Farrel, Addis. 246; Republica v. Keating, 1 Dall. 110; Same v. Ross, 2 Dall. 239; S. C. 2 Yeates, 1; Same v. Wright, 1 Yeates, 401; Territory v. Barran, 1 M. R. 208; People v. Dean, 6 Cowen, 27; People v. Howell, 4 Johns. 296; United States v. Johns, 4 Dall. 419; Commonwealth v. Hutchinson, 1 Mass. 7. In England the party whose name is forged is now, by statute 9 Geo. 4, c. 32, § 2, made a competent witness for the prosecution of forgery. γ

So, upon this reason it hath been adjudged, that he, against whom a verdict is given, cannot be a witness to prove perjury in the evidence.

2 Ro. Abr. 685; and the same point is taken for granted. Sid. 237; Keb. 836; Rex v. Whiting, Salk. 283, S. P. [Rex v. Nunez, 3 Str. 1043, S. P. But see Rex v. Broughton, 2 Str. 1229, *contr.* {And Bartlett v. Pickersgill, 4 Burr. 2255; 4 East, 577, n.} However, in the case of Rex v. Eden, Lord Kenyon held, that the defendant in the original action, against whom the verdict went, was an incompetent witness, he not having paid the debt and costs. Hil. 34, G. 3, Espinasse's Ca. at Ni. Pr. 97.] But see R. v. Boston, *supr.* {See also the King v. Dalby, Peake N. P. 12; and The King v. Menetone, stated there and 4 East, 576, n. In the case of Rex v. D'Faria, Peake N. P. 104, Lord Kenyon admitted the testimony of a party to the suit in which the perjury was committed and who had succeeded in it, because she had then no interest in the event of the prosecution. The subject was fully discussed in the King v. Boston, 4 East, 579; and the Court of King's Bench decided that the party injured by the perjury was a competent witness, on the principle established by the cases of Abrahams v. Bunn, 4 Burr. 2251; Bent v. Baker, 3 Term, 24; and Smith v. Prager, 7 Term, 60, viz., that a witness is not incompetent on the ground of interest, unless he is directly interested in the event of the suit, or the verdict may be evidence on any future occasion in a cause to which he may be a party. Taylor, 55, State v. Hassit, *acc.*}

Yet notwithstanding these cases, and the force of these reasons, there are several instances, where, in cases of (b) necessity, a person, whose (c) damage an indictment or information concluded to, has been allowed and admitted an evidence, and his credit left to the jury.

Sid. 211, 237; 2 Keb. 384; Salk. 286; 2 Ld. Raym. 1179; 6 Mod. 301, 311; 7 Mod. 119. (b) On the statute of robberies, a man swears himself, because there can be no other witness. 3 Mod. 114, *per Our.* (c) As in an indictment for a battery, &c., 2 Hawk. P. C. c. 46, § 24. —Where a person rescued was admitted a witness for the person against whom an action was brought for the rescue, and his credit left with the jury. 6 Mod. 211.

If the warden of the Fleet suffers a voluntary escape, and an inquisition, by virtue of a special commission issuing out of Chancery, is taken thereof, which he traverses; the person escaping, though he gave a bond to be a true prisoner, is a good witness to prove the escape; for this does not make the bond void, as a conviction on the statute of usury does. Besides, this

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is a matter privately transacted between the party and officer, of which there can be no other evidence.

2 Salk. 690, *The King and Ford*. [See Fitzg. 80; *The King against Huggins*, S. P., ruled on the authority of this case.]

Upon this rule, that an interested person cannot be a competent witness, it has been often doubted, how far (a) freemen of a corporation, the inhabitants of a hundred or parish, (b) should be admitted as witnesses in matters which concern those places. And here it is said that no general rule can be laid down, but that every case must stand upon its own particular circumstances, viz., Whether the interest be of that nature, or so considerable as by presumption to produce partiality in the witnesses.

(a) || If a corporation would examine one of their own members as a witness, they must disfranchise him; and the method of doing it is by an information in the nature of a *quo warranto* against him, when upon his confessing the information, judgment passes to disfranchise him. *Colchester Corporation v. —*, 1 P. Wms. 595, (n.) But this judgment must be such as cannot be avoided: for if it appears that the witness can avoid the judgment for irregularity, as, if he had not been summoned, and knew nothing of his disfranchisement, he is not competent. *Brown v. Corporation of London*, 11 Mod. 225. (b) Parishioners are not admissible to prove a charity given to a parish. *Attorney-General v. Wyburgh*, Ibid. 599. But a mere lodger, who does not pay to the poor, is admissible. By 54 G. 3, c. 170, § 9, "no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, in any matter relating to such rates or cesses, or to the boundary between such district, parish, township, or hamlet, and any adjoining district, parish, township, or hamlet, or to any order of removal to or from such district, parish, township, or hamlet, or the settlement of any pauper in such district, parish, township, or hamlet, or touching any bastards chargeable or likely to become chargeable to such district, parish, township, or hamlet; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appointment of any officer, or officers, or the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet; any law, &c." By 27 G. 3, c. 29, parishioners are made competent witnesses in prosecutions where the penalty is given to the parish, unless it exceed twenty pounds. || See *Falls v. Bellnapp*, 1 Johns. 486, 491; *Corwein v. Hames*, 11 Johns. 76; *Bloodgood v. Jamaica*, 12 Johns. 285; *The City Council v. King*, 4 McCord, 487; *Commonwealth v. Baird*, 4 S. & R. 141; *Schenck v. Gorshen*, 1 Cox, 189; *Schenck v. Stevenson*, 1 Penning. 387; *Overseers of Orange v. Overseers of Springfield*, 1 South: 186; *Smith v. Barber*, 1 Root, 207.¶

Hence, in an information in nature of a *quo warranto*, for taking 1d. per chaldron for all sea coals brought to London, where the defendants prescribed for the duty, upon which issue was taken and tried at the bar, it was held, that the freemen of London were good witnesses to prove the prescription, though the mayor, &c., have the whole profit of this toll, which is for the benefit of the corporation, of which all the citizens and freemen are members; for it cannot be presumed, that for an advantage so small and so remote, they would be partial and perjure themselves. (c)

2 Lev. 281, *The King v. The Mayor of London*. (c) [The quantum of interest will not affect the case at all: if the party have any interest, he is disabled from being a witness. Hence, where a corporation, being lord of a manor, had approved part of a common, and leased it, reserving rent to the corporation, a freeman was not admitted to prove, that there was a sufficiency of common left for the commoners. *Burton v. Hinde*, 5 T. R. 174.].

So, in the case of the city of London, concerning the duty of water bailage, where the mayor and commonalty brought an *indebitatus assumpsit* against A B for 5*l.* for so much due to them for divers tons of wine brought from beyond the seas to the port of London, at 4*d.* per ton; and some freemen

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being produced as witnesses, it was objected, that the commonalty of London comprehending all the freemen, this made them interested in the success of the cause; but it was held by three judges against one, that so small and remote an interest did not disable them from being competent witnesses. However, they were laid aside by consent.

Vent. 351. In 1 Vern. 254, it is held generally, that freemen of a corporation cannot be witnesses, and this case is there cited, as a case in which such evidence was rejected, and so said to be resolved, 2 Vern. 317. [4 Burn's E. L. 95.]

[A person, who has acted in breach of an alleged custom, is not a competent witness to disprove the existence of the custom; for if the custom should not be established, he would be discharged from any actions he may be liable to for the breach of it.

The Company of Carpenters, &c., v. Hayward, Dougl. 374.]

At a trial at bar concerning boundaries of lands; the parson of the one parish, the land lying in two parishes, was rejected, because he might enlarge his own parish, and by consequence the tithes; but one, who about seven years before had taken the profits, under the title of one of the parties, was received as a witness, because now he might plead the statute of limitations.

7 Mod. 63, Lord Wharton and Sir John Robinson.

It is said in 2 Sid. to have been ruled on evidence at a trial at bar, that if a remainder after an estate for life be limited to the minister and churchwardens of a certain parish, for the use and benefit of the poor of the parish, (a) that any of the parishioners may be witnesses to prove this devise.

2 Sid. 109, Townsend and Row. (a) But in 2 Vern. 317, where the question related to the loss and misapplication of a sum of money given for the benefit of the parishioners, it was held, that an inhabitant of the parish could not be a witness; and that the cases where the party was concerned in interest, though never so small, have always prevailed. {The inhabitants of an incorporated society to whom property is devised for the support of a school, are competent witnesses to attest the will. 1 Day. 35, Cornwell v. Isham.}

In an action against the hundred, upon the statute of Winton, an hundredor (b) cannot be a witness.

Vent. 351, admitted. (b) Mod. 73, S. P., though he be poor, and pays no taxes, or parish duties; for when the money recovered of the hundred comes to be levied, he may then be worth something; but servants, and those who receive alms, may be witnesses. 2 Keb. 73, S. P. [But now by stat. 8 Geo. 2, c. 16, § 15, inhabitants of hundreds are made competent witnesses at trials on the statutes of hue and cry.]

On an indictment against the county for not repairing (c) a bridge, it has been doubted whether an inhabitant of the county could be a witness.

Vent. 351. (c) If there be a dispute between two parishes, which of them shall repair a certain highway, the inhabitants of neither of the parishes can be witnesses. 4 Mod. 48. β In New York, the interest arising from being rateable inhabitants is too remote to prevent a witness for the town, as in actions on bastardy bonds. Falls v. Belknap, 1 Johns. 486; or for penalties in *qui tam* actions. Corwein v. Humes, 11 Johns. 76. When the state is a party, an inhabitant is a competent witness for the state, notwithstanding any interest he may have, as such inhabitant, in the event of the suit. The State of Connecticut v. Bradish, 14 Mass. 296. See also Gould v. James, 6 Cowen, 369.γ

But now, by the 1 Ann. st. 1, c. 18, reciting, That whereas many private persons, or bodies politic or corporate, are of right obliged to repair decayed bridges, and the highways thereunto adjoining; but because the inhabitants of the county, riding, or division, in which such decayed bridge or highways lie, have not been allowed, upon informations or indictments brought against such person or persons, bodies politic or corporate, for not repairing



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such decayed bridges and the highways thereunto adjoining, by the judges before whom such information or indictment is to be tried, to be legal witnesses ; it is enacted, " That in all informations or indictments to be brought and tried in any of her majesty's courts of record at Westminster, or at the assizes or quarter sessions of the peace, the evidence of the inhabitants, being credible persons, or any of them of the town, corporation, county, riding, or division, in which such decayed bridges or highways lie, shall be taken and admitted in all such cases in the courts aforesaid."

And by the 3 & 4 W. 3, c. 11, " In all actions to be brought in the courts of Westminster, or at the assizes, for money misspent by churchwardens, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted."

On this rule, that an interested person cannot be a witness, the time and manner of a witness's becoming interested seems also material ; and therefore it has been held, that it is no good exception against a witness, that he hath a promise of a reward, on condition of giving his evidence, especially, if such reward be not promised by the person for whose benefit he is to swear, and by way of contract for giving such and such particular evidence.

|| Also it was ruled by Lord Holt, that if a man be a witness to a wager, and afterwards bet himself, this shall be no objection against his being sworn to prove the wager.

Barlow v. Vowell, Skin. 586.||

Hence it hath been held, that on a *scire facias* against the king's patentee, a person who has a promise of being made a deputy, may be a witness.

Owen Hanning's case, Mod. 21 ; 2 Keb. 576, S. C. So ruled at a trial at bar by three judges against Twisden, who held, that it was like a man's promising another, that, if he recovered the lands, he should have a lease of them, which, he said, disabled him from being a witness. Gilb. Ev. 108.

But it has been held, that if several persons lay wagers at a horse-race, &c., and an action is brought against one of them for the money lost, that a better on the same side cannot be a witness for him who lost ; but, if such person acknowledges that he lost the wager, and pays the money, he may be a witness.

3 Lev. 152, Rescous and Williams, adjudged, and Jones, Ch. Just., held, that laying a wager, or being a better, did not destroy the testimony of the witness, but went only to his credit.—[See Baron v. Bury, Vin. Abr. tit. *Evidence*, (I), pl. 33, S. P., and same distinctions as in the text. In Str. 652, Rex v. Fox, on an indictment for an assault, it was proved, that the prosecutor had laid a wager that he should convict the defendant. And Lord C. J. Raymond held him to be a good witness for the king, though it might go to his credit. And the better opinion seems to be, that it is no objection to the competency of a witness, that he has laid a wager on the subject of the suit, though it may affect his credit. Cowp. 736 ; 3 T. R. 37. And it was laid down as a settled principle, deducible from the above case of Barlow v. Vowell, that where a person makes himself a party in interest after a plaintiff or defendant has acquired an interest in his testimony, he shall not by this deprive the plaintiff or defendant of the benefit of his testimony ; and that, therefore, a broker who underwrites a policy after getting it underwritten by others, is a competent witness for the defendant in an action against any of those who underwrote before him. Bent v. Baker, 3 T. R. 27.] || But this proposition would seem to be expressed in too broad and general terms. In the case of Forester v. Pigou, 1 M. & S. 9 ; 3 Campb. 380, where the defendant in an action on a policy of insurance called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the *voir dire* the witness stated, that " he had paid the loss to the plaintiff upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event," an objection being

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taken to his competency, the point was argued on the other side upon the authority of *Barlow v. Vowell*; but the witness was considered as incompetent and rejected. A motion was afterwards made for a new trial on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time when the undertaking was made to the witness. But the court added, that with respect to the case of *Barlow v. Vowell*, it appeared that the witness was the original witness to the wager; and that it was therefore a *fraud* to deprive the party of his testimony. So, in *Bent v. Baker*, the broker was the common agent and witness of both parties, and therefore his testimony was not to be taken from them. But, if a person, who is under no obligation to become a witness for either of the parties in a suit, choose to pay his debt beforehand, upon a condition which is to be determined by the event of that suit, he becomes as much interested in the event as if he were a party to a consolidation rule.]

It has been held in Chancery, that if a person is examined as a witness, who is no ways concerned in interest, and afterwards he becomes heir at law, and thereby interested in the matter, that notwithstanding, his depositions, when thus disinterested, may be read, even (a) at a trial at law; and that it was like the case, where the only surviving witness to a deed becomes the party interested, (b) or where a witness to a deed becomes blind, in which cases his hand may be proved at law.

2 Vern. 699. [1 P. Wms. 287, S. C.] Abr. Eq. 224. [2 Atk. 615; 2 Ves. 42; Tully's case, 2 Ld. Raym. 1008; 1 Salk. 286; *Holcroft v. Smith*, 1 Eq. Ca. Abr. 224; *Baker v. Lord Fairfax*, 1 Str. 1001, *contr.* But depositions have been allowed to be read at law, where the witness was beyond the reach of judicial process. *Lord Altham v. Lord Anglesea*, Gilb. Ca. in Eq. 16; 11 Mod. 210, S. C. So, where he could not be found, or was disabled from attending by sickness. *Fry v. Wood*, 1 Atk. 449; Bull. Ni. Pri. 230.] (a) But at a trial at bar in C. B. on an issue directed out of Chancery, the judges refused to have such depositions read, because the witness was still living. Abr. Eq. 224. But in 2 Vern. 699, such depositions were read in Chancery, and there said, that the reason of rejecting such evidence at law was, because it was against the rule, viz., that where the witness is living, and might be produced at the trial, the deposition of such witness cannot be read. (b) [As, where he becomes executor or administrator to the obligee of a bond. *Godfrey v. Norris*, 1 Str. 34; *Goss v. Tracy*, 1 P. Wms. 289. So, where he becomes infamous. *Jones v. Mason*, 2 Str. 833. But, if the subscribing witness be interested both at the attestation and at the trial, he can neither be examined as a witness to prove the execution, nor can his handwriting be proved. *Swire v. Bell*, 5 T. R. 371.]

A witness was examined whilst she was interested, before the hearing; and the cause being heard and decreed to an account, she was re-examined after the hearing, before the master, on the account, having first released her interest; it was objected, that she ought not to be heard, for having been examined whilst interested, and her depositions published, she was thereby engaged, and almost under a necessity of standing to what she had before sworn, and could not be free to retract or contradict it; but the lord-keeper overruled the objection.

3 Vern. 479, *Callow and Mine*.

It is no good exception against a witness, that he has a maintenance from the king or other person, for every one may maintain his own witnesses; nor is it any exception against a witness, that he has received a reward for having made a discovery of the crime to be proved against the prisoner, nor that he hath the promise of a pardon on condition of giving his evidence. (c)

2 Hawk. P. C. c. 46, § 25. (c) [But Sir Matthew Hale is of a different opinion. 2 Hal. H. P. C. 280.]

[A person cannot be a witness who apprehends himself to be interested, though in fact he be not so; {<sup>1</sup>} or, who admits himself to be under honorary

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engagements, though not under any legal obligation, to contribute to the expenses of the action.

*Fotheringham v. Greenwood*, 1 Str. 129. {4 East, 181. Therefore on an information against goods seized as forfeited, a witness is incompetent, if he acknowledges an expectation to receive a reward, in case of condemnation, for having assisted in the seizure, though he had no certain promise of it. 1 Dall. 62, *M'Veaugh v. Goods*. So, though a creditor is not as such excluded from giving testimony, yet if he acknowledges an expectation that he will be benefitted by the event of the cause, he must be rejected. 2 Dall. 50, *Innis v. Miller*; 2 Esp. Rep. 735, *Powell v. Gordon*; 1 Cain. 363, *Peyton v. Hallit*. See 2 Johns. Rep. 165; 1 Hen. and Mun. 167, n.} But *qu.* whether the being under mere honorary engagements ought not to go rather to the credit than the competency of a witness, since it is impossible to render the witness competent, a notional honorary interest not being the subject of a release. β<sup>[1]</sup> When a witness thinks himself interested at the time of taking the oath, though in fact he be not interested, he is nevertheless competent. *Long v. Baillie*, 4 S. & R. 226; *Fernsler v. Carlin*, 3 S. & R. 130.g

|| In a late case before the High Court of Admiralty, an objection was made to the evidence of a witness, who had acknowledged in his answer, "that he could not say that he was not interested, inasmuch as he conceived that he should be entitled to share, if his vessel should be pronounced a joint captor, though he had signed a release;" to which it was answered, that as he was clearly not interested, the effect of his impression was no more an objection in this case, than in those in which the expectation depended only on the bounty of the parties. But Sir William Scott rejected the witness, observing, that he had always understood the distinction to be, that if the witness says only he expects to share from the bounty of the captors, he is not disqualified or rendered incompetent, whatever may be the deduction of credit to which he is exposed. But, if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be.

Case of the *Amitié Villeneuve*, 5 Robins. Adm. Ca. 344, n. Phil. Ev. 43. β It is not a good objection to the competency of a witness, that he believes himself interested in the event of the suit, when in fact he is not so. *Cassiday v. M'Kenzie*, 4 Watts & S. 282.g

[A person shall not be permitted to give evidence to invalidate a negotiable instrument which he has signed.

*Walton v. Shelly*, 1 T. R. 300. But this rule is confined to *negotiable* instruments; for in the case of Mr. Jolliffe's will, all the subscribing witnesses were allowed to give evidence of the insanity of the testator at the time of making it. *Lowe v. Jolliffe*, 1 Bl. Rep. 365. β *Acc.* *United States v. Dunn*, 6 Pet. 51; and see *Wilson v. Lenox*, 1 Cranch, 201. The decisions upon this subject made by the various courts of the United States have not been uniform, as will be manifest by an examination of the following cases: *Todd v. Stafford*, 1 Stew. 199; *Allen v. Holkins*, 1 Day, 17; *Webb v. Danforth*, 1 Day, 301; *Townsend v. Bush*, 1 Conn. 260; *Gorham v. Carrol*, 3 Litt. 221; *Ford v. Hale*, 1 Monr. 23; *Cox v. Williams*, 5 N. S. 139; *Shamburg v. Commagere*, 10 M. R. 18; *Deering v. Sawtel*, 4 Greenl. 191; *Chandler v. Morton*, 5 Greenl. 374; *Ringgold v. Tyson*, 3 Harr. & Johns. 179; *Hunt v. Edwards*, 4 Harr. & Johns. 283; *Revere v. Leonard*, 1 Mass. 91; *Warren v. Merry*, 3 Mass. 27; *Brown v. Babcock*, 3 Mass. 29; *Hill v. Payson*, 3 Mass. 559; *Churchill v. Suter*, 4 Mass. 156; *Widgery v. Monroe*, 6 Mass. 449; *Jones v. Coolidge*, 7 Mass. 199; *Parker v. Hanson*, 7 Mass. 470; *Storer v. Logan*, 9 Mass. 55; *Manning v. Wheatland*, 10 Mass. 502; *Fitch v. Hill*, 11 Mass. 286; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368; *Bridge v. Eggleston*, 14 Mass. 245; *Buttler v. Damen*, 15 Mass. 223; *Fox v. Whitney*, 16 Mass. 118; *Hartford Bank v. Barry*, 17 Mass. 94; *Packard v. Richardson*, 17 Mass. 122; *Knights v. Parnam*, 3 Pick. 184; *Houghton v. Page*, 1 N. H. Rep. 60; *Bryant v. Ritterbush*, 2 N. H. Rep. 212; *Hadduck v. Wilmarth*, 5 N. H. Rep. 187; *Carleton v. Whitchee*, 5 N. H. Rep. 196; *Winton v. Sailer*, 3 Johns. Cas. 185; *Baker v. Arnold*, 1 Caines, 258; *Coleman v. Wise*, 2 Johns. 165; *Woodhull v. Holmes*, 10 Johns. 231; *White v. Kibbling*, 11 Johns. 128; *Mann v. Swan*, 14 Johns. 270; *Skelding v. Warren*, 15 Johns.

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270; Hubley v. Brown, 16 Johns. 70; Powell v. Waters, 17 Johns. 176; M'Fadden v. Samuel, 17 Johns. 188; Myers v. Palmer, 18 Johns. 167; Tuthill v. Davis, 20 Johns. 285; Stafford v. Rice, 5 Cowen, 23; Utica Bank v. Hilliard, 5 Cowen, 153; Powell v. Waters, 8 Cowen, 669; Williams v. Walbridge, 3 Wend. 415; Anon., 2 Hayw. 127; Alton's Ex'rs. v. Jones's Heirs, 2 Hayw. 298; Gwynn v. Stokes, 2 Hawks, 235; Stille v. Lynch, 2 Dall, 194; Pleasants v. Pemberton, 2 Dall. 196; Peterson v. Wil-ling, 3 Dall. 506; Shaw v. Wallis, 2 Yeates, 17; Barring v. Shippen, 2 Binn. 154; M'Farran v. Powers, 1 S. & R. 102; Brownrig v. Downing, 4 S. & R. 494; Baird v. Cochran, 4 S. & R. 397; Hepburn v. Cassel, 6 S. & R. 113; Bank of Montgomery v. Walker, 9 S. & R. 229; Griffith v. Reford, 1 Rawle, 196; Langer v. Felton, 1 Rawle, 141; Blagg v. The Phoenix Insurance Company, 3 Wash. C. C. R. 5; Canty v. Sumpter, 2 Bay, 93; 3 M'Cord, 71, note; Willbourn v. Parham, 1 Harp. 375, 379; Ketchler v. Cheer, 4 M'Cord, 397; Croft v. Arthur, 3 Desaus. Eq. R. 223; Payne v. Tresevant, 2 Bay, 23; Haig v. Newton, 1 Const. Ct. R. 423; Nicholas v. Holgate, 2 Aik. 138; Taylor v. Beck, 3 Rand. 316; Baring v. Reeder, 1 Hen. & Munf. 154. § {3 Term, 33, 36, Bent v. Baker; 10 Ves. J. 474. It is said that he may testify as to subsequent facts, not tending to show that the instrument was originally invalid. Peake, N. P. 6, Charington v. Milner; Ibid. 40, Phetheon v. Whitmore; Ibid. 52, Humphrey v. Moxon. A difference of opinion has prevailed among the English judges with regard to the application of the principle of Walton v. Shelly even to negotiable instruments. Peake, N. P. 117, Adams v. Lingard; Ibid. 40, Phetheon v. Whitmore; Ibid. 224, Rich v. Topping; 1 Esp. Rep. 176, S. C., and note {1} by Mr. Day; Ibid. 298, Hart v. M'Intosh. And in *Jordaine v. Lashbrooke*, 7 Term, 601, The Court of King's Bench, Ashhurst, J., dissenting, decided that in an action by an endorsee against the acceptor of a bill of exchange dated in *Hamburgh*, the latter may call the payee as a witness to prove that the bill was actually drawn in *England*, and was therefore void for want of a stamp.—But in several of the states of the Union, the rule in *Walton v. Shelley* has been recognised and adopted. In *Pennsylvania*, the rule was laid down in *Stille v. Lynch*, 2 Dall. 194, which was an action on a promissory note; and was confined to negotiable instruments in *Pleasants v. Pemberton*, 2 Dall. 196; and in *Baring v. Shippen*, 2 Bin. 154. And, on the same principle, the endorser of a note is not admitted, on an indictment for forgery, to prove that the name of the maker was forged, unless he has paid and taken up the note. 2 Dall. 242, *Commonwealth v. Ross*. The rule is adopted also in *New York* as to negotiable instruments. 1 Cain. 267, *Winton v. Saidler*; Ibid. 258, *Baker v. Arnold*; 2 Johns. Rep. 165, *Coleman v. Wise*. See 1 Johns. Rep. 572. So in *Massachusetts*; but the witness is admitted to prove subsequent facts which do not tend to show the instrument originally invalid; 3 Mass. T. Rep. 559, *Hill v. Payson*; Ibid. 565, *Parker v. Lovejoy*; Ibid. 27, *Warren v. Merry*; Ibid. 31, *Brown v. Babcock*: and in *Connecticut* with the qualification last mentioned; but it is not confined to negotiable instruments. 1 Day, 17, *Bisco v. Bishop*; Ibid. 301, *Webb v. Danforth*; 2 Day, 121, *Nichols v. Hotchkiss*. See 2 Wash. 63; 1 Hen. & Mun. 165, 166, 175; 1 Cran. 194.}

§ The payee of a promissory note, who has endorsed it "without recourse," is a competent witness for the endorsee, in an action against the maker, to prove that a material alteration of the note was made by the promisor at the time it was signed, and before its delivery to the payee.

*Abbott v. Mitchell*, 6 Shepl. 354. §

If a person who is tendered as a witness does every thing in his power to get rid of the objection to his testimony, it shall not be competent to the other party by an obstinate refusal to prevent him from being examined.

*Goodtitle v. Welford*, Dougl. 139. §

§ In an action of ejectment, a grantor with covenant of warranty is not a competent witness, when the outstanding title granted by him is set up as a defence.

*Goodman v. Losey*, 3 Watts & S. 526. §

In an action against an attorney for negligence in negotiating a grant of annuity to plaintiff, the person appearing on the deeds as grantor, may be called by the plaintiff to prove the deed a forgery; for he has no interest

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in the suit, and a verdict against the defendant could not be given in evidence by the witness if he were sued on the deed.

Hunter v. King, 4 Barn. & A. 209; and see Rex v. Crocker, 2 New R. 87; Rex v. Wait, 1 Bing. R. 21.

By the 9 G. 4, c. 32, no person shall be deemed an incompetent witness in support of a prosecution for forgery, by reason of any interest he may be supposed to have in the forged instrument.

If the witness may help to discharge his own debt by a verdict being given on the side for which he is called, he is not competent.

Bland v. Ansley, 2 New R. 331; Upton v. Curtis, 1 Bing. 210.

But the owner of goods may be called in an action of trover to prove property in himself, if the verdict cannot be evidence for him in any other action. The question is, whether the verdict would be evidence for the witness in another proceeding.

Nix v. Cutting, 4 Taunt. 18; Ward v. Wilkinson, 3 Barn. & A. 410; and see Nathan v. Buckland, 2 Moo. 153; Thomas v. Pearce, 5 Price, 547.

In ejectment the defendant cannot call a party to prove that he, the witness, is tenant in possession, and not the defendant; for the witness would lose his own possession if there were a verdict against defendant.

Doe dem. Jones v. Wilde, 5 Taunt. 183; Doe dem. Lewis v. Bingham, 4 Barn. & A. 672.

In an action on the case for an injury to the reversion, the tenant in possession may be a witness for the plaintiff.

Doddington v. Hudson, 1 Bing. 257.

On an issue to try a modus, the lessee of the vicar may be examined for him if he has released the vicar.

Robinson v. Williamson, 9 Price, 136.

In replevin on an issue of *non tenuit*, &c., a co-lessee of the plaintiff (not party to the record) may be examined for the plaintiff, unless on the *voire dire* it appear that he is so interested jointly with the plaintiff that he would be liable to contribution.

Bunter v. Tyndale, 1 Barn. & C. 689; and see 5 Moo. 319.

A remainderman after a tenant in tail is not competent for the tenant in tail in an ejectment for the entailed property.

Doe v. Tyler, 6 Bing. 390.

Where a bishop has omitted to present to a living lapsed to him for want of presentation within six months, a party on whom the right devolves, if the bishop omits, is not a competent witness for one who claims in the same right as such party.

Gully v. Bishop of Exeter, 5 Bing. 171.

(As to the incompetency of a witness on the ground of his liability in one event of the suit to costs in addition to the debt, see Jones v. Brooke, 4 Taunt. 464; Townend v. Downing, 14 East, 567; Keightly v. Birch, 3 Camp. 523; Brind v. Bacon, 5 Taunt. 183; Edmonds v. Love, 8 Barn. & C. 407.)

An assignee of a bankrupt having released his claims as creditor on the estate, is competent to prove the petitioning creditor's debt; for as assignee he has no interest.

Tomlinson v. Wilkes, 2 Bro. & B. 397; 5 Moo. 172, S. C.

In an action on the statute 9 Ann. c. 14, by an assignee to recover back money lost by the bankrupt at play, the bankrupt was held an incompetent

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witness for the plaintiff, but his competency was restored by three releases. 1. By the bankrupt to the assignee of all the surplus. 2. By the creditors to the bankrupt of all actions, claims, &c. 3. By the assignee (who was not a creditor) to the bankrupt of all actions, claims, &c.

*Carter v. Abbott*, 1 Barn. & C. 444. See further, as to bankrupts' evidence, *Emmett v. Bradley*, 7 Taunt. 599; *Morgan v. Price*, 2 Barn. & C. 14; *Moody v. King*, 2 Barn. & C. 558; *Affalo v. Fourdrinier*, 6 Bing. 306; and *ante*, tit. *Bankrupt*.

In case for negligently driving a mail-coach against the plaintiff's wagon-horse, it was held the wagoner could not be called for the plaintiff without a release; for if plaintiff recovered on his testimony, the wagoner would relieve himself from any action for negligence at suit of the plaintiff.

*Morish v. Foote*, 8 Taunt. R. 454; and see *Peake's Ca.* 117.

One joint maker of a promissory note may prove the signature of the other, in an action against him upon it.

*York v. Blott*, 5 Maule & S. 71.

A dormant partner, not a cocontractor, is competent for his partner to prove a contract.

*Mawman v. Gillett*, 2 Taunt. 325.

A codefendant in *assumpsit*, who has suffered judgment by default, is not admissible against the other defendant, for he has an interest to fix him, in order to gain contribution.

*Brown v. Brown*, 4 Taunt. 752. See *Mant v. Mainwaring*, 8 Taunt. 139. *Sed vide Hudson v. Robinson*, 4 Maule & S. 475; *Worrall v. Jones*, 7 Bing. 395.

A cocontractor in *assumpsit* is not admissible as a witness for his cocontractor.

*Evans v. Yeatherd*, 2 Bing. 133; and see *Hall v. Rex*, 6 Bing. 181.

In an action on a policy, if the sole question is as to the original destination of the ship, the captain may be called as to that fact, though a part owner; but not if the question be as to deviation.

*De Symonds v. De la Cour*, 2 New R. 374.

In an action on a policy, the party appearing on the policy as the party interested, cannot be a witness for plaintiff, though he have released to the plaintiff all claims in respect of the policy, and though, on being called on to indemnify plaintiff from costs, he have procured a third party to give the indemnity, and have assigned to such party all interest in the policy; for the witness is still liable to the attorney for the costs of the action, and therefore is interested in the verdict.

*Bell v. Smith*, 5 Barn. & C. 188.

An executor, though taking a pecuniary interest under a will, is competent to support the will in an ejectment for real property disposed of by it; for the verdict cannot set up the will as a will of *personalty*.

*Doe dem. Wood v. Teage*, 5 Barn. & C. 335.

The mother of a defendant in ejectment who claims to retain possession of premises as heir at law to his father is competent for the defendant, although the effect of her testimony be to prove a seisin in law in her husband, which would give her a claim to dower.

*Doe v. Maisey*, 1 Barn. & Adol. 469.

Upon an issue whether a messuage is situated within a chapelry, a person who occupies rateable property within the chapelry is competent to prove that it is, both at common law, and under the 54 G. 3, c. 170.

*Marsden v. Stansfield*, 7 Barn. & C. 815.

(C) Of the Number of Witnesses required in our Laws.

On the trial of an issue whether the owners of property within a chapelry are liable by immemorial usage to repair the chapel, an owner of property within the chapelry is not competent to disprove the liability, for he is interested to remove the burden.

*Rhodes v. Ainsworth*, 1 Barn. & A. 87.

A parishioner is a competent witness for his parish, if not actually rated, though rateable; for the mere liability does not give him an interest.

*Rex v. Kirdford*, 2 East, 559.

On a question of title between a parish and individuals, where the parish claimed lands by virtue of an enclosure act, which lands would, if recovered, be vested in trust for the parish, in aid of poor-rates, rated inhabitants were held admissible, the case being within the 54 G. 3, c. 170.

*Meredith v. Gilpin*, 6 Price, 146.

A member of a corporation is not competent to support a claim by the corporation, though he release his interest in the subject-matter of the suit.

*Doe v. Tooth*, 3 Young & J. 19.

(C) Of the Number of Witnesses required in our Laws.

It is holden by my Lord Chief Justice Holt, that at common law it was not necessary in any case, that a proof of matter of fact should be made by more than one witness, and that the single testimony of one credible witness was sufficient to prove any fact, and that the authorities cited by my Lord Coke (a) do not warrant the opinion founded on them.

Carth. 144. (a) Co. Litt. 6 b, where my Lord Coke says, that when a trial is by witnesses, as of the challenge of a juror, or summons of a tenant, the affirmative ought to be proved by two or more witnesses; but, when the trial is by verdict, there the judgment is not given upon witnesses, or other kind of evidence, but upon the verdict; and upon such evidence as is given to the jury they give their verdict.

But the civil law requires two witnesses to prove a fact; and therefore it has been holden, that if the spiritual court, which proceeds according to the civil and canon law, refuse, where a temporal matter is pleaded in bar of an ecclesiastical demand, to admit the evidence of one witness, they shall be prohibited; as, where an executor proves payment of a legacy by one witness, &c.

Show. 158; 3 Mod. 172, 283; Comb. 160; Holt, 752; 1 Ld. Raym. 220; Vent. 291; Carth. 142; 2 Salk. 547.

Hence it hath been established as a fundamental rule in the courts of equity, that on a bill for relief a decree cannot be made on the testimony of one single witness against the positive denial of a fact by the defendant's answer; (b) because the oath of the party is ever looked upon to be as good as the oath of a single person.

Vern. 161; 3 Chan. Ca. 123. ¶ 1 Ves. 64; 3 Atk. 646; 1 Ves. 97, 125; 2 Ves. jun. 243; 6 Ves. 40; 9 Ves. 282. ¶ (b) If an executrix to a first husband marries a second, and a bill is exhibited against them to discover a trust, and they, in their answers, disagree in the matter, the wife confessing what the husband denies, and what the plaintiff can prove only by one witness, the plaintiff can have no relief; for one witness is not sufficient against the husband's answer; and the wife's confession will not avail, for she can be no witness against her husband. 2 Chan. Ca. 39; 3 P. Wms. 238. ¶ Neither the answer nor the evidence of the wife can be used for or against the husband. *City Bank v. Bangs*, 3 Paige, 36. ¶

Yet there may be cases in which the court will ground a decree upon the testimony of a single witness; as, where that testimony is supported by circumstances, or is not clearly and positively contradicted by the answer.

¶ *E. I. Company v. Donald*, 9 Ves. 283. Lord Chancellor Eldon, in delivering judg-

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ment in this case, admirably explains the rules of evidence peculiar to a court of equity, and the principles on which they are founded. See also *Only v. Walker*, 3 Atk. 407; *Le Neve v. Le Neve*, *Ibid.* 650; *Walton v. Hobbs*, 2 Atk. 19; *Janson v. Rany*, *Ibid.* 140; *Pember v. Mather*, 1 Br. Ch. Rep. 52; *Evans v. Bicknell*, 6 Ves. 184; *Biddulph v. St. John*, 2 Sch. and Lefr. 521. ¶ See *Lenox v. Prout*, 3 Wheat. 520; *Clason v. Morris et al.*, 10 Johns. 524; *Smith v. Brush*, 1 Johns. Ch. R. 459; *Clark v. Van Riemadyk*, 9 Cranch, 160; *Russel v. Clark's Ex'rs.*, 7 Cranch, 92; *Beatty v. Smith*, 2 H. & M. 395; *Purcell v. Purcell*, 4 H. & M. 507; *Greenland v. Brown*, 1 Desaus. 196, 200; *Zylstra v. Keith*, 2 Desaus. 140; *McDowell v. Teasdale*, 1 Desaus. 459; *Neufville v. Mitchell*, 1 Desaus. 480; *Heffner v. Miller*, 2 Munf. 43; *Moffat v. McDowall*, 1 McCord, Ch. R. 434, 440; *Sullivan v. Bates*, 1 Litt. 42; *Searcy v. Pannell*, *Cooke*, 110; *Hawkins v. Embry*, 3 Monr. 225; *Roberts v. Salisbury*, 3 Gill & Johns. 425, 432. *g*

Also, by several acts of parliament, a certain number of witnesses is required, as by the 29 Car. 2, c. 3, "That all devises of lands shall be attested and subscribed in the presence of the testator, by three or four credible witnesses, or else shall be void."

But for this vide head of *Wills*.

By the 7 W. 3, it is enacted, "That no person shall be indicted, tried, or attainted for high treason, but upon the oaths of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the (a) same treason."

(a) There must be one witness to one, and another witness to another overt act of the same species of treason, or at least one witness to an overt act, and another to a material circumstance to prove it. 2 Hawk. P. C. c. 46, § 2. But for this vide tit. *Treason*. ¶ The constitution of the United States, art. 3, § 3, provides that "no person shall be convicted of treason unless by the testimony of two witnesses to the same overt act, or on confession in open court." *g*

¶ On an indictment for perjury, the evidence of one witness is not sufficient to convict the defendant; (b) it must be supported either by another competent and credible witness, or by such circumstances as would authorize a conviction where only one witness is required, or at least they must be such as are strongly corroborative of the testimony of the accusing witness.

(b) 10 Mod. 92. See 6 Cowen, 120, 121; 4 C. H. Rec. 58; *State v. Molier*, 1 Dev. 263, 265. *g*

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It is held to be maintenance for a person officiously to give evidence in a cause, without being called (c) upon to do it. Also, if a man, who is not subpœnaed, happens to be in court during a trial, he shall not be forced to be sworn against his will; but, if he consents, the want of a subpœna is not material: and in certain cases, the court will, in discretion, wait till a subpœna can be procured.

21 H. 6, 6 a; 11 H. 6, 4 b; Bro. *Maintenance*, 5, 51; 2 Ro. Abr. 118. (c) [This is now not law. See 4 T. R. 340.] ¶ The witness may attend voluntarily and be sworn and examined. *De Benneville v. De Benneville*, 1 Binn. 46; S. C. 3 Yeates, 558. A bystander is obliged to testify in a criminal case, where the proceedings are by indictment. *Rex v. Sadler*, 4 Car. & Payne, 218. But see 1 Dall. 439. *g*

Hence it follows, that the parties have (d) a right to process to bring in their witnesses, and to this purpose it is enacted by 5 Eliz. c. 9, § 12, "That if any (e) person or persons, upon whom any process out of any of the courts of record within this realm, or Wales, shall be (g) served, to testify or depose concerning any cause or matter depending in any of the same courts, and having (h) tendered unto him or them, according to his or their countenance or calling, such (i) reasonable sum of money for his or their costs and



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charges, as, having regard to the distance of the place, is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary; that then the party making default to lose and forfeit for every such offence ten pounds, and to yield such further recompense to the party (k) grieved, as by the discretion of the judge of the court out of which the said process issues shall be awarded, according to the loss and hinderance that the party which procured the said process shall sustain, by reason of the non-appearance of the said witness or witnesses; the said several sums to be recovered by the party so grieved against the offender or offenders, by action of debt, bill, plaint, or information, in any of the queen's majesty's courts of record, in which no wager of law, essoin, or protection to be allowed."

(d) And therefore witnesses are privileged *cundo et redeundo*, for which vide tit. *Privilege*. (e) A feme covert is within the statute, and if she be served with a subpoena, and refuse to appear, the action lies against the husband and wife. Cro. Eliz. 122; Havitholme and Harvey, adjudged; Jon. 430, S. C. and S. P. adjudged. (g) A delivery of a ticket containing the substance of the writ, is a sufficient service within the act; 5 Mod. 355; Cro. Car. 540, S. P., for there being two, three, or four names of witnesses in one writ, he cannot leave the writ with every one of them; and to have several writs for every witness would be very chargeable to the subject. [Four witnesses only can be put in one writ of subpoena; Cowp. 846; and a ticket should be made out for each witness, and personally delivered to him, a reasonable time before the day of trial, 2 Str. 1054; for witnesses ought to have a convenient time to put their own affairs in such order that their attendance on the court may be of as little prejudice to themselves as possible. 1 Str. 510.—(h) If a feme covert be the person to appear as a witness, the tender must be to her, and not to her husband. Cro. Eliz. 122; W. Jon. 430, S. P. (i) If the party gives the witness a shilling, which he accepts, and promises, that on his appearance he will pay him all further reasonable charges; this is sufficient. Cro. Car. 522, 540; Marsh, 18. || Regularly, no witness is bound to appear in civil cases, unless his reasonable expenses for going to and returning from the trial be tendered to him at the time of serving the subpoena; nor, if he appears, is he bound to give evidence, till such charges are actually paid or tendered; Chapman v. Pointon, 2 Str. 1150; 13 East, 16, n. a, S. C., more fully reported; Bowles v. Johnson, 1 Bl. Rep. 36; Fuller v. Prentice, 1 H. Bl. 49; except he reside, and be summoned to give evidence, within the bills of mortality. 3 Bl. Comm. 369; Tidd's Pr. 805. If a witness is brought over from a foreign country after the commencement of the action, it should seem that the expenses of his passage over, subsistence here, and of his return, are to be allowed on the taxation of costs. Sturdy v. Andrews, 4 Taunt. 699. See Cotton v. Witt, Ibid. 55. *Secus*, if the witness were here before the commencement of the suit, Schimmel v. Lousada, Ibid. 695, or if, being in this country, he was detained here for the purposes of the trial; for in these cases the expenses of his subsistence here during the action only will be allowed. Sturdy v. Andrews, *ubi supr.* || (k) In Cro. Eliz. 130, and the S. C. Leon. 122, it is adjudged, that the plaintiff need not set forth any special damage which he sustained by the negligence of the defendant in not appearing to give evidence, where the action is brought for 10l. only, and not for any more damages; but the contrary has since been resolved in Cro. Car. 522, 540; Goodwin and West, Jon. 430; and Madison and Shore, 5 Mod. 355, which was affirmed on a writ of error; for there must be a party grieved, otherwise there is no cause of forfeiture, and a particular damage must be set forth, &c. [But the action or the further recompense will not lie, unless such recompense hath been previously assessed by the court out of which the process issued; neither the jury, nor the judge at *nisi prius* being competent to do it. Pearson v. Iles, Dougl. 556. Upon such assessment debt may be brought. {And an action for damages will lie at common law. Ibid. 561, S. C.; 9 East, 473, Amey v. Long. See Peake, N. P. 60, Bland v. Swafford.} However, the more usual way is to proceed by attachment against the witness neglecting to attend. But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served; Smalt v. Whitmill, 2 Str. 1054; Wakefield's case, Ca. temp. Hardw. 313. β In New York, when a witness merely disobeys a subpoena, the court will, in the first place, grant a rule to show cause why an attachment shall not be awarded. Jackson v. Mann, 2 Caines, 92; and the same rule obtains in Virginia. Morris v. Creel, 1 Virg. Cas. 333. When he refuses to attend, an attach-

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ment will be issued in the first instance. *Andrews v. Andrews*, 2 Johns. Cas. 109.<sup>g</sup> And that his reasonable expenses were paid or tendered to him. *Chapman v. Pointon*, 2 Str. 1150; *Stephenson v. Brookes*, Barnes, 33; *Bowles v. Johnson*, 1 Bl. Rep. 36.] {See 8 East, 319, 323, *Battye v. Gressley*.}

{Where material written evidence is in the possession of a witness, a *subpoena duces tecum* may be issued, directing him to produce it on the trial: and he is bound to obey the writ and produce the papers demanded by it, if they are in his possession and he has no lawful reason for withholding them. Of the validity of the reason the court is to judge.

9 East, 473, *Amev v. Long*.—Lord Kenyon held that a witness could not be compelled to produce his *private* papers. 1 Esp. Rep. 405, *Miles v. Dawson*; 4 Esp. Rep. 43, *Bateson v. Hartsink*.}

If a person, who can give evidence against one who is accused of felony, refuses to be bound to do so at the general jail delivery, &c., the justice of peace may either commit to prison such person so refusing, or may bind him to his good behaviour, and to appear at the next jail delivery, or quarter sessions.

Dalt. Just. 111. § See *Commonwealth v. Jones*, 1 Virg. Cas. 270.<sup>g</sup>

Lord Preston was committed by the Court of Quarter Sessions for refusing to be sworn to give evidence to the grand jury on an indictment of high treason; he was brought by *habeas corpus* in B. R.; and Holt, C. J., said, it was a great contempt, and that had he been there he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed.

Salk. 278.

[Where a witness is detained in prison, or on board a ship under the command of an officer, who refuses to allow his attendance, a *habeas corpus ad testificandum* is necessary to bring him up; for which an application is made to a judge, upon an affidavit, sworn to by the party applying, (a) stating that he is a material witness; and, in case of his being on board a ship, that he is willing to attend: (b) Upon this application, the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed, and sealed. (c) But a *habeas corpus ad testificandum* will not lie to bring up a prisoner of war; (d) and where the application for it appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it. (e) The writ being sued out, should be left with the sheriff, or other officer in whose custody the witness is detained, who will bring him up, on being paid his reasonable charges.

Tidd's Pr. 528. {See 4 East, 587. In the matter of Sir Edw. Price.} (a) Fortesc. 396. (b) Cowp. 672. (c) Imp. K. B. (d) Dougl. 419. (e) 3 Burr. 1440; 2 Cr. Pr. 248, 249. Qu. Whether the officer may not require an indemnity against the prisoner's escape? Id. Ibid. § See *Wattles v. Marsh*, 5 Cowen, 176; *Hassam v. Griffin*, 18 Johns. 48; *Matter of Stacy*, 10 Johns. 328; *Matter of Carlton*, 7 Cowen, 471; *Noble v. Smith*, 5 Johns. 357; *Utica Bank v. Kibbe*, 7 Cowen, 424.<sup>g</sup>

|| It having been doubted, whether persons in custody could be brought up as witnesses by writ of *habeas corpus* to give evidence before any other courts than those at Westminster, it is enacted by 43 G. 3, c. 140, that any judge of the courts at Westminster may, at his discretion, award such writ for bringing a prisoner, detained in any jail in England, before a court martial, or before commissioners of bankrupts, commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant.

Phil. Ev. 10.

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Where a cause of action has arisen in India, or any offence has been committed there, which is to be tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by 13 G. 3, c. 63, § 40 & 44. ||

It seems that by the common law the defendant, in capital cases, has no right to any process against his witnesses, without a special order of the court; but now by the 7 W. 3, c. 3, it is enacted, that all persons accused and indicted for any high treason, whereby any corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them at any trial or trials, as is usually granted to compel witnesses to appear against them. And now, since the statute of 1 Anne, c. 9, which ordains, that the witnesses for the prisoner shall be sworn, process may be taken out against them of course in any cause whatsoever.

2 Hawk. P. C. c. 46, § 30. β The Constitution of the United States provides, Amendm. art. 6, that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favour. See *United States v. Moore, Wallace*, 23.g

On a commission issuing out of Chancery for the examination of witnesses, there must be a *subpœna ad testificandum* taken out, directed to the witnesses, and a summons from two of the commissioners, of the time and place where they are to be examined; and if the witness so summoned and served do not appear, the court will grant an attachment against him, unless he come up at his own expense to be examined before the examiner; or if he be summoned by the commissioners without a *subpœna ad testificandum*, and do not appear, the court will order such witness to attend at his own expense, and to be examined; and if he disobey such order, then an attachment shall go against him.

|| If a witness has in his possession any deeds or writings, which are thought necessary at the trial, a special clause must be inserted in the subpœna called a *duces tecum*, commanding him to bring them with him. If the writings are in the possession of the adverse party or his attorney, notice should be given to produce them, and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents will be admitted. It is not necessary to give notice to the defendant himself: notice to his attorney will be sufficient, even in penal actions.

Phil. Ev. 11; *Attorney-General v. Le Merchant*, 2 T. R. 203; *Cates v. Winter*, 3 T. R. 706. β See *Rogers v. Van Hoesen*, 12 Johns. 221; *Dobbins v. Watkins*, Col. Cas. 33; *Eisenhart v. Slaymaker*, 14 S. & R. 153; *Jackson, ex dem. Burr v. Shearman*, 6 Johns. 19; *Bogart v. Brown*, 5 Mass. 18.g

The writ of *subpœna duces tecum*, as well as the other writ of *subpœna ad testificandum*, is compulsory on the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required by the court.

*Amey v. Long*, 9 East, 485. || β See *Bull v. Loveland*, 10 Pick. 9, 14; *Gray v. Pentland*, 2 S. & R. 31; *United States v. Reyburn*, 6 Pet. 352, 366; *The People v. C. P. of New York*, 8 Cowen, 127; *Hawkins's ex'r. v. Sumpter*, 4 Desaus. 446.g

It seems that a party subpoenaed to the assizes, and not attending, is guilty of a contempt, though the cause is not called on. But the Court of Common Pleas will not grant an attachment unless the affidavit state that the witness was called at the trial.

*Barrow v. Humphreys*, 3 Barn. & A. 591; *Malcolm v. Ray*, 3 Moo. 222; and see 5 Taunt. 260; 1 Marsh. 410; 6 Taunt. 9; 1 Bing. R. 366.

## (E) Of the Manner of giving Evidence.

A witness is liable to attachment if he leave the court, thinking, without any sufficient ground, he is not wanted, and the plaintiff is nonsuited for want of his evidence.

Malcolm v. Day, 3 Moo. 579.

A justice may commit a *feme covert*, or other party, who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions, or to give sureties for appearance; and a witness's attendance in such case may be compelled by subpoena from the crown office.

Bennet v. Watson, 3 Maule & S. 1; Rex v. Ring, 8 Term R. 585.

A witness cannot recover compensation for time, though an express promise has been made.

Willis v. Peckham, 1 Bro. & Bing. 515; and see 7 Moo. 120; 5 Maul. & S. 156.

One subpoenaed, but who refuses at the trial to give evidence, because his expenses are not paid, may yet maintain *assumpsit* for the necessary expenses of attendance against the party who subpoenaed him.

Hallet v. Mears, 13 East, 15: and see Battye v. Greeley, 8 East, 319.

A person bringing papers under a *subpoena duces tecum*, may be compelled to produce them, without being sworn.

Daws v. Dale, 1 Moo. & M. 514.

## (E) Of the Manner of giving Evidence: And herein,

1. *Where the Examination is in open Court; and therein of such Questions as may be asked a Witness.*

§ ALL testimony must be given under the sanction of an oath or solemn affirmation of the witness, for without this sanction, no witness, however high his moral character may be, can be heard to testify. There are three modes of giving this sanction. The first by the witness holding up his right hand, while the officer repeats, "You do swear by Almighty God, the searcher of hearts, that," &c. "And this as you shall answer to God at the great day." (a) Secondly, the most usual form is by the witness taking the Gospel in his right hand, while the officer repeats, "You do swear that," &c., "So help you God," and then the witness kisses the book. The commencement of this oath is made by the party's taking hold of the book, after being requested by the officer, and ends with the words "So help you God." (b) The origin of this oath may be traced to the Roman law, (c) and the kissing the book is said to be an imitation of the priest kissing the ritual as a sign of reverence, before he reads it to the people. (d) Thirdly, the attestation in the affirmation is as follows: the officer repeats, "You do solemnly, sincerely, and truly declare and affirm that," &c., to which the witness answers "Yes," or merely gives his assent by nodding his head.

(a) 1 Breeze's R. 28. (b) 9 C. & P. 137. (c) Nov. 8, tit. 3; Nov. 74, cap. 5; Nov. 124, cap. 1. (d) Rees' Cyclop. h. t.

The oath may, however, be varied in form so as to conform to the religious opinions of those who take it.

16 Pick. 154, 156, 157; Ry. & Mo. N. P. Cas. 77; 2 Hawks, 458; 6 Mass. 262; 2 Gallis. R. 346.

The examination of witnesses *viva voce*, in open court, is justly esteemed one of the greatest excellencies of our law, not only from the awe and reverence which the solemnity of the manner is supposed to produce in the witness, and the regard which from thence he must have for truth, but also from the benefit of cross-examining: and further, the air and manner of

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giving evidence often carry such convictions with them, as will induce the court and jury to believe or reject what the witness has sworn.

Hob. 325; Hale's Hist. C. L. 253 & 259; Pref. to Fortesc. Rep. ii. to iv.; Vaugh. Rep. 143.

Hence it hath always been held as a settled rule, that in cases of life, no evidence is to be given against a prisoner, but in his presence.

2 Hawk. P. C. c. 46, § 1. β See Reg. v. France, 2 M. & Rob. 207; Commonwealth v. Richards, 18 Pick. 434.γ

Also in a civil cause, where the jury withdrew to confer about their verdict, one of the witnesses, that was before sworn on the part of the defendant, was called by the jurors, and he recited again his evidence to them, and they gave their verdict for the defendant; and complaint being made to the judge of assize of this misdemeanor, he examined the jury, who confessed all the matter, and that the evidence was the same in effect that was given before, *et non alia nec diversa*; and this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire facias de novo* was awarded.

Cro. Eliz. 189, Metcalfe and Dean.

But it is said, that a witness, who by reason of sickness, extreme age, or (a) other cause, cannot come to a trial, may, by order of court, (b) be examined in the country before any judge of the court where the cause depends; and the testimony so taken shall be allowed to be given in evidence at the trial.

Style's Pract. Reg. 671, 672. (a) In Comb. 63, it is said, that witnesses may be examined before a judge, by leave of the court, as well in criminal causes as in civil, where a sufficient reason appears to the court, as going to sea, &c., and then the other side may cross-examine them; but for this vide Keb. 36, 249, 787; 2 Keb. 13. (b) [The order for this purpose cannot be obtained without consent; the depositions of witnesses, upon interrogatories, not being the best evidence the nature of the case admits of. Tidd's Pr. 529. The court, however, will do every thing in their power to make the parties consent, when necessary; as by putting off the trial, at the instance of the defendant, if the plaintiff will not consent, Cowp. 174; Dougl. 419; and if the defendant refuses, the court will not give him judgment as in case of a nonsuit. Tidd's Pr. 529.] {But see 1 Bos. & Pull. 210, Calliand v. Vaughan.} || Where a party, after obtaining leave by consent, examines witnesses abroad on depositions, he will not be entitled to any allowance in the taxation of costs for the expense of taking the depositions, although he may succeed in the action. Stephens v. Crichton, 2 East, 259; Taylor v. Royal Exchange Assurance Company, 8 East, 393. The same rule prevails in the Court of Chancery; if a party applies to that court for a commission to examine witnesses, he must pay the expenses. Phil. Ev. 11.]]

But, if a witness going to sea be by rule of court examined upon interrogatories before a judge, and the trial come on before he is gone, his deposition shall not be read, but he must appear; for the rule was made on supposal of his absence.

2 Salk. 691. β The Samuel, 1 Wheat. 9.γ

Every person produced as a witness must, before he gives his evidence, be sworn to depose the truth, the whole truth, and nothing but the truth: this the law required in all cases, (c) except on indictments for capital offences, where by (d) immemorial practice, the witnesses against the king were not suffered to be sworn.

(c) Cro. Car. 292; 2 Bulst. 147. β A person is to be sworn in the form most binding on his conscience. Edmonds v. Rowe, Ry. & Mo. 77. See Vail v. Nickerson, 6 Mass. 262; United States v. Coolidge, 2 Gall. 364.γ (d) But my Lord Coke says, that he never read in any statute, ancient author, book, case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore that there

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is not so much as *scintilla juris* against it. 3 Inst. 79. And in H. P. C. 264, it is said, that there is no known law against it.—But in 2 Hawk. P. C. c. 46, § 29, it being the constant practice not to suffer witnesses to be sworn against the king upon indictments of capital crimes, the judges presumed it founded originally on some statute, or other good foundation, and were therefore tender of departing from the settled practice.

But now by 1 Anne, st. 2, c. 9, § 3, it is enacted, “That every person who shall be produced, or appear as a witness on the behalf of the prisoner, upon any trial for treason or felony, before he or she be admitted to depose, or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are by law obliged to do; and, if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which by any of the laws and statutes of this realm are and may be inflicted upon persons convicted of wilful perjury.”

By the practice of the courts, if one be produced and sworn for the plaintiff or defendant, being once (a) sworn, the other may examine him to any thing whatsoever, though he be the solicitor of the party who produces him: (b) also either party may, on application to the court, have the witness examined apart, and out of the hearing of the others. (c)

(a) || If he has been once sworn, the other party may cross-examine him, though he gave no evidence for the party calling him. *Philips v. Eamer*, 1 Esp. N. P. C. 357. And it is reported to have been ruled at *nisi prius*, that, if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause: so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. *Dickinson v. Shee*, 4 Esp. N. P. C. 67. But it has been well observed, that in the case referred to, the witness might possibly have shown a strong bias in favour of the party who first called him; and on that account perhaps a greater scope was granted to the adverse party than is usually allowed: that it may happen, on the other hand, that the plaintiff calls a witness, unwillingly and from mere necessity, knowing him to be favourable to the other side: that in such a case to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage; on the contrary, the court might perhaps be induced to invest the plaintiff's counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel to treat such a witness strictly as his own, and confine him within the limits of an examination in chief. *Phil. Ev.* 211. A witness cannot be cross-examined as to any fact, which, if admitted, would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, in case he should deny the fact, and in this manner to discredit his testimony; *Spenceley v. De Willot*, 7 East, 108, and if the witness answers such an irrelevant question before it is withdrawn or disallowed, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. *Harris v. Tippet*, 2 Campb. 638. || (b) [But a solicitor cannot be compelled, and ought not to disclose matters confidentially communicated to him by his client. (c) The like indulgence will be given to a prisoner; but he cannot demand it as of right. 4 St. Tr. 9.]

It is a general rule that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; (a) and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes against which he cannot be presumed prepared to defend himself.

2 Hawk. P. C. c. 46, § 20; 7 Mod. 119; Dougl. 593; *Cooke's case*, 4 St. Tr. 748. (d) || A witness shall not be compelled to answer not merely questions which have a direct tendency to subject him to penalties, but those also which have such a connection with them, as to form a step towards it. Formerly the judge frequently informed the witness, that he was not bound to answer; so frequently, as to prove that it was the duty of the court to do so. Now it appears to be understood, that the witness may waive the objection, and proceed, if he thinks proper: and in general it is left to his own discretion. *Paxton v. Douglas*, 16 Ves. 239. || A judge is not bound to answer an inquiry, whether he has administered an oath, or taken the acknowledgment of a

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deed out of his jurisdiction, as this may tend to impeach his conduct as a judicial officer. *Jackson v. Humphrey*, 1 Johns. 498. Nor is a witness bound to answer a question which may tend to show an officious and improper interference and attempt to influence a juror on the panel of the cause, by conversation. *Grannis v. Branden*, 5 Day, 260. See *Perry v. Almond*, 12 S. & R. 284; *Benjamin v. Hathaway*, 3 Conn. 528; *Billinger v. The People*, 8 Wend. 595.*g*

{And he cannot be cross-examined concerning a distinct collateral fact not relevant to the issue, for the purpose of contradicting the expected answer by other witnesses, in order to discredit the whole of his testimony.

7 East, 108, *Spenceley v. De Willott*.}

||It having been doubted whether a witness could be compelled to give any evidence, which might subject him to a civil action, or charge him with a debt; it is enacted by 46 G. 3, c. 37, that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such a question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty, or of any other person or persons."

The right, which the parties to a suit have, to refuse answering any question, is not in any degree affected by this statute; and therefore on a question of settlement, a rated parishioner is not compellable by the adverse parish to give evidence, as he is directly interested as party to the appeal, and does not come within the words or meaning of the act.

R. v. Woburn, 10 East, 395.||

If a witness, when under examination, through surprise and inadvertency, gives a wrong answer to a question that is asked him, he is always allowed to recollect himself, and that, which he affirms on due deliberation, is to be taken for the truth. So, if he mistakes the true state of the question, in such a manner as shows that it is rather owing to his weakness than perverseness, he cannot be punished for it as guilty of perjury.

5 Mod. 350; 13 Ves. 284, and tit. *Perjury*. *β Parry v. Almond*, 12 S. & R. 284.*g*

If a person is produced as a witness for the king, upon a trial in an information, and he is guilty of perjury, he cannot be punished for it on the 5 Eliz. by way of indictment, which is the suit of the king; and such a one hath been discharged accordingly.\*

Cro. Ja. 120, *Price's case*. \**Qu. de hoc?*

If a witness in giving evidence reflects on the character of another, or makes use of such words as are actionable; yet this being in a judicial way, he cannot be punished for it, nor will an action lie for such words.

Ro. Rep. 61.

[A witness shall not be allowed to read his evidence, but he may refresh his memory by any book or paper, if he can afterwards swear to the fact from recollection: but, if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, the *original* book or paper must be produced.

*Doe v. Perkins*, 3 T. R. 749; *Tanner v. Taylor*, Ibid. 754; 8 East, 282, 289; 1 East, 460.] *β Juniata Bank v. Brown*, 5 S. & R. 87; *Robertson v. Lynch*, 18 Johns. 451; *Smith v. Lane*, 12 S. & R. 87; *Féeter v. Heath*, 11 Wend. 477.*g*

||When a witness has recourse to a written memorandum for the purpose of assisting his recollection, there seems to be no good reason for confining

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him to such writings only as were drawn up at the precise time when the facts occurred ; for one person may have as clear and strong a recollection from looking at a paper half a year after the fact, as another who wrote down the fact on the very day it happened. However, the entry ought to have been made by the witness himself, or, if made by another, examined by him while the fact was fresh in his memory.

Phil. Ev. 209, Burrough v. Martin; 2 Camp. 112.]

A witness may refresh his memory from any book or paper, if he can swear to the fact from recollection; but if he cannot swear to the fact, except from finding it in the paper, the original must be produced.

Doe v. Perkins, 3 Term R. 749; and see 8 East, R. 273; Maugham v. Hubbard, 8 Barn. & C. 14.

Two or three lines of a letter may be exhibited to a witness, without showing the whole, and the witness may be asked whether he wrote the part exhibited. But, if he deny, he cannot be examined to the contents of the letter.

Queen's case, 2 Bro. & B. 286.

It is not allowable, on cross-examination in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and having asked him whether he wrote that letter.

Queen's case, 2 Bro. & B. 286.

In order to discredit a witness by proof of a contradictory statement, it is not enough to ask him generally whether he has ever made such a statement, but particulars must be specified to him.

Angus v. Smith, 1 Moo. & M. 473.

An examined copy of a deposition in Chancery is admissible in evidence, for the purpose of contradicting the testimony of the same person when produced afterwards as a witness.

Highfield v. Peake, 1 Moo. & M. 109.

Under 13 G. 3, c. 63, § 44, a *mandamus* is grantable to examine witnesses in India on behalf of a *defendant* in a civil suit.

Grillard v. Hogue, 1 Bro. & B. 519; and see 1 Bos. & Pull. 177.

It is an inflexible rule in the Exchequer that a witness who is present in court during a trial when he ought not to have been there, under an order made for that purpose, cannot be examined as a witness ; but it seems discretionary with the judge in other courts.

Attorney-General v. Bulpit, 9 Price, 4; Parker v. M'William, 6 Bing. 685.

Where a commission to examine witnesses abroad directed the depositions to be reduced to writing in the English language and sent to England, and to swear an interpreter to interpret the evidence of the witnesses not understanding the English language, and the depositions were reduced to writing in the foreign language, and translated within six weeks into English by the interpreter, this was held sufficient.

Atkins v. Palmer, 4 Barn. & A. 377.

It is no objection in such case that a clerk to the plaintiff's attorney is one of the commissioners.

4 Moo. 424.



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2. Of Examinations and Proofs in Chancery.

By the civil and canon law it was absolutely necessary, that there should be a citation taken out against the defendant previous to the examination of witnesses. And the reason is, that the defendant, if cited, might either examine or object to their credibility, or put such cross interrogatories to them, as might bring out circumstances in his favour, which he would not have an opportunity to do, if he were not cited. But it was not necessary for the defendant to appear, because the citation is in his favour, and he might renounce a privilege introduced in his favour.

Gilb. For. Rom. 115, 116.

Hence it is, that in Chancery, after the plaintiff has replied to the defendant's answer, before he proceeds to examine any witnesses, he must take out a subpoena against the defendant to rejoin. But, if the plaintiff serves the defendant with a subpoena to rejoin before he has filed a replication, the defendant appearing upon such subpoena shall have his costs taxed, because the plaintiff had not closed the contest of the answer before he served the subpoena to rejoin.

The defendant being served with a subpoena to rejoin, the plaintiff, of course, upon producing an affidavit thereof, is to have an order for the defendant to rejoin and join in commission in four days, giving the defendant's solicitor notice thereof: and the plaintiff thereupon may, in eight days afterwards, leaving his commissioners' names at the office, have, at his own costs, a commission *ex parte* directed to two of the plaintiff's commissioners, and two such as the officer shall think fit to nominate.

Also, it is usual to apply by petition or motion, that a subpoena to rejoin *return. immediate* may be awarded against the defendant; and that service thereof on the defendant's clerk may be deemed good service on the defendant; and to this is often added, especially in a country cause, that the defendant may join and strike commissioners' names sometimes in four days, sometimes in a week; or that the plaintiff may have a commission *ex parte*, directed to his own commissioners; and all this is of course.

But the more usual way is for each party to name four commissioners for the examination of witnesses, and two apiece are struck out on each side; and if a defendant join in a commission and names commissioners, and yet afterwards refuses to strike, the court, upon petition, will strike out such two of them as they please, and the commission shall go to such of the four as are left standing.

But here it is necessary to observe, that there is an office called the Examiner's Office, which extends itself, and has a right to examine all witnesses in town, or within ten miles of town, which is the circuit of the court; and if any commission be made out, or witnesses examined within that district, the depositions taken by commission will, upon complaint, be suppressed, and the clerk who made out the commission will stand committed for a misbehaviour, and breach of the known duty of his office. (a)

(a) || It is now settled, that *after a decree* the examination may be by one of the masters of the court. It was usual formerly to insert in the decree, (and it is still constantly done in the Court of Exchequer,) that the master be armed with a commission to examine witnesses, and to direct the same into the country, if he thinks fit. But the course now is, for the master to examine, where he sees fit; and if he sees cause to direct a commission into the country, he does not direct it himself; but he certifies, that it is necessary; and upon that certificate an order issues for the commission. The same subpoena is used to bring witnesses before the master as before the examiner, and it is indeed no other than the common subpoena to answer, its purpose being explained

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by the label. Upon an examination in the country, the body of the writ expresses that it is to give testimony. *Parkinson v. Ingram*, 3 Ves. 603; *Sandford v. Biddulph*, 9 Ves. 36. It seems, that the masters had been in the habit of performing this part of their duty by their clerks; a practice which the master of the rolls gravely observes, in the first of the above cases, can *never be proper*; though there was a time when the very same practice was not considered as altogether improper at the rolls or in the Exchequer, and the judges of those courts are still enjoying the immunity arising from it. See *Gilb. For. Rom.* 124, 125, *et infra*, 235.—Evidence in the cause, though not read at the hearing, may be received by the master; but he cannot re-examine a witness, who has already been examined in the cause, without leave of the court; *Hough v. Williams*, 3 Br. Ch. Rep. 190; *Vaughan v. Lloyd*, 1 Cox, 312; *Smith v. Althus*, 11 Ves. 564, whether the interrogatories be to the same matter, or essentially different. *Browning v. Barton*, 2 Dick. 508; *Sawyer v. Bowyer*, 1 Br. Ch. Rep. 388. And even before decree, if publication has passed, and the depositions have been seen, he cannot, without the special order of the court, examine witnesses to the same matters. *Willan v. Willan*, *Coop.* 291. It is not indeed in the ordinary course of proceeding to re-examine the same person to the same matter; though this has been done *in toto* under very special circumstances; as, where the witness, from mere accident, and without design, was incompetent at the time of his original examination, the release, which he had executed, not being sufficiently comprehensive. *Sandford v. Paul*, 3 Br. Ch. Rep. 370; 1 Ves. Jun. 398, S. C. And to the order to re-examine, Lord Thurlow in one case declined adding any directions that the witness should not be examined to the same points, but left it to the judgment of the master; for if the witness had been examined in the cause on a more general interrogatory, under which he might have deposed to the point in question, but did not; and a more particular interrogatory were exhibited to get at his testimony, the master would feel no difficulty in admitting it. *Vaughan v. Lloyd*, *ubi supra*. But *qu.*; and see *Purcell v. M'Namara*, 17 Ves. 434.—“It was settled by Lord Hardwicke, that the master could re-examine a party in the cause without leave, but not a witness, because the decree was that he might examine parties as he should see fit, and he settles the interrogatories for the examination of the parties, but not for the examination of the witnesses.” *Per Lord Eldon*, *Willan v. Willan*, *ubi supra*. But in another case, his Lordship, agreeing that the interrogatories were so settled in those respective cases, says, “though the usual direction is to examine the parties, as the master shall think fit, the practice has been long settled, that the master cannot, without an order, examine a party, who has been previously examined; that it is not of course; but in the discretion of the court.” His lordship’s order therefore for the examination of a defendant in that case upon interrogatories, who had been examined and cross-examined, restrained it to such of the points in the cause, to which he had not before been examined, as the master should think reasonable. *Purcell v. M'Namara*, 17 Ves. 434.—The depositions taken before the masters are filed in their offices: but depositions taken in the country are filed in the six-clerks’ office. *Parkinson v. Ingram*, *ubi supra*.]

When interrogatories are filed in the examiner’s office, the witness is carried to the seat of the examiner, and a note in writing is there taken of his name and place of abode, to the end the other side may cross-examine, if they think fit; and, to prevent the personating of any witness, he is constantly carried in person, and shown at the seat of the adverse party’s clerk in Chancery. This being done, he returns back to the examiner’s office, and is there examined.

If interrogatories are filed for his cross-examination, the party who produces him must see that he stays, or returns, and attends to be examined.{}  
 ||But as it is usual, after the witness is sworn, for the examiner to appoint some other day for him to attend to be examined; to prevent the examination from being taken unknown to the other side, a note in writing may be stuck up in the examiner’s office, that if *such a person* come to be examined in *such a cause*, let him be cross-examined; or the examiner may be instructed to take care that the witness be cross-examined, which seems the better method.|| But, if no such interrogatories are filed, or he is not demanded to be cross-examined at the same time when he is under examination, and if he goes away about his business, the party who intends to cross-

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examine him must get him examined as well as he can; and the adverse party is not in that case bound to produce him over again, to attend to be cross-examined, since it was the party's fault he had not his interrogatories ready to cross-examine him, while he was under his former examination.

β {} Whittuck v. Lysaght, 1 Sim. & Stu. 446; Steer v. Steer, 1 Hopk. 362.g

If the examiner is served with an order whereby publication is to pass on such a day, he cannot afterwards examine any witness, though it often falls out, that three or four witnesses have been before that time sworn to the interrogatories, but have not attended to be examined; in this case the party cannot examine them without leave of the court, which is seldom denied on motion.

If a witness is duly subpoenaed to attend and be examined, and he refuses to attend; then, upon a certificate from the examiner that interrogatories are filed, and the witness hath not attended to be examined, he shall stand committed,(a) unless he attends and is examined in four days after notice. And this is sometimes allowed as a good cause for enlarging publication or putting off the cause. But, where publication is actually passed, and depositions are delivered out, if the party moves for enlarging publication, he must offer good reasons, by affidavit, or some material witnesses whom he hath to examine, and the reasons why they could not attend and be examined before publication passed.

(a) || So, if a person having attended as a witness refuse to be sworn, an order will be made, that he attend to be examined, or stand committed. *Hennegal v. Evance*, 12 Ves. 201. In these cases a motion is necessary before the witness can be committed for a contempt of such an order, upon which it is open to the court to consider, whether, under the circumstances, he ought to be committed. If the witness attending refuses to answer, conceiving the interrogatory put to him to be improper, he must demur. Whether the demurrer must be in writing, or may be *ore tertius*, does not appear. *Bowman v. Rodwell*, 1 Madd. 266.||

And in this case the plaintiff or defendant, as the case falls out, must make oath, and so must his clerk or solicitor, that they have neither seen, heard, read, nor been informed of any of the contents of the depositions taken in that cause; nor will they see, hear, read, or be informed of the same; || nor shall any person or persons by or with their or either of their order, privy, direction, or knowledge, read, see, hear read, or be informed of the same,|| till publication is duly passed in the cause; and upon such an affidavit it is usual for the court to enlarge publication, and give the party an opportunity to examine his witnesses. But he is to be limited to a time, and so as not to put off the hearing of the cause; for otherwise it would be hard to put the defendant to hear his cause without proof.

If the party examines some witnesses in town, and others by commission, he is not obliged to exhibit or file his whole set of interrogatories in the examiner's office; he only files such and such alone as he hath occasion to examine to in town; for if this were otherwise, it would put the plaintiff to a double expense of paying for copies of the whole interrogatories twice over.

Here also we must observe, that anciently the examination was before a judge of the court, who was to consider whether the witness answered readily, or whether he brought a story formed to the judge. The examination in Chancery was originally before the master of the rolls, who was one of the judges of the court; and therefore it should seem that the examination might be upon the bill without interrogatories drawn and framed, as the examination with the canonists may be upon the *libellus articulatus*. But

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afterwards the master of the rolls having left the examination of the witnesses to his clerks, as the barons of the Exchequer did to theirs, thenceforward not the judge, but the counsel for the party, whose witnesses were to be examined, framed the interrogatories upon which the clerks examined; and so it became the practice to send the commission to the commissioners to examine upon interrogatories, as the examiners did above.

Gilb. For. Rom. 117, 124, 125.

But, as witnesses often lived remote from the court, it was thought more convenient to appoint commissioners to examine such witnesses, the court sending a notary of their own, who was often in commission with them, and with those commissions a copy of the articles. The commissioners are to examine themselves, and cannot delegate their power, for *delegata potestas non potest delegari*.

Gilb. For. Rom. 118. *β* Cappeau's Bail v. Middleton and Baker, 1 Harr. & Gill, 154.*g*

The commissioners were likewise to be indifferent, for, upon exception to the partiality of any of them, the court would supply their places by putting in others; for though they are named by the parties, yet that is but by way of proposal to the court; for they are the ministers of the court, and therefore must be impartial.

Gilb. For. Rom. 118.

These commissioners were to have their charges, and (a) the rule was, that rich persons were to have their expenses only, because they were not to be paid for their duty; but the poor were to have, not only their expenses, but the price of their labour over and above, that they might not be damaged for doing their duty.

Gilb. For. Rom. 118. (a) But there seems to be no such rule or distinction at this day, and therefore it hath been resolved, that a commissioner may maintain an action for the labour and pains he has been at in the execution of the commission. *Stockhold v. Collington*, Carth. 206; || 1 Salk. 330, S. C.; *Comb.* 186, S. C.; 1 Show. 343; S. C. The acting commissioners are allowed one guinea *per diem* during the execution of the commission, exclusive of every other expense incident thereto. The clerks are in like manner entitled to half a guinea *per diem*. The expenses and charges of entertainment, and other matters, are borne by the parties joining in and attending the execution of the commission. If a commissioner refuse to sit, the suitor has no remedy by action against him; and though perhaps his refusal be a contempt of the court, if without excuse, yet doubtless they will not punish him for it, unless his reasonable expenses be allowed. 1 Show. 343.||

The interrogatories were anciently annexed to the commission, and so now they are supposed to be; but by consent of parties they are delivered to the commissioners at the opening of the commission; and this is the present practice.

The commissioners can only examine upon the set of interrogatories that are first put in before them, and no new ones can be examined upon before them, without leave of the court, because their commission is to examine upon such interrogatories as are supposed to be annexed to the commission, or such as are delivered in at the opening of the commission.

But before the examiner they may examine upon a new set of interrogatories, because that is presumed to be the examination of the judge; and the judge might examine upon interrogatories *ex re nata* out of the articles.

The plaintiff has regularly the carriage of the commission, and so is to appoint time and place; but, if the defendant supposes that the plaintiff will aggrieve him by such appointment, he may move for a duplicate of the commission, and that the officer may appoint time and place.

Gilb. For. Rom. 127.

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But, if the officer appoints time and place, yet the commissioners may agree to adjourn, because the appointment of the master is only for the opening of the commission; and, therefore, if the commissioners agree, they have yet power to make proper adjournments.

If the plaintiff, or his commissioners, abuse the carriage of the commission, by making unnecessary adjournments, or an irregular examination of the witnesses, that will entitle the defendant to a commission of his own, and he may have the carriage of it himself, because he shall not be obliged to produce and examine his witnesses where it cannot be done impartially.

Gilb. For. Rom. 127.

The fair examination by commissioners is not to adjourn without necessity, because that would be to harass the defendant by obliging him to travel from place to place to cross-examine; but, if it be necessary, they may adjourn, not only as to time, but place.

Gilb. For. Rom. 127.

And this affair must be performed as far as it is possible *uno actu*, that there be as little opportunity as possible to divulge the depositions, that neither side may better their proof.

Gilb. For. Rom. 127.

When a witness is produced, he must first be examined upon the interrogatories of the producer, and then forthwith, without suffering him to go abroad, upon the cross interrogatories of the other side; and the depositions are to be read over to him, every sheet whereof he is to sign, that so they may have the sense of the witness *ex re nata*, without being tampered with.

Gilb. For. Rom. 128. {See 2 Dall. 157, *Stewart v. Ross*. If cross interrogatories are not filed, but the party only files interrogatories to be put to his own witnesses, they need not be put to the witnesses of the other party. 1 Bin. 436, *Pigott v. Holloway*.}

The depositions, thus taken, are to be bound up, and signed and sealed by the commissioners, and sent by a messenger of their own to the court out of which the commission issued, who is to swear that they were not opened or altered since they were delivered to him.

Gilb. For. Rom. 128. {If the envelope in which it is enclosed is sealed by them, it is sufficient. 4 Cran. 224, *Grant v. Naylor*.} β See *Irving v. Viand*, 1 Young & Jer. 416.

If there be due notice of executing the commission, and at the day appointed the commissioners meet, and the commission be opened, but no witnesses examined nor adjournment made, the commission is lost; but, if it be not opened, they may give new notice, and proceed, unless in the mean time the court be moved, and order be made to pay the costs of the former day before they proceed. And the reason of this rule seems to be, that the not adjourning is a refusal of the commissioners to act any further upon it; for though the court itself never adjourns, because it is always open, yet the delegated authority must adjourn, because they have no standing and constant power, as the seal has, but their power arises from the words of their commission, which are *quod mandamus quod ad certos dies et locos quos ad hoc provideritis testes præd. coram vobis venire faciatis et advocetis*; so that if they do not provide time and place by an adjournment, they have no authority further to act by that commission, for the delegated authority must pursue the words of the commission, else it will be construed a refusal to act. But, if they do not open the commission, their not acting at that time will not be construed as a refusal to act; but it is a harassing

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of the defendant, for which he may complain to the court and have his redress; and the not acting before the commission is opened, is not construed to be a refusal, because they do not know what their authority is till the commission is opened.

Gilb. For. Rom. 129.

Where one of the plaintiff's commissioners and one of the defendant's meet, and the commissioner for the plaintiff refuses to act, the commission is lost; but the plaintiff shall pay the defendant his costs, and the defendant shall have a new commission and the carriage of it. And so it is when any commission is lost through the default of him that has the carriage of it; for he is unworthy to have the carriage of the commission, who appears to make default in the execution of it.

Gilb. For. Rom. 130.

If due notice be given, and the one side proceed and examine his witnesses; the other, if he does not examine, shall not have a new commission, unless affidavit be made of some reasonable cause of his non-attendance, and that neither the party who did not examine, nor any for him, or by his direction or knowledge, has seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c., till he has examined, or till publication. And the reason hereof is, that the defendant may not have an opportunity to know what has been proved for the plaintiff, and so be able to contest it.

Gilb. For. Rom. 130. {As to issuing a second commission, see 1 Dick. 6, Lewis v. Owen; Ibid. 18, Mineve v. Row; Ibid. 25, Earl of Coventry v. Countess of Coventry; 2 Dick. 793, Barnesly v. Powel; 3 Atk. 593, S. C.; 8 Ves. J., 316, Turbot v. —; 1 Cain. 345, Nicol and Thomson v. Columbian Ins. Co.; 2 Cain. 253, Ferris v. Smith.} *β* Bond v. Bond, 4 Sim. 518; Grinnel v. Cobbold, 4 Sim. 546; Grubb v. Grubb, 1 Young & Jer. 36.*g*

And where such a new commission is granted, it shall all be at the charge of the defendant, and the plaintiff is permitted to cross-examine without charge.

Gilb. For. Rom. 131.

But, if the plaintiff will, upon such new commission, produce any witnesses, he must be at equal charges of the commission, because he has equal benefit by the examination of his own witnesses.

Gilb. For. Rom. 131.

But he, at whose instance a commission is renewed, must examine all his witnesses upon such commission, or in court, before the return of it, because he cannot be indulged a farther probatory term.

Gilb. For. Rom. 131.

If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other neither examines nor puts in interrogatories, he shall never afterwards examine, unless upon special order of court, upon good cause shown, because he might form his interrogatories upon the discovery made to his commissioners of what the other side examined to.

Gilb. For. Rom. 131.

Where the commissioners meet and examine, and afterwards adjourn, and one of the defendant's commissioners takes away the commission, and the other commissioners meet at the day adjourned, and examine witnesses and return the depositions, the court will order such depositions to lie, and the *subpœna duces tecum* to issue against the commissioner who took away the

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commission, that he may bring in the authority by virtue of which the depositions were taken; for if they had a proper authority, the not having the commission before them does not impeach the depositions.

Gilb. For. Rom. 132.  $\beta$ In the Circuit Court of the United States, it has been held, that where a commission was directed to four persons jointly, and it was executed by only three of them, it could not be received in evidence, although two of the three commissioners were nominated by the party objecting. Guppy v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. C. C. R. 43.

There must be fourteen days' notice given by the commissioners to all the defendants, of the time and place of the execution of the commission, else it is not good notice, and the depositions will stand suppressed for irregularity, in not pursuing the tenor of the commission. This rule seems to be taken from the common law, which requires fourteen days' notice of trial. But, where it is a short vacation, as between Easter and Trinity term, ten days, or less, is good notice.

Gilb. For. Rom. 132.

No commission can be executed in term-time, unless by leave of the court, or consent of the parties; for the commissioners being generally country attorneys, it is more than probable they are in town attending the term, on their other clients' affairs, and, consequently, cannot attend upon the execution of the commission.

Gilb. For. Rom. 132.

If two of the plaintiff's commissioners attend at the time and place appointed for the execution of the commission, they may proceed therein *ex parte*, if the defendant's commissioners do not then attend; but, if the defendant's commissioners attend at the time and place appointed, and the plaintiff's commissioners are not there, they cannot go on, because the plaintiff having the carriage of the commission, he will not produce it, if he is disappointed of his commissioners, and, consequently, there can be no proceedings for want of the commission. This makes a duplicate of the commission more necessary; for in this case, if the defendant's two commissioners meet, they may proceed in the execution of the commission; but, where there is no duplicate, and the defendant's commissioners attend at the time appointed, and none attend for the plaintiff, the party grieved is to be recompensed in costs upon complaint made thereof to the court; and in that case the court will give him leave to sue out another commission, and order him the carriage thereof.

Gilb. For. Rom. 136. {A joint commission issued to London, in which the plaintiff named commissioners whose profession and particular residence he set out; and the defendant named A B and C D "of London." The plaintiff's commissioners caused inquiries to be made for the commissioners of the defendant, and no such persons being found, they executed the commission *ex parte*. The commission was held to be well executed. 1 Bin. 436, Pigott v. Holloway.}

There must, at least, one commissioner attend on each side; for if the plaintiff hath but one commissioner that attends on his side, he cannot proceed to execute the commission, unless one of the defendant's commissioners attends and joins with him therein; but, if one commissioner for each party attend, they may proceed in the execution of the commission, and not otherwise.

Gilb. For. Rom. 136. {If the commission is directed to four commissioners jointly, three of them cannot execute it; and the defendant may object though his two commissioners joined in the execution. It is a special authority derived from the court, and must be strictly pursued. 4 Dall. 410, Guppy v. Brown.}  $\beta$ When a foreign

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government will not permit the commissioners to act, depositions fairly taken in a foreign country, in the presence of the commissioners, by a judge of such country, and where all the interrogatories have been put and answered, and the depositions are otherwise regular, they may be read. *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. R. 7*g*

It having been found by common experience, that country commissioners were apt to publish and divulge all the evidence taken before them, even before the passing of publication, and in such a manner, as that it could rarely, if ever, be detected, because they usually disclosed it to the attorney or solicitor who employed them, and who was always their friend; and since the very life and vitals of almost every cause, and of every man's property, lie in keeping close and secret his evidence, till after the depositions are published, because after that there is an end of examining, unless it is to prove exhibits, (which may be done after the hearing, or by order *vidē voce*, and then they must be particularly named in the order, that the other side may have notice what is to be proved; and this indeed can only be to prove the execution of deeds, or signing receipts or acquittances; but a man cannot have leave to prove a will *vidē voce* at the hearing, because the due execution may come in question, (a) which cannot be examined to at the hearing *ore tenus*, but ought to be done before publication passes:)

Gilb. For. Rom. 141. (a) [No examination is allowed to points that would admit of a cross-examination. 3 Ves. 480.] || But see *Turner v. Burleigh*, 17 Ves. 355, where Lord Eldon says, "in the case of an exhibit proved at the hearing, the court would examine *vidē voce* at the hearing upon the suggestion of any question. In *Aylett's* case, upon an indictment for perjury, the question was made, whether this court had the right of examining *vidē voce*; and it was settled, that the examination may be in either way." See *Gascoigne's* case, 14 Ves. 182; *Ogle's* case, 11 Ves. 556.]

To remedy this inconvenience, the following order was made the 9th of February, the 8th year of G. 1, in Chancery:

Whereas this court hath been informed, that commissioners and their clerks attending the execution of commissions for examination of witnesses in causes depending in this court, do frequently, before publication is passed, and even before the executing of such commissions, disclose to or inform the parties, or their agents, of the contents of the depositions of witnesses taken on such commissions, which leads to introduce perjury, and occasions tedious and unnecessary examinations; for remedying and preventing thereof for the future, the Right Honourable the Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable the Matter of the Rolls, doth order, that from and after the last day of this present Hilary term, where any commission issues for examination of witnesses, all and every the commissioners named in such commission shall, before they act in or be present at the swearing or examining any witness or witnesses upon interrogatories in such causes, severally take the oath following: "You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with you, and you shall not publish, disclose, or make known to any person or persons whatsoever, except to the clerk or clerks by you employed and sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them, to be taken by you and the other commissioners in the said commission named, or any of them, by virtue of the said commission, until publication shall pass by rule or order of the High



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Court of Chancery."—Which oath is to be annexed in a schedule to the said commission.—And it is further ordered, that all and every the clerk or clerks attending the execution of such commission, and employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses examined on such commission, shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at the execution of such commission, severally take the oath following: "You shall truly and faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and engross the depositions of all and every witness and witnesses produced before and examined by the commissioners, or any of them named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners, or any of them, to take, write down, or engross the said depositions, or any of them, and you shall not publish, disclose, or make known to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken, wrote down, transcribed, or engrossed by you, or whereto you shall have recourse, or be any ways privy, until publication shall pass by rule or order of the High Court of Chancery."—Which oath is likewise to be annexed in the same schedule to the said commission.—These oaths the said commissioners are by such commissions to be empowered jointly and severally to administer to each other, and also to the persons attending as clerks to the said commissioners.

{The certificate of the commissioners that they took the oath is sufficient evidence of the fact. 4 Cran. 224, 231, Grant v. Naylor.}

If any practiser, or other person, goes about to tamper with or suborn any witness, upon complaint made thereof, and upon examination of the matter upon oath, he shall stand committed.

Gilb. For. Rom. 143.

|| If a commissioner be examined as a witness, at the execution of the commission, he must be examined by the other commissioners, as well previously to his acting as a commissioner, as also before any other witness be examined. After his examination he may join and proceed in the execution of the commission with the other commissioners; for if other witnesses be examined previously to the examination of a commissioner, and in the presence of that commissioner, the examination in that case would be irregular, the commissioner having heard the former examination. The deposition of a commissioner, who has so acted, and was afterwards examined in court, was suppressed upon motion. So, if a clerk, who writes for the commissioners, be examined as a witness, his examination must precede the examination of any other witness, except a commissioner under the same commission.

Hinde's Pr. 356; 2 Ch. Ca. 79; 1 Vern. 369; Gilb. For. Rom. 138.

If a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition in the usual way for that purpose. This order must be served on the adverse party's clerk in court, by leaving a true copy of it with him *personally*, or with his agent at his seat in the six-clerks' office, showing at the time of service the original order passed and entered. A defendant may obtain a like order for the examination of a codefendant. These orders are of course, (a) but they proceed upon a suggestion, that the defendant is not interested in the matters in question; and they are never granted without a clause of saving just exceptions to the other side, which

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must be made at the hearing. This order must be produced at the execution of the commission, or in the examiner's office, when the defendant attends to be examined; for without it he cannot be examined, it being only by virtue of this order, and the authority given to them by the court, that the commissioners or examiners are empowered to examine a defendant.

Hinde's Pr. 356, 357; Gilb. For. Rom. 139. See *Murray v. Shadwell*, 2 Ves. & Beam. 401, and the cases there cited. (a) They are of course before, but not after, a decree. *Franklyn v. Colquhoun*, 1 Ves. 218.¶

When the parties have examined, they give a rule, as they do in the civil and canon law, for publication; and if no cause be shown to the contrary within four days, the rule is made absolute.

When publication is moved to be enlarged, it must be upon notice, and upon good reasons offered to the court, and upon affidavits, showing the reasons why the party could not examine his witnesses sooner; and it is seldom or never done where it is to put off the hearing of the cause. (a)

Gilb. For. Rom. 144. (a) ¶ It has been refused on the application of a party who has taken the depositions of the opposite party out of the office, although by mistake. *Lawrell v. Titchborne*, 2 Cox, 289.¶

But, where the adverse party can suffer no injury, as, where the cause is not set down, or where the party is not served to hear judgment, there the court will enlarge publication upon asking for it.

And in some cases they will do it, though the cause is set down, and the party is served to hear judgment. But this must be when it is shown to the court, that it is not possible for the cause to come on very soon, and the court will in this case expect the party to appear *gratis* to hear judgment, on six days' notice to be given to his clerk in court, and to pray no day over, and will often oblige him to take no advantage for want of parties at the hearing. This forwards the plaintiff; for if default is made at the hearing, the decree cannot be made absolute till the next succeeding term; but, if the party who moves to enlarge publication, will not agree to appear *gratis*, and to pray no day over, he is often denied his motion, and with great justice, because in that case he intends only delay, which the court always avoids when in its power.

Gilb. For. Rom. 144.

When publication is passed, and the depositions are copied and delivered out, and either party has a mind to examine touching the credit {1} or reputation of any of the witnesses, the way is this:

They must file objections or articles, so called, in the examiner's office. These contain in substance the objections they make to the reputation of the witness; as in cases of felony, burglary, perjury, forgery, standing in the pillory, (b) or any other criminal case that would disable the party from being a good witness at the common law; for the rule of evidence is the same in equity as at law; if the party cannot be a good witness at law, no more can he be in equity. Or these articles may be founded upon the party's leading a lewd life, or being a common drunkard or swearer, or of ill repute and character in his neighbourhood, a common vagabond, a man not known, that hath no abode, or such like; though all these latter objections seldom come to any thing; for notwithstanding these, the man is a legal witness, and the court will hear his evidence, and judge of the credibility of it accordingly.

(b) ¶ Provided it be for an infamous crime, for it is the crime and not the punishment

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which incapacitates. 2 Wils. 18.} { This examination respecting the credit of the witness is confined to an inquiry into his general credit for veracity, or to contradicting him with regard to facts stated by him not in issue in the cause, and therefore not material. But it cannot, under pretence of examining to credit only, be extended to contradict the witness as to facts in issue. 8 Ves. J. 324, Purcell v. M'Namara; 9 Ves. J. 145, Wood v. Hamerton; 10 Ves. J. 49, Carlos v. Brook; 12 Ves. J. 406, Mill v. Mill.}

These articles being filed, and a certificate being produced from the examiner that they are so, the court, upon application, by motion or petition,(a) (or it may be done without,) will give leave to the party to examine witnesses thereof; and the other party, who is to support the credit and reputation of his witness, may examine accordingly *toties quoties*, and the depositions must be published as in other cases. But this is a case which but very rarely happens, and, generally speaking, it ends in nothing more than putting the party to an expense to no purpose.

Gilb. For. Rom. 148. (a) || This is an application, which the court very cautiously attends to, and will grant only to examine as to the credit of the witness by general interrogatories, and as to such particular facts as are not important to the matters in issue in the cause. Purcell v. M'Namara, 8 Ves. 324; Wood v. Hamerton, 9 Ves. 144; Carlos v. Brooke, 10 Ves. 49; Anon., 3 Ves. & Beam. 93; White v. Fussell, 1 Ves. & Beam. 151; 2 Ves. & Beam. 267, n. (g), S. C. Notice of the application is necessary, whether it be made before or after publication; Mill v. Mill, 12 Ves. 406; but it need not be supported by an affidavit. Watmore v. Dickinson, 2 Ves. & Beam. 267. The commission for this purpose should be executed before the hearing; if afterwards, the costs must be paid by the party taking it out. White v. Fussell, *ubi sup.*; Russel v. Atkinson, 2 Dick. 532. ||

When the depositions are thus copied and delivered out, and both parties come to see the interrogatories examined by each side, if they find them to be leading or impertinent, then it is the proper time to refer them to a master, for being too leading,(b) impertinent, or scandalous. This is done by motion or petition of course.

Gilb. For. Rom. 148. (b) || Depositions have been suppressed because the commissioners employed the clerk of one of the parties as their clerk; Wyatt's Pr. Reg. 122, referring to 2 Ch. Rep. 393; because they were brought before and admitted by the commissioners ready prepared. Shaw v. Lindsey, 15 Ves. 380. || It has been decided in the Supreme Court of the United States that the commissioners have a right to employ a clerk, and that it is, therefore, immaterial in whose handwriting the depositions are. 3 Peters, R. 8. See 2 Harr. & Johns. 442. g And because they were taken from the witness using during the examination full minutes in writing, which she stated to have been originally her own, put into method by the plaintiff's attorney, and so copied with some corrections by herself. Ferry v. Fisher, cited in 15 Ves. 382; Anon., Amb. 252. In the cases of Shaw v. Lindsey and Ferry v. Fisher, the commission was directed to proceed for the purpose only of re-examining the particular witness; but Lord Eldon added, in the first of those cases, that though the court does give this sort of direction, yet if it should happen that the witness could not be examined again, the objection does not go the length of preventing the court from directing hereafter, that the deposition may be opened, if necessity should require, that the rule should be dispensed with. ||

If the master reports the interrogatories to be leading, and this report is not excepted to, then all the depositions taken to these interrogatories must stand suppressed, as of course, by motion or petition; but, if the report is excepted to, as, on the one hand, the court never countenances leading or impertinent interrogatories; so, on the other hand, they are not over curious in these matters, because it may fall out that the interrogatories be reported leading in the very vital of the examination, and on the very point on which the cause turns; and when this comes to be the case, the party who referred them hath gained his end; for perhaps he had a very bad cause, if the depositions had stood; whereas, if they are suppressed, he hath a very good

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one, since his adversary must have his cause without any proof at all, unless the court is pleased to grant him another commission on payment of costs for his leading interrogatories, which is seldom or never done after the depositions are published. And it is hard, that in equity, a man should be deprived of a plain right, through the slip of another man's pen, or the inadvertency or unskilfulness of his counsel's penning his interrogatories; and therefore, if it is possible for the court to help him, they will, from the manifest inconvenience which must attend such a case. Indeed, if the interrogatories are reported to be leading in points upon which the gist of the cause does not turn, and if the depositions in these points should be suppressed, and the party have evidence enough left without it, there is no hurt done; but, if the very life and quintessence turn upon it, he will struggle to the last before he will let his depositions be suppressed.

Gilb. For. Rom. 148.

Therefore, where interrogatories and the depositions of a witness taken on them had been suppressed, for that the interrogatories were leading, and the court was moved, that a new set of interrogatories might be drawn, and settled by the master for the examination of this witness, whose evidence was very material, and yet would be wholly lost, unless the court would indulge them this way; though the practice was admitted to be always against it, and it was urged to be of dangerous consequence; yet, one precedent being produced to this purpose, and the interrogatories which had been suppressed, being such as might be drawn by many other counsel, without any apprehension of their being leading, the court, to let in the party to the benefit of his witness's testimony, ordered interrogatories to be put in, and settled by a master for his examination over again.

If the commissioners misbehave themselves, or if the commission is executed contrary to notice given to the party, or if the depositions returned by commission are so engrossed, or so interlined, that they are not legible; in these and many other cases of the like nature, there may be good reason to suppress the depositions; but in this last case the record or engrossment of the depositions is always brought into court by the proper officer: the court take the engrossment into their hands; and if it is possible to be read, or if it is handed down to the six-clerk, and he can read it, they will hardly suppress the depositions, or put the parties to a new trouble, or to the expense of examining all over again.

When the depositions are copied they must be signed by the examiner or proper six-clerk; for if either of the six-clerks, who constantly attend the court every day of hearing, stands up and says, that the books are not signed, they are not to be admitted to be read.

Gilb. For. Rom. 150.

The civilians had a manner of examining witnesses (*a*) in *perpetuam rei memoriam*, which was twofold, either the common examination, or in *meliori forma*. The common examination was, when witnesses were very old and infirm, or sick and in danger of death, or were going into other countries; in this case it was usual to file a libel, and without staying for the *litis contestatio*, the plaintiff examined his witnesses immediately, and gave notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses, if he thought fit; and these depositions stood good, in case the witness died or went abroad; but the plaintiff was obliged *edere actionem* within a year, otherwise these exa-

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minations went for nothing. But, if the witnesses lived or did not go abroad into other countries, then they were to be examined *post litem contestatam*.

Gilb. For. Rom. 118. (a) In what cases a bill to examine witnesses *in perpetuum rei memoriam* will now lie, vide Vern. 105, 185, 331, 354; 2 Vern. 159; Abr. Eq. 233, 234; 1 Atk. 571, 620; 1 P. Wms. 117; 1 Br. Ch. Rep. 469; 2 P. Wms. 162.

The examination *in perpetuum rei memoriam in meliori forma* is *ad transumenda instrumenta*; and in this case there must be a *litis contestatio* before the examination, because there is no need of so much celerity in proving instruments, as there is where witnesses are likely to die, or are going into remote parts. In these cases they are not confined to proceed in any action upon these instruments within a year.

But now the usual method is, where one man brings a bill against another, and hath a most material witness to examine, upon affidavit made, that this witness is in a languishing condition or danger of dying before he can be examined in chief; or that the witness is going a long voyage to India, or other remote parts, from whence he cannot return by the time he is to be examined in chief, and to which place he is bound, and cannot possibly stay; in either of these cases, the court upon motion or petition of either party will, and never refuses to make an order as of course, (a) for leave to examine such witness *de bene esse*, saving just exceptions to the other side.

Gilb. For. Rom. 140. [A witness may be examined *de bene esse* on affidavit that the thing to be examined into lies in the knowledge only of the witness, though there be no affidavit of his being old, or infirm, or in danger of dying. Shirley v. Ferrers, 3 P. Wms. 78; Hankin v. Middleditch, 2 Br. Ch. Rep. 641.] {8 Ves. Jr. 31, Bellamy v. Jones; or after trial of an issue, if the witness is old, and there is an intention of moving for a new trial. 6 Ves. Jr. 573, Anonymous.} (a) || Brydges v. Hatch, 1 Cox's Rep. 423; Pearson v. Ward, Ibid. 177. But the affidavit should state the particular points to which his evidence is meant to apply. Motions of this sort have been looked upon by the court with a great deal of jealousy, and where not made on the ground of age, require notice as well as an affidavit, either that the witness is of the age of seventy, or is the only witness to the particular fact, or is in a dangerous state, &c. Bellamy v. Jones, 8 Ves. 31. An order has been granted after the trial of an issue directed by the Court of Chancery, that the plaintiff be at liberty to examine a witness *de bene esse* for the purpose of securing his testimony in case of his death, upon the ground, that it was intended to move for a new trial, and the witness was above seventy years old. Anon., 6 Ves. 573. ||

If the witness lives till he can be examined in chief, he must be examined over again as other witnesses in chief are; but, if he dies in the mean time, then, upon producing and proving the register of his death, the party for whose benefit he was examined may apply, by petition or motion, for an order, with liberty to publish his depositions, (for they cannot be published without such an order;) and to the petition must be annexed a certificate of the death of the witness, and the party must show that he died before he could be examined in chief; and hereupon the court makes an order, not only to publish his depositions, but to read them at the hearing, saving exceptions; and notice of this order is always given to the adverse clerk to prevent surprise, and to give him an opportunity to object thereto, as he shall see occasion.

Gilb. For. Rom. 140. β Fisher v. Dale, 17 Johns. 345. γ

If the witness beyond sea be not returned, there must be an affidavit of it, and that the party has not heard from him for such a time, nor doth he know whether he is living or dead; and in this case there will be the like order, as in the case of the witness who died before he could be examined in chief.

|| The examination of a witness *de bene esse*, it is obvious, may be incidental.  
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tal to every suit in the progress of it; whereas the examination *in perpetuam rei memoriam* is the fruit of a suit instituted for that particular purpose. And herein seems to be the emphatical distinction between an examination *in perpetuam rei memoriam*, and an examination of a witness *de bene esse*; though the examination *de bene esse* may eventually be *in perpetuam rei memoriam*, if the witness so examined die before he be examined in chief.

The residence of witnesses beyond sea, or out of the jurisdiction of the court, whose testimony will be material to some of the parties in the suit, frequently occasions an application for a commission to examine witnesses abroad, and if foreigners, in their own language. (a) This commission, like all other commissions for the examination of witnesses, never issues but by an order of court; which may be applied for either by motion or petition to the master of the rolls. If by motion, (b) notice of it must be served on the adverse clerk in court, by leaving a true copy of the notice with the clerk in court personally, or with his agent at his seat in the six-clerk's office, on the day next but one before the motion is to be made, unless Sunday intervenes. There must be an affidavit that some of the witnesses, whose evidence will be material, and whom it will be necessary to examine on the behalf of the party making the application, reside at ———, and that the party cannot safely go to trial without their testimony. It is not necessary to state in the affidavit (c) the points to which the examination is intended, nor the names of the witnesses. Nor, if the matter in question (d) arise abroad, is it necessary to have that fact verified by affidavit; it is sufficient if it be shown out of the pleadings.

(a) But the depositions in this case are not to be taken in the language of the witness, but must be turned by the interpreter into English, and be so taken down and returned. *Lord Viscount Belmore v. Anderson*, 2 Cox, 288. β A deposition taken in the English language before Dutch commissioners, is valid, though it does not state that they had the assistance of a sworn interpreter. *Gilpins v. Consequa*, Pet. C. C. R. 85. γ (b) Where in the course of the proceedings on a bill of interpleader, a commission issued on the part of one defendant for the examination of witnesses abroad, of which notice was given to the plaintiff, but *not* to the other defendant; *Lord Chancellor said*, it might not perhaps be an inconvenient rule to make, that defendants to a bill of interpleader should give notice to each other of the issuing of a commission; but it had not yet been done, and he therefore could not discharge the order for irregularity. *Brymer v. Buchanan*, 1 Cox, 425. (b) *Oldham v. Carleton*, 4 Br. Ch. Rep. 88; *Rougemont v. Royal Exchange Assurance Company*, 7 Ves. 304. (d) *Jessup v. Dupont*, *Barnardist*. 192; *Akers v. Chaney*, 2 Br. Ch. Rep. 273.

The residence of an adverse party in England creates an absolute impossibility of giving him that notice of the time and place of executing a commission of this nature, which would be essentially necessary to the regular execution of a commission for the examination of witnesses in this country. The court therefore has substituted notice in this instance to the adverse party's commissioners, or to his agent, in lieu of notice to the party himself.

On granting an order for a commission of this kind pending an injunction against an action, it is not the practice of the Court of Chancery, though it was formerly the practice in the Exchequer, to insist upon the payment of the money into court.

*Cook v. Donovan*, 3 Ves. & Beam. 76. In *Foderingham v. Wilson*, Coop. 222, n., Lord Chancellor imposed this condition on the party applying, but that was on the special circumstances.

The return of this commission may be *without delay*, or on a *general return day* in term; but the former seems the better and more usual form.

*Gilb. For. Rom.* 140; *Hinde's Pr.* 307.

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If the witnesses reside in an enemy's country, the practice is to direct the commission to the nearest neutral port.

— *v. Romney*, Amb. 69; *Cahill v. Shepherd*, 12 Ves. 335.

Where the bill is merely for a discovery and commission to examine witnesses abroad, the Court of Chancery will, it seems, permit the commission to issue before answer, if the time for answering has expired, but not if it is still running. But the Court of Exchequer will not order a commission before issue joined.

*Noble v. Garland*, Coop. 229; *Foderingham v. Wilson*, Ibid.; *Yates v. Barker*, Ibid.; *Cheminant v. De La Cour*, 1 Madd. 208.

The defendant being entitled to examine witnesses in chief under a commission sued out by the plaintiff, is therefore entitled under the bill filed by the plaintiff to a commission for the examination of witnesses abroad, without filing a bill for that purpose himself.

*Sheward v. Sheward*, 2 Ves. & Beam. 116.

The sending out and receiving back a commission for this purpose, must be proved by affidavit.

*Bourdillon v. Alleyne*, 4 Br. Ch. Rep. 100.

It was moved on the part of the plaintiffs, that depositions taken abroad might be received and filed under the following circumstances: The depositions were taken at Gibraltar, whence they were brought to England from a commissioner by a Mr. Mawhood, charged with the safe delivery of them in the usual way. Mr. Mawhood being obliged to perform quarantine on his arrival off the coast of England, and thinking that the depositions might be wanted before the period of his quarantine expired, he sent them by a Portsmouth coachman to London, who left them with the plaintiff's solicitor there in a box sealed up, as Mr. Mawhood had received them from a commissioner in Gibraltar. Upon reading Mr. Mawhood's affidavit of the identity of the seals and package, and his reasons for sending the depositions to London, the court ordered them to be received and filed. This was moved upon notice, but not opposed.

*Bourdieu v. Trial*, Scac., 24th May, 1783, 2 Fowl. Pr. Exch. 94.

A commission for the examination of witnesses in Lisbon was executed, but the ship in which the depositions were sent to England was lost on the passage. The court ordered the commissioners to transmit the *drafts* of the depositions, and to certify the circumstances of the return of the commissions, but would not make any order for the reading of the drafts on the hearing of the cause, until after the commissioners had made their return and certificate.

*Burn v. Burn*, 2 Cox, 426.

A commission being granted to examine witnesses at Algiers, the plaintiff died before the execution of it, by which the suit abated; but two witnesses were examined there before notice of the plaintiff's death, one of whom had died since his examination. The court held, that although in strictness there was an abatement of the suit by the death of the plaintiff, and no such cause *in esse* as that in which the witnesses had been examined; yet, it being in a court of equity, and where the commissioners and witnesses had no notice of the plaintiff's death; it could not in reason or justice affect the validity of the depositions; which were therefore allowed to stand *in toto*, as well with regard to the witness then living, as to the witness who was dead.

*Thompson's case*, 3 P. Wms. 195.

## (E) Of the Manner of giving Evidence.

## §3. Of Depositions taken under the acts of Congress.

It is enacted by the act of Sept. 24, 1789, § 30, that when the testimony of any person shall be necessary in any civil cause depending in any district, in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a Supreme or Superior Court, mayor, or chief magistrate of a city, or judge of a county court or Court of Common Pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided, that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after being notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel. And in causes of admiralty and maritime jurisdiction, or other causes of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons, circumstanced as aforesaid, shall be taken before a claim be put in, the like notification, as aforesaid, shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the deposition, so taken, shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any given, to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a District Court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court, that probably it will not be in his power to produce the witnesses, there testifying, before the Circuit Court, should an appeal be had, and shall move that their testimony shall be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the court is sitting; or that, by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, That



## (F) Of written Evidence.

nothing herein shall be construed to prevent any court of the United States from granting a *dedimus protestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice; which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which, if they relate to matters that may be cognisable in any court of the United States, a Circuit Court, on application thereto made as a court of equity, may, according to the usages in Chancery, direct to be taken.

This section applies only to the Circuit and District Courts of the United States. The *Argo*, 2 Wheat. 287. Depositions in the Supreme Court can be by commission only. *Ibid*.

The act of January 24, 1827, authorizes the clerk of any court of the United States within which a witness resides or where he is found, to issue a subpoena to compel the attendance of such witness; and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpoena as for a contempt. And when papers are wanted by the parties litigant, the judge of the court within which they are may issue a *subpoena duces tecum*, and enforce obedience by punishment as for a contempt.

(F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c., as Evidence.

THE word *evidence*, as has been observed, comprehends not only the testimony of witnesses, but also matters of record, as letters patent, fines, recoveries, enrolments, and the like; writings under seal, as charters and deeds; and other writings without seal, as court rolls, accounts, &c., and (a) records are said to prove themselves, and to admit of no averment against the truth of them.

Co. Litt. 283 a. § An administration account obtained from the office of the clerk of the Orphans' Court in another county by an attorney at law, not clerk nor deputy, and produced by him on trial, was held not to be evidence. *Devling v. Williamson*, 9 Watts, 317. (a) That a jury may and must take knowledge of any particular record, either patent, statute, or judgment, if it be given in evidence to them, for that is their *allegata* verbally alleged and produced, if it make to the issue. *Hob. 227*, and vide *Leon. 206*; *And. 37*; *Plow. 92 a, 411*; *Dyer, 118*; *9 Co. 12*; *Co. Litt. 237*. § The contents of a record cannot be proved by parol. *Brown v. Wright*, 4 Yerg. 57.

[The first sort of records are acts of parliament: these are the memorials of the legislature, and therefore are the highest and most absolute proof: and they either relate to the kingdom in general, and then are called general acts of parliament, or only to the concerns of private persons, and are thence called private acts.

Gilb. L. E. 11.

Of general acts of parliament the printed statute book is evidence; not that the printed statutes are the perfect and authentic copies of the records themselves, for there is no absolute assurance of their exactness, but every person is supposed to apprehend and know the law which he is bound to observe, and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already.

Gilb. L. E. 12; 2 Salk. 566; 10 Mod. 126; Keb. 2; Jenk. Cent. 280, pl. 5; Hale's Hist. of the Common Law, 15, 16; Style, 462; L. E. 89; Tri. *per Pais*, 417; Stra. 446; 3 R. S. L. 90. § The practice is not uniform in the several states as to the credit which is to be given to a volume of laws purporting to be the laws of a sister state. Some, as Massachusetts, *Raynham v. Canton*, 3 Pick. 293; Vermont, *State v. Stade*, 1 D. Chap. 303; Kentucky, *Taylor v. The Bank of Illinois*, 7 Monr. 385; admit such

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book as evidence of public statutes. In Pennsylvania, *Biddis v. James*, 6 Binn. 321; *Thomas v. Musser*, 1 Dall. 462; *Kean v. Rice*, 12 S. & R. 203; Virginia, *Taylor's adm'r. v. The Bank of Alexandria*, 5 Leigh, 471; North Carolina, *Poindexter's ex'rs. v. Barker*, 2 Hayw. 173; such volume of laws will be received in evidence both as regards public and private acts. In New York, the statute book of another state is not evidence. *Peckard v. Hill*, 2 Wend. 411; S. C. 5 Wend. 175; *Duncan v. Dubois*, 3 Johns. Cas. 125.*g*

|| By 41 G. 3, c. 90, § 9, for the better and more effectual proof of the statute law of Great Britain and Ireland, it is enacted, that copies of the statutes of Great Britain and Ireland prior to the Union, printed and published by the printer and publisher duly authorized to print and publish the same by his majesty, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.||

[In private acts of parliament the printed statute-book is not evidence, though reduced into the same volume with the general statute, but the party ought to have a copy compared with the parliament roll. For private statutes do not concern the kingdom in general, and therefore no man is understood to be possessed of them as he is of those general laws which are set up as the regulation of his own actions, and, consequently, the private statutes are no intimation of what is already known, but they are the rules and decrees that relate to the private fortune of this or that particular man, which no one else is under any obligation to understand or take notice of, and therefore they ought to be proved with the same punctuality as the copies of all other records.]

§ See *Young v. The Bank of Alexandria*, 4 Cranch, 384. In Pennsylvania, copies of the laws printed by authority of the legislature, are evidence, whether the laws be public or private. *Biddis v. James*, 6 Binn. 321; *Gray v. Monongahela Navigation Company*, 2 Watts & S. 159.*g*

But my Lord Chief Justice Parker, in the case of the College of Physicians and Doctor West, allowed the printed statute to be evidence of the truth of a private act of parliament touching the institutions of the college.

10 Mod. 533. But this matter of evidence does not appear there. *Ld. Raym.* 472.

And a private act of parliament in print that concerns a whole country, as the act of Bedford Levels, for rebuilding Tiverton, &c., may be given in evidence without comparing it with the record. And these things are the rather admitted, because they gain some authority by being printed by the king's printer: (a) and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. And for this reason, printed copies of other things of as public a nature have been admitted in evidence without being compared with the original; as the printed proclamation for a peace was admitted to be read without being examined by the record in Chancery. So, the Gazette is evidence of all acts of state. So, the articles of war, as printed by the king's printer, are evidence of such articles.

*Bull. N. P.* 225. (a) § See 3 Johns. 39, 40.*g* || To prevent the inconvenience of a strict proof, a special clause is usually inserted, providing that the act shall be deemed public; in which case the copy printed by the king's printer will be sufficient evidence of its contents. || *Vide Dougl.* 594, n.; *R. v. Holt*, 5 T. R. 436.

§ The written or statute laws of foreign countries must be proved by the laws themselves, if they can be procured; if not, other evidence may be received.

*Consequa v. Willings*, 1 Pet. C. C. 225; *Seton v. Delaware Ins. Co.* 2 Wash. C. C. R. 175; *Robinson v. Clifford*, 2 Wash. C. C. R. 1; *Dougherty v. Snyder*, 15 S. & R. 84; *Phillips v. Gregg*, 10 Watts, 169; *French v. Lowell*, 18 Pick. 34; *Swift v. Fitzhugh*, 9 Porter, 39; *Owen v. Boyle*, 3 Shepl. 147.

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Upon proof of the loss of the other part of the record, the docket entries are competent evidence, and parol proof may be given of the contents of that part of the record which is lost.

Harvey v. Thomas, 10 Watts, 63.*g*

The next thing is the copies of all other records, and they are twofold; under seal, and not under seal.

First, under seal, and these are called by a particular name, exemplifications, and are of better credit than any sworn copy: for the courts of justice that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examinations, than any other person is or can be; and besides, there is more credit to be given to their seal than to the testimony of any private person; and therefore we are more sure of a fair and perfect copy when it comes attested under their seals, than if it were a copy sworn to by any private person whatsoever.

10 Mod. 125. ¶ The seal of the king, and the seals of the public courts of justice, and of all courts established here by act of parliament, are admitted in evidence without extrinsic proof of their genuineness; as, the seal of the county palatine of Chester, Dy. 276, cited *per Cur.* in Olive v. Gwin, 2 Sid. 146; or of the great sessions in Wales, Ibid. Hardr. 118; S. C., Gilb. Ev. 16; or of the ecclesiastical court on an exemplification of a will. Kempton v. Cross, Ca. temp. Hardw. 108. ¶ An exemplification under the great seal of a state, of a public grant, is by the common law, *per se*, evidence, without producing or accounting for non-production of the original. Patterson v. Winn, 5 Pet. 241.*g* But the seals of private courts, or of a foreign colonial court, Henry v. Adey, 3 East, 221; or of a corporate body, Moises v. Thornton, 8 T. R. 307, must be proved by a witness acquainted with their impression. However, in Woodmass v. Mason, 1 Esp. N. P. C. 53, Lord Kenyon held, that the seal of the city of London proves itself. But *qu.* When an instrument purports to be under the seal of a corporation, it will be sufficient to show that it is the official seal of the corporation. 8 T. R. 307; Phil. Ev. 290, 291. ¶ Whenever the court whose record is certified has no seal, this fact should appear in the certificate of the clerk, or in that of the judge. Craig v. Brown, 1 Pet. C. C. 352. When there is a seal, the attestation by the clerk, of the judgment in another state, must have the seal of the court annexed to it: it is not enough that the seal of the court is annexed to the certificate of the judge. Turner v. Waddington, 3 Wash. C. C. 126.*g*

Exemplifications are twofold; under the broad seal, or under the seal of the court.

Under the broad seal; such exemplifications are of themselves records of the greatest validity, to which the jury ought to give credit, under the penalty of an attainder.

Sid. 145, 146; Hard. 118; Pl. Com. 411 a.

When a record is exemplified under the great seal, it must either be a record of the Court of Chancery, or be sent for into the Chancery by a *certiorari*; for the Chancery is the centre of all the courts, and thence the subjects receive a copy under the attestation of the great seal: for in the first distribution of the courts, the Chancery held the broad seal, whence the authority issued to all proceedings, and those proceedings cannot be copied under the great seal, unless they come into the court where that seal is lodged.

3 Inst. 173.

Nothing but records may be given in evidence exemplified under the broad seal; for these being preserved by the proper officer of every court from all rasure and corruption, are supposed to be so fair and unblotted, that there can be no danger in the exemplification. But the exemplification of deeds under the broad seal cannot be admitted in evidence, for these being in the custody of the party and not of the law, are subject to rasures and

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interlineations, and therefore ought to be produced themselves as the best evidence of the contract.

Bull. N. P. 227.

When any record is exemplified, the whole record must be exemplified, for the construction must be taken from the view of the matter taken together.

3 Inst. 173. But this rule is to be taken with exceptions, as see hereafter.

§ The Constitution of the U. S., art. 4, s. 1, declares, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress may by general laws prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof." The object of the authentication is to supply all other proof of the record. The laws of the United States have provided a mode of authentication of public records and office papers; these acts are here transcribed.

By the act of May 26, 1790, it is provided, "That the act of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the court of any state shall be proved or admitted, in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken."

The above act having provided only for one species of record, it was necessary to pass the act of March 27, 1804, to provide for other cases. By this act it is enacted,

§ 1. "That, from and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken."

§ 2. "That all the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the

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United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts, and offices of the several states."

The act of May 8, 1792, s. 12, provides, "That all the records and proceedings of the court of appeals, heretofore appointed, previous to the adoption of the present Constitution, shall be deposited in the office of the clerk of the Supreme Court of the United States, who is hereby authorized and directed to give copies of all such records and proceedings, to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said court are by law directed to be given: which copies shall have like faith and credit as all other proceedings of the said court."

By authentication is also understood whatever act is done either by the party or some other person with a view of causing an instrument to be known and identified; as for example the acknowledgment of a deed by the grantor; the attesting a deed by witnesses.

2 Benth. on Ev. 449.

When copies are made evidence by statute, the mode of authentication required must be strictly pursued.

*Smith v. The United States*, 5 Pet. 501.

A copy of the proceedings of any court of record in Massachusetts, certified to be a true copy of the record of such court, by the clerk of such court, under its seal, is competent evidence of the existence of such record, in any other judicial tribunal of that commonwealth.

*Commonwealth v. Phillips*, 11 Pick. 28.

Though sworn to, copies of records from another state are not evidence, until it be shown that the records are kept under the authority of law.

*Richmond v. Patterson*, 3 Ohio, 368.

The second sort of copies under seal are exemplifications under the seal of the court, and these are of higher credit than a sworn copy, for the reasons formerly given.

Copies not under seal are of two sorts, 1, Sworn copies; and, 2, Office copies.

1. Sworn copies; these must be of the records brought into court in parchment, and not of a judgment in paper signed by the master, though upon such judgment you may take out execution; for it does not become a permanent matter till it be delivered into court; and there fixed as memorandums or rolls of that court; and until it be a roll of that court it is transferable anywhere, and so doth not come under the reason of law, that permits us to give a copy in evidence.

Where a record is lost, a copy of it may be read without swearing it to be a true copy; for the record is in the custody of the law, and not of the party, and therefore, if lost, there ought to be no injury arising to the party's private right; and, consequently, if it be lost, the copy must be admitted without swearing to any examination concerning it, since there is nothing with which the copy can be compared, and therefore it must be presumed true without examination.

Vent. 257; Styl. Pr. Reg. 205; Mod. 117; Salk. 285; L. E. 89. See Jackson, ex dem. Taylor v. Collum, 2 Blackf. 228; Newcomb v. Drummond, 4 Leigh, 57; Adams v. Betz, 1 Watts, 427; Hargett v. —, 2 Hayw. 78; Lowry v. Cady, 4 Verm. 504; Doe v. Greenlee, 3 Hawks, 281; Hiltz v. Colvin, 14 Johns. 182; Lyons v. Gregory, 3 H. & M. 237; Cook v. Wood, 1 M'Cord, 139; Inhabitants of Stockbridge v. Inhabitants of West Stockbridge, 12 Mass. 400; Brown v. Wright, 2 Yerg. 57; Judge

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of Probate v. Briggs, 3 N. H. Rep. 309; State of Maryland v. Wayman, 2 Gill & Johnson, 283.g

But in such cases as these, the instruments must be according to the rules required by the civil law: they must be *vetustate temporis, aut judicariâ cognitione roborata*.

Corvin. Dig. 292; Mod. 117.

So, the copy of the decree of tithes in London has been often given in evidence without proving it a true copy, because the original is lost.

Vent. 257.

So, a recovery of lands in ancient demesne was given in evidence, where the original was lost, and possession had gone a long time according to the recovery.

Vent. 247.

When a man gives in evidence the sworn copy of a record, he must give the whole copy of the record in evidence, for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore so much at least ought to be produced as concerns the matter in question.

Tri. per Pais, 166; 3 Inst. 173.  $\beta$  A sworn copy of entries in a justice's docket, may be admitted in evidence with the same effect as the original. Welsh v. Crawford, 14 Serg. & R. 440.g

In case of a private act of parliament, though an examined copy of the original is the proper evidence, yet if a party has done an act under the statute, against which the other appeals, the appellant need only produce a common printed copy.

Rex v. Shaw, 12 East, 479.

To prove a copy of a record, it is sufficient merely to prove that the paper offered agrees with what the officer read as the record; it is not necessary for the persons examining to exchange.

Rolf v. Dart, 2 Taunt. 52.

Secondly, office copies may be given in evidence.

Here the difference is to be taken between a copy authenticated by a person trusted to that purpose, for there that copy is evidence; and a copy given out by the officer of the court that is not trusted to that purpose, for that is not evidence, without proving it actually examined.

The reason of the difference is, that where the law hath appointed a person for any purpose, it must trust him as far as he acts under the authority which it has lodged in him.

$\beta$  An office copy duly authenticated needs no supplementary proof to make it evidence. Snyder v. Bowman, 4 Watts, 132. $\beta$

Therefore the chirograph of a fine is evidence to all persons of such a fine, for the chirographer is appointed to give out copies between the parties of those agreements that are lodged of record, and therefore his copy must be admitted as evidence without further dispute.

Pl. Com. 110 b.

So, where a deed is enrolled, the endorsement of that enrolment is evidence, without further proof of the deed, because the officer is intrusted to authenticate such deeds by enrolment; and when such officer endorseth, that he hath done it pursuant to the law, then the law which intrusted him with the authority of doing it, ought to give credit to what he has done.

See 10 Ann. c. 18; 8 G. 2, c. 6, § 21. In a duchy lease, the certificate of the auditor

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on the margin, is sufficient evidence of the enrolment. Dougl. 56.] *An exemplification of a deed, recorded in Philadelphia county, for lands lying in several counties, was received in evidence, the original being lost. Scott v. Leather, 3 Yeates, 184. The copy of a deed, enrolled in the King's Bench, in England, proved before the Lord Mayor of London to be a true one, was allowed to be given in evidence to a jury, to support title to lands in Pennsylvania. Hyman v. Edwards, 1 Dall. 1.*

|| A rule of court under the hand of the proper officer is itself an original, and may be given in evidence in a legal proceeding in that court, without being proved a true copy.

Selby v. Harris, 1 Ld. Raym. 745.

So, where a witness, being about to leave this country, had been examined at a judge's chambers, a copy of his depositions, delivered out by the judge's clerk, and attested by the clerk's signature, was admitted in evidence, without proof of its having been examined and compared with the original depositions.

Duncan v. Scott, 1 Campb. 101.

[But, if an officer of the court, who is not intrusted to that purpose, makes out a copy, they ought to prove it examined; because being no part of his office, he is but a private man, and a private man's mere writing or word ought not to be credited without his oath.

Therefore it is not enough to give in evidence a copy of a judgment, though it be endorsed to have been examined by the clerk of the treasury, because it is not part of the necessary office of such clerk: for he is only intrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them.

So, if the deed enrolled be lost, and the clerk of the assize make out a copy of the enrolment only, this is no evidence, without proving it examined; because the clerk is intrusted to authenticate the deed itself by enrolment, and not to give out copies of the enrolment of that deed.

The office copies of depositions are evidence in Chancery, but not at common law, without examination with the roll; for the Court of Chancery have for convenience allowed their office copies to be evidence in their own court, and have empowered their officers to make out such copies as should be evidence; but the particular rules of their court are not taken notice of by the courts of common law.

Where a fine with proclamations is to be a bar to a stranger, there the proclamations must be examined from the roll; for although the chirographer is authorized by the common law to make out copies to the parties of the fine itself, yet he is not appointed by the statute to copy the proclamations, and therefore his endorsement on the back of the fine is not binding.

Chutel and Pound, Trin. Ass. 1700; 3 Taunt. 166. See Tri. *per* Pais, 209.

{ *Foreign* judgments are authenticated, 1, By an exemplification under the great seal {<sup>1</sup>} of the nation; 2, By a copy proved to be a true copy; 3, By the certificate of an officer {<sup>2</sup>} authorized by law, which certificate must itself be properly {<sup>3</sup>} authenticated. These are the usual and most proper, if not the only modes of verifying foreign judgments. If they be all beyond the reach of the party, other inferior evidence may be admitted.

2 Cran. 187, 238, Church v. Hubbard. {<sup>1</sup>} The public seal of one state is matter of notoriety, and is taken notice of by another, as part of the law of nations acknowledged by all. Peake, Ev. 51, n. 2; Cran. 187, 239; 2 Cain. 163. {<sup>2</sup>} A copy certified under the seal of a secretary of state of the country in which the tribunal exists is not evidence, unless it be shown that the secretary has officially the custody of such proceedings. But a certificate of that fact under the great seal will be sufficient *prima*

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*facie* evidence of the truth of what is so certified. 2 Cran. 187, 239, Church v. Hubbard; 2 Cain. 155, 163, Vandervoort v. Columbian Ins. Co. {} It is not sufficient to prove the handwriting of the officer subscribed to it; but the seal affixed must also be proved to be the seal of the court. 4 Esp. Rep. 228, Henry v. Adey; 3 East, 221, S. C.; 3 Johns. Rep. 310, Delafield v. Hand. See Jenkins v. Pepon, cited 1 Cain. Er. 33; also 3 Esp. Rep. 4, Moises v. Thornton; 8 Term, 303, S. C.—Though the original proceedings are properly authenticated, a translation of them certified to be correct by our consul in the foreign country cannot be admitted. Interpreters are always sworn, and the translation of a consul not on oath can have no greater validity than that of any other respectable man. 2 Cran. 187, 239; 2 Cain. 164. The acts of a foreign notary public are admitted without proof of the seal. 3 Johns. Rep. 314; 6 Ves. J. 823.}

§ In Louisiana, copies from the notarial register of deeds and bills of sale, certified under the notarial seal of the officer, are evidence: and such copies being evidence by the laws of that state, are legal evidence in a suit instituted before the Circuit Court of the United States, in another state.

Owing v. Hull, 9 Pet. 607.‡

Having thus shown how the record is to be given in evidence, by the proving of a copy, we must in the next place see in what manner, and in what cases, it ought to be evidence.

And here, in the first place, it is regularly true, that when the record is pleaded and appears in the allegations, it must be tried on the issue *nul tiel record*; but, where the issue is upon fact, the record may be given in evidence to support that fact.

When the issue is *nul tiel record*, the record must be brought *sub pede sigilli*; but, where the record is offered to a jury, any of the forementioned copies are evidence.

Style, 22; Sid. 145. {On the issue of *nul tiel record*, if the record be of the same court, it must itself be inspected, and no copy can be admitted in evidence. 2 Wash. 215, Burk's Ex'rs. v. Tregg's Ex'rs.}

But out of this rule there is an exception, that where the record is inducement, and not the gist of the action, there, it is not of itself traversable, but must be given in evidence on the proof of the action; for nothing can be of itself traversable, that doth not make a full end of the matter in question.

Sid. 145, 146.

Tenant for life, the remainder in fee; he in the remainder in fee suffers a common recovery with single voucher, and this recovery is ancient: The court will presume a surrender of the tenant, because when there hath been a constant enjoyment under that recovery, it shall be supposed to be a lawful foundation, for unless there had been a lawful tenant to the *præcipe*, it must be supposed that it would have been controverted and overthrown.

Green v. Froud, Vent. 257; 1 Mod. 117, S. C. It is laid down in the case of Warren v. Grenville, 2 Str. 1129, that after a recovery of 40 years' standing, the court will, *without any other circumstances*, presume a surrender of the estate for life. But in that very case, the court did admit other evidence of the surrender, namely, the attorney's book, the attorney himself being dead, wherein, among his charges for suffering the recovery, were two *items* for drawing and engrossing a surrender of the life estate. Neither doth the above case of Green v. Froud, (for there possession had accompanied the recovery,) nor what is said in Fig. 41, warrant this general position. And therefore, in the case of Goodtitle v. Duke of Chandois, 2 Burr. 1065, where tenant in tail of a considerable estate, part in possession, the residue held by a widow on whom it was settled for life, suffered a recovery of the whole, and settled it on the Duke of Chandois, and the duke on the death of the tenant in tail entered into the part of which he died in possession, and on the death of the widow on the remainder; on which the reversioner brought an ejectment to recover this remainder, on the ground that there was no surrender of the widow's life estate; for that no actual surrender was proved, and no sort of evidence having been offered to make such surrender probable, it could not



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be presumed; the court of K. B. held, that the length of time was not to be reckoned from the date of the recovery, but from the possession going with the recovery: that in this case there was no possession after the death of the tenant for life, for the reversioner brought his ejectment immediately: that where the person suffering the recovery has a right to suffer it, the court will presume all things to have been regular, unless the contrary appear; but that here, the recoveror, being only tenant in tail in remainder, and the life estate under the same settlement still subsisting at the time of suffering the recovery, it was most clear he had no power to alien or bar.—And even where the person suffering the recovery has a clear right to alien, yet the court will not, from mere length of time, presume proper tenants to the *præcipe*, where it appears from the deeds that proper parties did not join, and the uses are declared to have been warranted by those deeds. *Keen v. Earl of Effingham*, 2 Str. 1267.

But, if there be tenant for life, the remainder in fee, and he in remainder suffer a common recovery with single voucher, and this recovery be modern, this record will not give a title; for the freehold is in tenant for life, and the *præcipe* ought to be brought against him; and so there is no lawful action commenced.

Vent. 257.

If there be tenant for life, with remainder in tail, and they both join in a common recovery with single voucher, this will not bar the tail, because the remainderman is not tenant to the *præcipe*; and in this case the *præcipe* is brought against them both as jointenants, and he in remainder hath no immediate estate of freehold in him, and the remainderman is not bound by the recovery had against the tenant for life, unless he comes in upon the aid prayer, though the remainder is turned to a right by such recovery.

Moore, 256, pl. 402; 2 Ro. Abr. 395; Pig. of Rec. 36.

But, if there be tenant for life, the remainder in tail, and they suffer a recovery, and come in as vouches on the double voucher, then he in remainder is barred, because he in remainder is as properly called in as vouchee, as if he had been called in on the aid prayer of tenant for life, and then when he takes up the defence, and makes default, he must be barred by the judgment, as for the want of a title appearing; for where any person is properly in court, and doth not defend his title, he is as properly barred as he who hath no title at all; and when tenant in tail is barred for want of title, the issue can never after recover in his *formedon*.

2 Ro. Abr. 396.]

|| There are many exemplifications of recoveries suffered between the commencement of the reign of Queen Anne and that of George the Second, whereof no entries upon the rolls in the Treasury of the Common Pleas, nor any writ of entry, summons, or seisin can be found. Mr. Pigot having, in the course of his practice, discovered repeated instances of this neglect, procured the following statute to be passed, in order to prevent the inconveniences which might arise to purchasers from an omission of this kind. St. 14 G. 2, c. 20, § 4, "Whereas by the default or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights: for remedy thereof, be it enacted, that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or estates in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates from the time of such purchase, shall and may, after the end of twenty years from the time of such

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purchase, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries, and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: Provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

2 Cruise, 158.]

[Although, regularly, no recovery or judgment is to be admitted in evidence but against parties or privies, yet under some circumstances they may; as, in an information in nature of a *quo warranto*, a judgment of ouster was allowed to be given in evidence to prove the ouster of a third person, the mayor, by whom the defendant was admitted. And such evidence is conclusive, unless the judgment can be impeached as obtained by fraud.

Bull. N. P. 231; R. v. Hebden, 2 Str. 1109; Andr. 389; 5 T. R. 72.

As to verdicts; if a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial was not had for the same lands; for the verdict in such cases is a very persuading evidence, because what twelve men have already thought of the fact, may be supposed fit to direct the determination of the present jury. For to go contrary to what a former jury have decided in relation to any fact, is to arraign the honesty and sincerity of their judgment; and there is that common credit to be given to twelve men of the country, discerning of any fact upon their oaths, that no second jury ought rashly to depart from their judgment. Their verdict also further stands in credit, because the jury must be supposed honest men, and men of clear reputation, their verdict not having been attained by the party against whom it was given.

Lewis and Clerges, Term Pasch. 1700; Trial at bar. {A verdict and judgment on the same point, if it was in issue, is conclusive evidence thereof in a subsequent suit between the same parties or their privies, though the land or other thing in controversy is not the same. 2 Wash. 64, Shelton v. Barbour; 1 Hen. & Mun. 387, Pegram v. Isabell; 2 Hen. & Mun. 55, Preston v. Harvey. See 3 East, 346, Outram v. Morewood.} But no one can take advantage of a verdict or deposition who had not been prejudiced by it, had it been to the contrary. Bourdereau v. Montgomery, 4 Wash. C. R. 186. See Westons v. Stammers, 1 Dall. 2; Lazarus v. Folmer, 4 Watts & S. 9; Stevelie v. Reed, 2 Wash. C. C. R. 274; Carmack v. Commonwealth, 5 Binn. 184; Quinn v. Crowell, 4 Whart. 334; McClelland v. Lindsay, 1 Watts & S. 360.

But then the verdict ought to be between the same parties, because otherwise a man would be bound by a decision, where he had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that anybody should be injured by a determination which he was not at liberty to controvert; for that is to set up a decision not thoroughly examined, in prejudice of a cause that is under examination. Besides, one that is not party to the trial has no redress for the injury if the verdict were false, for he cannot have an attain, and therefore ought not to be injured by the verdict.

Lewis and Clerges. But the record of a suit between A and B, plaintiffs, and C and

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D, defendants, cannot be used in evidence against C in another suit, to which neither A, B, nor D is a party. *Townley v. Sumrall*, 2 Pet. 170. See *The Inhabitants of the town of Reading v. The Inhabitants of the town of Weston*, 7 Conn. 143.

But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and if the verdict arise upon the same question, then it is no doubt good evidence; for every matter is evidence that amounts to proof of the point in question.

*Lewis and Clerges*. See *Carth*. 79, 181; 5 Mod. 386; 3 Mod. 142.

In an action of trespass, the indictment for the same trespass and verdict thereupon, shall not be given in evidence, if the indictment be only found on the party's own oath; for if the party's oath be no evidence in his own cause, (as we shall hereafter show that it is not,) then cannot the verdict which is founded only on the party's own oath be any evidence; for what cannot be evidence directly, cannot be made evidence by any such circuitry.

But, where the verdict on the indictment is founded on other evidence, besides the party's own oath, there, it may be given in evidence; for, there, this verdict seems to be under the same general rule with all others, and there the judgment of twelve men on the fact ought to sway in determination of the same fact, whether the verdict be on indictment or action:

This is the practice *ex relatione* Mr. Phipps, 1700.

Still, it may be objected, that the fact might have found credit from the party's own oath; and since the evidence is so intermixed, that it doth not appear on what the verdict was founded, it cannot be produced in evidence at all on the trial of the action.

It is true, this doth in part take off the force of such evidence; for as, when a verdict is produced in evidence, it may be answered that it did not arise from the merits of the cause, but from some formal defect of the proof, and that makes it no evidence toward gaining the point in question; so a verdict may be diminished in point of authority, by showing that it was in part founded on the oath of the party interested in the action: and the jury are to respect it no further than as they presume it given upon, and supported by, the credit of other disinterested testimony.

Yet others have said the verdict given on the indictment cannot be given in evidence, because on that prosecution there is no liberty left to the party to attain the jury, as he hath power to do, if injured on a civil action; therefore *qu*.

A verdict in a criminal case, where the matter was not capital, was denied to be given in evidence in a civil case; as, where the father was acquitted on an indictment for having two wives, this could not be given in evidence in a civil case, where the validity of the second marriage was controverted. The reason seems to be, because much less evidence is necessary to maintain the action than to attain the criminal, and therefore his acquittal was no argument that the fact was not true.

|| This point, whether verdicts, which have been given in criminal proceedings, can be admitted as evidence in civil cases, does not appear to be settled. Lord Hardwicke thought they could not. *Gibson v. McCarty*, Ca. temp. Hardw. 311; *Hillyard v. Grantham*, cited by Lord Hardwicke, *Ibid.*, and in *Brownword v. Edwards*, 2 Ves. 246. But see *Jones v. White*, 1 Str. 68; *Bull. N. P.* 245, and see Mr. Phillipps's *Law of Evidence*, 237, 241, where the question is fully discussed. See also *Richardson v. Williams*, 12 Mod. 319.||

If a verdict be given against the defendant on the same point, though another party were plaintiff, yet in some cases it may be given in evidence; as, if there be a trial of title between A, lessee of E, and B, in which there

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is a verdict against B, and afterwards there be a trial of the same title between C, lessee of E, and B; C may give the verdict found against B in evidence upon the trial between him and B, for this was the sense of a former jury on the fact, in which trial B had the liberty to cross-examine.

Trin. Ass. 1701. {A verdict in an action of trespass *quare clausum fregit*, is evidence in an ejectment which is really between the same parties, but brought in the name of a trustee for one of them. 4 Dall. 120, Calhoun's Lessee v. Dunning.}

A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence for a jury.

Vooght v. Winch, 2 Barn. & A. 662.

Under the general issue in *assumpsit*, a judgment recovered for the same cause of action may be given in evidence.

Stafford v. Clarke, 2 Bing. R. 377.

Copies of bills and answers in courts are admissible in evidence for the convenience of keeping the originals in their proper place.

Hennell v. Lyon, 1 Barn. & A. 183; Dartmouth v. Roberts, 16 East, 334; Salter v. Turner, 2 Campbell, 87; Ewer v. Ambrose, 4 Barn. & C. 25.

If defendant give in evidence an answer in Chancery, the plaintiff is not entitled to read any statements in it which are stated as hearsay.

Roe v. Ferrars, 2 Bos. & Pull. 548; and see 4 Maule & S. 497.

The judgment book is not evidence of the judgment entered therein, though the record has not been made up, and the person interested to prove the judgment is no party to the action.

Ayrey v. Davenport, 2 New R. 474.

The seal of the court to a foreign judgment must be proved, as well as the judge's handwriting.

Henry v. Adey, 3 East, 231; and see Appleton v. Braybrook, 6 Maule & S. 34.

The certificate of a British vice-consul, of the amount of proceeds of damaged goods, which, by the law of that country, must be sold under his inspection, is not evidence.

Waldron v. Coombe, 3 Taunt. 162. As to certain admissible certificates, see 6 Term, R. 619, 638.

Nor is the certificate of an agent of Lloyd's evidence against an underwriter, though a member of Lloyd's.

Drake v. Marryat, 1 Barn. & C. 473.

In ejectment by the vendee of a term sold under a *feri facias* against the execution debtor, it is sufficient to produce the *fi. fa.* without the judgment.

Doe dem. Batten v. Murless, 6 Maule & S. 110. See vide 1 Bing. 209.

In an action for use and occupation, by plaintiff claiming under an *elegit*, an examined copy of the judgment roll, containing the award of *elegit* and return of the inquisition, is evidence of plaintiff's title, without proving a copy of the *elegit* and of the inquisition.

Ramsbottom v. Buckhurst, 2 Maule & S. 565.

Where one writ was produced, together with three declarations and three rules to plead, this was held sufficient evidence of three actions having been commenced by this process.

Jones v. Stevens, 11 Price, R. 235.

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A writ of *supersedeas*, reciting that a commission of bankrupt issued on such a day, is evidence of that fact.

*Gervis v. Grand Western Canal Company*, 5 Maule & S. 76.

In case against the sheriff for a return of *nulla bona* to a *fi. fa.*, an inquiry taken by him to ascertain the property in the goods, and finding it in A B, a third person, is not evidence for the sheriff.

*Glossop v. Pole*, 3 Maule & S. 175.

A gazette is evidence of all acts of state; so also to prove an averment that "divers addresses had been presented to his majesty by his subjects," which was a fact stated in the gazette. So also of a proclamation under an order in council.

*Rex v. Holt*, 5 Term R. 436; *Attorney-General v. Theakstone*, 8 Price, 89.

The king's proclamation, reciting a fact, is evidence to prove that fact; and so also is a preamble to an act of parliament, to prove a fact recited in it.

*Rex v. Sutton*, 4 Maule & S. 532.

By the 51 G. 3, c. 60, (local act,) the register book of the Bristol Canal Company is evidence in an action brought by them for calls, of the defendant's being proprietor of the number of shares affixed to his name.

*Bristol and Taunton Canal Navigation Co. v. Amos*, 1 Maule & S. 569.

Entries in a steward's book above thirty years old, and coming from the proper custody, are evidence without showing the handwriting of the steward.

*Wynne v. Tyrwhitt*, 4 Barn. & A. 376; and see 3 Bro. & B. 132.

A will, more than thirty years old, is evidence without proof of execution, although testator died within thirty years, and although some of the witnesses are living.

*Doe v. Wolley*, 8 Barn. & C. 22.

A book kept at the India House from returns given in on oath, pursuant to the 53 G. 3, c. 155, containing the lists or numbers of passengers going on board an East India ship, is evidence to show the value of the voyage, on the ground that it is a public book kept by authority of an act of parliament.

*Richardson v. Mellish*, 2 Bing. 229, and see 4 Taunt. 787.

Returns of sales of corn under the 1 & 2 G. 4, c. 87, are not conclusive evidence to show to whom the corn was delivered.

*Woodley v. Brown*, 2 Bing. 527.

An entry in public corporation books is not evidence for the corporation, if the entry be of a private nature; for a corporation could otherwise make evidence for themselves.

*Marriage v. Lawrence*, 3 Barn. & A. 142

In an action for a penalty for using a gun, being unqualified, where the defendant claims to act as gamekeeper under a deputation, evidence of the real title to the manor is admissible for the purpose of negating the existence of a colourable title in the person under whom the defendant claims to act. And entries in the books of the clerk of the peace, of deputations formerly granted to gamekeepers by the real owner of the manor, are also evidence to show that manorial rights were publicly exercised by him, and

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that the person whose title was set up by defendant knew that he had not any title whatever.

Hunt v. Andrews, 3 Barn. & A. 341.

Communications in official correspondence, relating to matters of state, cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in such office, not only because such communications are confidential, but because the disclosure of secrets of state is injurious to the country.

Anderson v. Hamilton, 8 Price, 244, n.; 2 Bro. & B. 156, n.

The copy of an original letter, giving notice of dishonour of a bill, is admissible in evidence without notice to produce the original letter.

Kine v. Beaumont, 3 Bro. & B. 288; 7 Moo. 112. *Sed vide* 1 Moo. & Malk. 31; and *see post*, 840.

A receipt is not conclusive evidence of payment; it may be shown, that the giving the receipt was fraudulent, and that the money was not paid.

Straton v. Rastall, 2 Term R. 366; Skaife v. Jackson, 3 Barn. & C. 421; and *see* 7 Bing. 574.

In an action, for use and occupation, against the defendants, assignees of a bankrupt, the defendants produced, under a notice from the plaintiff, the assignment of the bankrupt's effects: held, that the deed was admissible without proof of its execution, the defendants having occupied under it.

Orr v. Morice, 3 Bro. & B. 139; and *see* 6 Barn. & C. 30; 5 Barn. & C. 589.

If a declaration on a deed aver that the deed is in possession of the defendant, which is not traversed, and on *non est factum* pleaded, the plaintiff give notice to produce the deed, and the deed is not produced, the plaintiff may give parol evidence of it, without calling the subscribing witness, and this although the plaintiff's notice state the name of the subscribing witness.

Cooke v. Tanwell, 8 Taunt. 450; 2 Moo. 513.

Proof that a party signed a deed which bears on the face of it a declaration that the party sealed and delivered it, is evidence for the jury that the party did seal and deliver it.

Talbot v. Hodson, 7 Taunt. 251; 2 Marsh. 527.

If a deed be produced purporting to bind a trading company, proof that the person executing it was their general law agent, is *prima facie* sufficient, without showing that he was authorized to execute the particular deed.

Doe v. East London Water-works Co., 1 Moo. & M. 149.

If an attesting witness to a deed deny having seen it executed, other evidence of the fact is admissible.

7 Taunt. 251.

The evidence of an inspector of franks, who has never seen the party write, to prove, from his general knowledge of handwriting, that the signature to an instrument is an imitation and not genuine, is entitled to very little weight, even if admissible; it is very doubtful whether it is admissible.

Gurney v. Langlands, 5 Barn. & A. 330; 8 Price, 653. *Sed vide* Goodtitle v. Braham, 4 Term R. 497.

An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments.

George v. Surrey, 1 Moo. & M. 516.

The handwriting of a person dead many years may be proved by showing its resemblance to the handwriting of his will; (no objection was taken by

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the bar :) and the court or jury may compare the handwriting of two documents.

*Morewood v. Wood*, 14 East, 327, n.; and see 7 East, 282, n.; 1 Crompt. & J. 47.

In an action on an instrument where the subscribing witness is dead, it is doubtful whether any other evidence is necessary than the proof of the subscribing witness's handwriting. At all events, it is quite sufficient to show that the defendant was present at the making of the instrument.

*Nelson v. Whittall*, 1 Barn. & A. 19. In *Kay v. Brookman*, 1 Moo. & M. 286, it was held, no other evidence was necessary than proof of the witness's handwriting; and see *Page v. Mann*, *Ibid.* 79; *Mitchell v. Johnson*, *Ibid.* 176. Where the plaintiff in an action on a charterparty had given to the attesting witness an interest subsequent to the execution, it was held his handwriting could not be proved. *Hovill v. Stephenson*, 5 Bing. 493.

Where in an action on a bond the clerk of defendant's attorney was the subscribing witness, and, when subpoenaed, said he would not attend, and the trial was put off twice in consequence of his absence, and search had been made at defendant's house and in the neighbourhood, and on receiving information that the witness was gone to Margate, inquiry was there made without success; it was held, that under these circumstances evidence of his handwriting was admissible.

*Burt v. Walker*, 4 Barn. & A. 697.

If by a parol agreement a landlord agree to let and a tenant to take a farm, upon the terms of a certain lease, the lease cannot be produced to prove the terms, unless duly stamped.

*Turner v. Power*, 7 Barn. & C. 625.

An endorsement on the feoffment, (purporting to be made by the attorney appointed to deliver seisin,) that he had done so in presence of A, is not evidence of that fact, though the deed is produced by defendant at desire of the plaintiff, unless the defendant claims under it.

*Doe v. Marquis of Cleveland*, 9 Barn. & C. 864; and see 5 Barn. & C. 589; 3 Taunt. 60; 3 Bro. & Bing. 139; 6 Barn. & C. 28.

The evidence of a subscribing witness is never dispensed with on the ground of the instrument coming from the adverse party, except where it is produced by him at the trial.

*Vacher v. Cox*, 1 Barn. & Adol. 15

In trover for a chattel by the vendee of an executor, the will is not evidence of the executor's title, only the probate.

*Pinney v. Pinney*, 8 Barn. & C. 335.

The time of commencement of an action may be proved by parol evidence of the attorney, without producing the writ.

*Lester v. Jenkins*, 8 Barn. & C. 339; and see 5 Barn. & A. 847; 3 Barn. & C. 317.

If there be several ejectments brought against several persons, though for lands under the same title, and there be a verdict against one, that verdict cannot be given in evidence against the rest, for it is only the party against whom the verdict is given that can have relief by attain, inasmuch as the residue are not prejudiced; and these parties shall not be injured by a verdict they had not the power to controvert.

*Lock v. Norborne*, 3 Mod. 142; L. E. 91, pl. 23. A judgment is in general conclusive only when it covers the same ground in dispute. For example, a recovery against husband and wife for a tort, is no bar to an action for the same tort against the husband alone; for, as husband and wife cannot in law commit a joint tort, such an action as the former cannot lie. *Park v. Hopkins*, 2 Bail. 411. A judgment at law is no bar to equitable relief which could not be obtained at law. *Gallagher's ex'rs. v.*

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**Roberts, 1 Wash. C. C. R. 320.** A recovery in a writ of right does not affect a claim of the tenant to an easement of the land. **Thompson v. The Proprietors of Androsroggin bridge, 5 Greenl. 62, 65.**

If a man have two wives, and be thereof convicted, and die, and the second wife claim dower, the verdict and conviction cannot be given in evidence, but in this case the writ must go to the bishop; for whether the marriage be lawful or not, is the point in controversy, and that is of ecclesiastical jurisdiction, and is not to be decided at common law.

3 Mod. 164; Comb. 72, S. C.; 2 Stra. 960.

§ The dockets and records of a court, showing that money has been received by the marshal or his deputy, under execution, are evidence in a suit against his sureties.

**Williams v. The United States, 1 How. U. S. Rep. 290.**

But the verdict may be made an exhibit in the cause before the bishop, to induce him to believe there was a former marriage.

But this rule of giving verdicts in evidence on the same point is to be taken with great restriction. If a termor for years had recovered against B, the reversioner might give such verdict in evidence; for B has no prejudice, because he hath the liberty to cross-examine the witnesses, and to attain the jury, and it is fit the reversioner should make use of the verdict, and have benefit by it, since he had been dispossessed by the verdict, if it had gone against the termor, and therefore he may offer it in evidence. So, if there were tenant for life, the reversion in fee, and B bring his action in ejectment against the tenant for life, and a verdict be given against the plaintiff, it seems that the reversioner may give this in evidence against B, because he would have been prejudiced in case B had recovered, for his reversion would have been turned to a naked right in him. *Quere, et vide infra.*

Lord Howard and Lady Inchiquin, 1700. *Qu.* this case, and where it is to be found?

But a person that hath no prejudice by the verdict can never give it in evidence, though his title turns upon the same point, because, if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant, and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit from it. Besides, as the cause is now to be tried as a new matter, it would be unjust to let in that species of evidence, which supposes it to have been already decided.

Hard. 472.

As, if A prefers a bill against B, and B exhibits his bill, in relation to the same matter against A and C, and a trial at law is directed, C cannot give in evidence the depositions in the cause between A and B, but it must be tried entirely *ut res nova*.

Hard. 472; **Rushworth v. Viscountess of Pembroke, L. E. 108, pl. 692.** {See **Whateley v. Manheim, 2 Esp. R. 608.**} § Depositions between other parties are sometimes introduced for the purpose of showing that on a former occasion a witness has given a different account of the same matter, in order to discredit his testimony, but, in such case, when a part of the deposition is read for that purpose, the other side may read the whole to show his consistency. **Harrison v. Rowan, 3 Wash. C. C. R. 580;** and see **Temperly v. Scott, 5 Carr. & Payne, 341.**

A lessee of B brings an ejectment against D, and the verdict goes for the defendant; this may at any time be given in evidence against B, for the possession of B's lessee is his own possession, inasmuch as the lessee *tenet in nomine alieno*, and B might in this case give any thing in evidence, as well as the plaintiff himself, and challenges might have been made to the jury



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for consanguinity to B the reversioner; now then since A hath the possession of B as his bailiff, if there be a verdict against that possession it must conclude B, since he hath in this case all liberty to cross-examine as well as A himself, and, by consequence, this verdict must be evidence against any other lessee of B.

But, if there be recovery against tenant for life, by verdict, this is no evidence against the reversioner; for the tenant for life is seised in his own right, and the possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no aid was prayed, for he had no permission to interest himself in the controversy.

If a verdict were given against J S, and then judgment were arrested, and then J S alien to J N, it seems that the verdict given against J S may be given in evidence against J N, for the alienation of J S cannot put J N in a better condition than J S was; for the substitute of J S can but succeed into his place, and at the time of the alienation the verdict might have been given in evidence against J S, and J S cannot by alienation destroy the advantage that his adversary ought to derive from the verdict; for though J N had not the liberty to cross-examine upon his title, yet J S had, and J N has but his title, and therefore cannot be supposed to make the fact better on the examination.

2 Ro. Abr. 680; 3 Mod. 142.] {Where a question of right has been decided, the verdict is evidence in another action against the same defendant, though others are then joined with him, if they claim under him. 5 Esp. Rep. 58, *Strutt v. Bovingdon*.}

{A special verdict given in another action on the same policy of insurance, but against a different underwriter, is admissible evidence, if all the underwriters agreed to be bound by one verdict; for under that agreement they were all entitled to interfere on the former trial, and cross-examine the witnesses then produced.

1 Dalh. 419, *Patton v. Caldwell*.

A sold a horse to B, and C afterwards claimed the horse, and recovered in trover against B. B gave notice of the suit to A, who attended with a witness at one court when it was not tried, and did not attend at the trial at a subsequent court. The record of the recovery in that action is admissible and strong but not conclusive evidence of C's title to the horse, in an action brought by B against A on the implied warranty as to the title.

1 Johns. Rep. 517, *Blasdale v. Babcock*. See 2 East, 459, 460, *Birt v. Kershaw*; 1 Wash. 306, *Lee v. Cooke*. In *Bender v. Fromberger*, 4 Dall. 436, n., it was held that in an action on a covenant that the defendant was lawfully seised in fee and had full power to convey, &c., a verdict in an ejectment for the lands against the plaintiff by another person was *conclusive* evidence of a defect of title; the defendant having had notice of the ejectment, taken part in preparing evidence for the trial, and acceded to a settlement made in consequence of the eviction.}

[On an ancient verdict in prohibition, where the custom of tithing is set out, whether it might be given in evidence against another parishioner that was not party to the verdict, nor had the lands in question, was doubted. But by the better opinion it might be given in evidence, because it could not be supposed to have been a contrivance to alter the custom, it appearing to be ancient, and because there can be no other proofs but of this sort of what was then thought to be the custom.

By the opinion of Dodderidge, J., in the case of the Vicar of Rolvend. *Qu.*]

||A decree in the Court of Exchequer in a cause between the vicar on one side, and the impropiator, who was the patron, on the other, (establish-

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ing the vicar's right to small tithes under an ancient endowment against the defendant, who insisted that the vicar was entitled only to an annual payment in lieu of tithes,) is evidence between succeeding vicars and improprators; but not conclusive evidence, as it would be, if the ordinary had been a party to the first suit.

*Carr v. Heaton*, 3 Gwill. 1261. See *Bishop of Lincoln v. Ellis*, Bunb. 110.]

[The exception of its being *res inter alios acta* is not allowed against verdicts in case of customs and tolls: for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts or to such verdicts as have found and determined them. And it is not material in this case whether such verdicts be recent or ancient.

Bull. N. P. 233; Carth. 181; *R. v. St. Pancras*, Peake's N. P. C. 219.] {Peake, N. P. 156, *Berry v. Banner*. So in other cases of prescription for public rights. In trespass defendant justifies under a public right of ways, a verdict on that issue negating the right is evidence in another action against another defendant, who justifies an entry into the same land under the same right. Reputation would be evidence as to that right of way; *a fortiori*, the verdict of twelve men. 1 East, 355, *Reed v. Jackson*.}

||So, on a question of (a) public right of way, (b) or on the liability to repair a highway, (c) or on the public right of election to a parochial office, a verdict in a former action between any other persons is admissible in evidence. The common reputation of the place would be evidence of the right; *a fortiori* the finding of twelve men upon their oaths. (d) On such questions, therefore, a verdict in an action between A and B is evidence of the point there directly determined in an action between C and D, where the same point comes in issue; but it is clearly not conclusive. (e) And it seems not to be conclusive evidence for and against A or B, in an action between either of them and a third person C: it could not be pleaded in such a case by way of estoppel. (g)

(a) *Reed v. Jackson*, 1 East, 355. (b) *R. v. St. Pancras*, Peake's N. P. C. 219. (c) *Berry v. Banner*, Peake's N. P. C. 156. (d) *Per Lawrence, J.*, 1 East, 357; *Gillb. Ev.* 31. (e) *Biddolph v. Arthur*, 2 Wils. 23. (g) *Mayor of Hull v. Horner*, Cowp. 111, *ad. fin.*; *Travis v. Chaloner*, 3 Gwill. 1237.

[A commission under the seal of the Exchequer, and the inquisition taken thereupon, is admissible, though not conclusive evidence; and so are depositions taken thereon, though the parties in the cause had no notice of it, nor any opportunity of defending it.

*Tookes v. Duke of Beaufort*, 1 Burr. 146. {So an inquisition of lunacy is *prima facie* but not conclusive evidence of the lunacy against third persons. 9 Ves. J. 609, *Hall v. Warren*.}

Where the fact to be proved is such, whereof hearsay and reputation are evidence, a special verdict between other parties stating a pedigree would be evidence to prove a descent; for in such case, what any of the family, who are dead, have been heard to say, or the general reputation of the family, entries in family books, &c., are allowed. And of this opinion was Mr. Justice Wright in the Duke of Athol's case; which opinion is generally approved, though the determination by the rest of the court was contrary; perhaps founding themselves on the case of Sir William Clarges and Sherwin, where, in a trial at bar, the only question was on the legitimacy of the Duke of Albemarle, and the court would not suffer a former verdict between other parties concerning other land depending upon the same question and title to be read in evidence. But there, it did not appear, either from the issue or

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verdict, that the same question was inquired into or determined. Besides, the giving a verdict in evidence to prove a particular fact, viz., that John had a son Thomas, is very different from giving it in evidence to show the opinion of a former jury, which is only their deduction from a variety of facts proved to them.

Bull. N. P. 233; 2 Str. 1151; Ca. K. B. 343.

A verdict, with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, may be given in evidence in an action brought by the owner against the carrier for the same goods, for it is a strong proof against him that he had the plaintiff's goods.

Tyley v. Cowling, Bull. N. P. 243; Com. Dig. tit. *Evidence*, (A. 5), p. 86; 1 Ld. Raym. 744; Fisher v. Kitchingman, Willes, Rep. 368.

|| In *assumpsit* for goods sold and delivered against two defendants, (one of whom suffered judgment by default, and the other defended,) the question at the trial was, whether the defendants were partners at the time when the goods were delivered. To prove the partnership, a verdict, on an issue directed by the Court of Exchequer to try that fact, was offered in evidence, and objected to, because the plaintiff was not a party to the suit, so that the verdict given in that cause was *res inter alios acta*. But Lord Kenyon ruled, "that the verdict was conclusive evidence of a subsisting partnership, and could not properly be deemed *res inter alios acta*, because both the defendants had been parties on the record in that suit, and it was open to either of them by any evidence to rebut the idea of a partnership."

Whateley v. Menheim, 2 Esp. N. P. C. 608. *Qu.* these cases, and see *infra*. β See *Respublica v. Davis*, 3 Yeates, 128; *Carmack v. Commonwealth*, 5 Binn. 184; *Munford v. Overseers*, 2 Rand. 313; *State v. Colerick*, 3 Hamm. 487; *Kip v. Brigham*, 6 Johns. 159; *McKellar v. Bowell*, 4 Hawks, 34.γ

[But a verdict will not be admitted in evidence without likewise producing a copy of the judgment founded upon it, because it may happen that the judgment was arrested, or a new trial granted. This rule, however, does not hold in the case of a verdict on an issue directed out of Chancery,(a) because it is not usual to enter up judgment in such case; and the decree of the Court of Chancery is equally proof, that the verdict was satisfactory, and stands in force.

Bull. N. P. 234. (a) *Montgomery v. Clarke*, 1745, at the Delegates. β *Donaldson v. Jude*, 2 Bibb, 60; *Ragan v. Kennedy*, 1 Overt. 94; *DeLoah v. Works*, 3 Hawks, 36; *State v. Grayton*, 3 Hawks, 187; *Murphey v. Guion's Ex'rs.*, 1 N. Car. Law Repos. 94; *Jones v. Zollickoffer*, *Ibid.* 376; *Hinckle v. Carruth*, 1 Const. Ct. Rep. 471; *Richardson's Lessee v. Parsons*, 1 Harr. & Johns. 253; *Green v. Stone*, 1 Harr. & Johns. 505; *Ridgeley v. Spencer*, 2 Binn. 70; *Shaeffer v. Kreitzer*, 6 Binn. 430; *Felter v. Mulliner*, 2 Johns. 181.γ {If the verdict has been set aside, it is not evidence. 2 Binn. 70, *Ridgely v. Spencer*.—The *postea* without the judgment is evidence that a cause was brought to trial, though it is not evidence that the fact was legally decided thereby. See 1 Str. 161, *Pitton v. Walter*; Buller, 243; Willes, 367, *Fisher v. Kitchingman*; 2 Esp. 648, *Garland v. Schoones*; *Ibid.* 650, *Rex v. Page*.}

{A verdict between the same parties found 36 years before, being given in evidence by the defendant, the plaintiff offered to prove by a witness that the evidence now given by him was not then produced or discovered. But the court refused to admit the testimony; as it would be too dangerous to trust to the recollection of a witness in so old a transaction, in order to shake the strength of the evidence which the record imports.

2 Dall. 125, *Leech v. Armitage*.}

|| But, though the *nisi prius* record, with the *postea* endorsed, is not

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evidence of the verdict, it is good and proper evidence that the cause came on to be tried.

*Fisher v. Kitchingman, ubi supr.*; *Pitton v. Walter*, 1 Str. 151.¶

In an information by the attorney-general for the king, when the jury are ready to give a verdict, the attorney-general may withdraw a juror; (a) for this is part of the prerogative, and is in room of the nonsuit of the subject, (for the king cannot be nonsuited, being always in court,) and this prerogative is derived out of a general reason of the king's employment for the public safety. And therefore if he hath failed in any point of proof, so that disadvantage may be expected from the verdict, it shall be at his election, whether he shall receive his verdict or not, and therefore in a second information, none of the first jury shall be admitted to give in evidence, that they were agreed in their verdict, for such evidence would be of the same weight, as if the verdict had been given, and thereby the king would be dispossessed of the benefit of his prerogative.

2 Ro. Abr. 679, pl. 10; Vent. 28; Raym. 84; 2 Str. 984. (a) Holt says it was the opinion of all the judges of England, that it must be by consent. Carth. 465; 2 Keb. 507.

But, if the king aliens the estate on which the trial was had, so that it comes into private hands, there on a second trial between private persons, the agreement of the jury may be given in evidence; for the prerogative is annexed to the crown, and cannot extend to any private person, and therefore they take the estate with the disadvantage of having a verdict against them.

2 Ro. Abr. 680.

But then on such trial they must have the record of the proceedings, on the first information; because, as a verdict cannot be given in evidence without the record, which gave authority to the jury to proceed, no more can they give in evidence the agreement of the jury without the record on which they were empaneled.

2 Ro. Abr. 679 a, 3.

But a verdict cannot be thus avoided in criminal cases; for there the party must consent to the withdrawing of a juror; since he is in character and estimation so highly interested, and hath a right, if he so prefer, to entitle himself to a solemn acquittal by his peers.

As to writs, when a writ out of court is only inducement to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record, and therefore the copy of it is not required. But, where a writ itself is the gist of the action, you must have a copy from the record, inasmuch as you are to have the uttermost evidence the nature of the thing is capable of, and it cannot become the gist of the action till it is returned.

*Tri. per Pais*, 448. 2 Gilb. Ev. 40; Buller, 234.g

In an action of trespass against a bailiff for taking goods in execution, if it be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of *fiery facias*, without showing a copy of the judgment. But, if the plaintiff be not the party against whom the writ issued, but claim the goods by prior execution (or sale) that was fraudulent, there, the officer must produce not only the writ, but a copy of the judgment. For in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass: but in the other case, they are not the goods of the party

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against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within 13 Eliz., for which purpose it is necessary to show a judgment.

1 Ld. Raym. 733; 5 Burr. 2631, S. P.; Dougl. 41, S. P.; 2 Bl. Rep. 1104, S. P. *See* Holmes v. Nuncaster, 12 Johns. 395; Parmele v. Hitchcock, 12 Wend. 96; Coon v. Congden, 12 Wend. 496; Yates v. St. John, 12 Wend. 75; Savacool v. Boughton, 5 Wend. 170; Wilson v. Connine, 2 Johns. 280; Harget v. Blackshear, Taylor, 107; Clay v. Caperton, 1 Monr. 10; Damon v. Bryant, 2 Pick. 411. When the plaintiff is sued, he must show a judgment when he justifies under the process. 1 Monr. 10, 11. *See* also Davis v. Baxter, 5 Watts, 515; McCormick v. Miller, 3 Penna. 230; Cleveland v. Rogers, 6 Wend. 438.*g*

In *plene administravit*, the execution executed cannot be given in evidence, without the judgment, because there appears to be no authority for such execution without the judgment; for where the execution is of record, and the authority for such execution is also of record, they must both appear to the jury, otherwise they have not the uttermost evidence of the fact in question.

In an action brought by an attorney for his fees, it is sufficient to prove the taking out of the writ by a warrant made by the coroners; for the writ may not be returned of record, and, by consequence, is no record, and then the warrant made by the coroners is sufficient to prove a title to his fees; for the attorney in this case is entitled to his fees, whether the writ be returned or not.

Silby and Hinecly, Trin. Ass. 1701, *per* Gould.]

|| The return of the sheriff upon a writ, which has been duly returned and filed, is *prima facie* evidence of the fact there stated, when that fact comes incidentally into question. If the sheriff return a rescue, the court above, to which the return is made, will give it such credit, as to issue an attachment in the first instance; though, upon an indictment for a rescue, the defendant may show, that the return is false. And so, in an action for maliciously suing out an *alias fieri facias*, the Court of King's Bench held, that the sheriff's return annexed to the writs (in which he stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff) had been properly admitted at the trial as evidence of that fact, in support of a plea of license pleaded by the defendant: for, as the court said, faith ought to be given to the official act of a public officer, like the sheriff, even where third persons are concerned.

Phil. Ev. 294. *See* A sheriff's return has a different effect as evidence, sometimes it is conclusive, at others it is merely *prima facie* evidence. It will be proper to consider its effects, 1st, as regards the officer; 2dly, the parties to the action; 3dly, purchasers; and 4thly, strangers. 1. In general the return of the sheriff is conclusive on him, and he will not be allowed to question its truth. Purrington v. Loring, 7 Mass. 388; Townsend v. Olin, 5 Wend. 207; Denton v. Livingston, 9 Johns. 98; Williams v. Cheesebrough, 4 Conn. 356; Scott v. Sellar, 5 Watts, 235; Armstrong v. Garrow, 6 Cowen, 465; Shewell v. Fell, 3 Yeates, 17; S. C. 4 Yeates, 47; Meredith v. Shewall, 1 Penna. 496; Barney v. Weeks, 4 Verm. 146. But to this rule, that the return is conclusive on the officer, there are some exceptions; as, for example, when an officer is prosecuted for not seizing and selling property levied on by him under an attachment, and returned as the property of the debtor, he may show, notwithstanding such return, that the property was not the debtor's. Fuller v. Holden, 4 Mass. 498; Learned v. Bryant, 13 Mass. 224.*g* R. v. Elkins, 4 Burr. 2129; Gyfford v. Woodgate, 11 East, 297. ||

[Among the records of the kingdom are to be ranked the journals of the House of Lords. And a copy of the minute book of the House of Lords may be given in evidence; for as Lord Mansfield said, "The minutes of the judgment are the solemn judgment itself;" not a word is added upon

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the journals, and a copy of them may certainly be read in evidence, for the inconvenience would be endless if the journals were to be carried all over the kingdom. Formerly a doubt was entertained whether the minutes of the House of Commons were admissible; because it is not a court of record; but that doubt seems now to be done away: and those of the House of Lords have always been admitted even in criminal cases.

*Jones v. Randall*, Cowp. 17.  $\beta$  In Pennsylvania, the journals of Congress have been allowed to be read without other proof of their authenticity. *Commonwealth v. De Longchamps*, MS. Whart. Dig. 280, 2d ed. In New York, the Senate journals, proved by the clerk to have been printed by the printer of the Senate, and laid upon the tables of the members, have been received as *prima facie* evidence. *Root v. King*, 7 Cowen, 613, 636. See *Albertson's Lessee v. Robeson*, 1 Dall. 9; *Radeliffe v. United States Ins. Co.*, 7 Johns. 38; *Talbot v. Seaman*, 1 Cranch, 37, *g* Dougl. 594.  $\parallel$  But a resolution of either House is not evidence of the truth of facts there affirmed; and therefore in the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the Popish plot, a resolution of parliament, asserting the existence of the plot, was not allowed to be evidence of that fact. 4 St. Tr. 39.  $\parallel$

The things that stand second in point of probability are all public matters that are not of record.

The public matters that are not of record all come under this general definition: they must be such matters as have an evidence in themselves, and do not expect an illustration from any other thing; such are the copies of court rolls, and transactions in Chancery, and the like. And the copies of such matters may be given in evidence, inasmuch as there is a plain and coherent proof; for the matters themselves are supposed to be self-evident, and, by consequence, when a copy of them is produced upon oath, you have a full proof, because you have proved upon oath a matter which when produced would carry its own light with it, and, by consequence, would need no proof.

But here it will be objected, that this is not the utmost evidence which the nature of the thing is capable of, for these testimonies themselves must be better than the copies of them.

To this the answer is, that the copy upon oath is reckoned as an equivalent to the thing itself; and the testimony itself must not be rigidly required, because since these matters lie for the public satisfaction, every man has a right to their evidence, and in several places they cannot be at the same time, and therefore the things themselves cannot be demanded, but only the copies of them.

The first sort of testimonies that are not of record are the proceedings of the Court of Chancery on the English side.

The reason why the proceedings in Chancery and the rolls of the court are not records is this, because they are not the precedents of justice; for the proceedings in Chancery are founded only on the circumstances of each private case, and they cannot be rules to any other; and the judgment there is *secundum æquum et bonum*, and not *secundum leges et consuetudines*; and the reason why any record is of validity and authority is, because it is declarative of the sense of the law, and is a memorial of what is the law of the nation: now Chancery proceedings are no memorials of the laws of England, because the chancellor is not bound to proceed according to law.

Co. Litt. 260 a.  $\beta$  A decree in the Court of Chancery may be given in evidence as the verdict or judgment of a court of common law. It is to be received on the same footing and subject to the same limitations. 1 Phil. Ev. 358; *U. S. v. Nourse*, 9 Pet. 8; *Strike v. McDonald*, 2 Harr. & Gill, 191; *Irvin v. Divine*, 7 Monr. 246; *Garnett v. Macon*, 6 Call, 338; *Arnold v. Styles*, 2 Blackf. 391; *Bugg v. Norris's Lessee*, 4 Yerg. 326; *Hunt v. Lyle*, 6 Yerg. 412; *Starke v. Woodward*, 1 Nott & M'C. 329, n.;

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*Coit v. Tracy*, 8 Conn. 268; *Garner's adm'r. v. Strode*, 5 Litt. 314; *Thompson v. Clay*, 3 Monr. 359; *Irvin v. Divine*, 7 Monr. 246; *Winaus v. Dunham*, 5 Wend. 47. *g* But see 3 Bl. Com. c. 27.

Now because these several proceedings before mentioned are not records, they are, by consequence, not such memorials as are lodged inseparably in any certain place, but are transferable from one place to another, and therefore may be themselves given in evidence.

The bill in Chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; nor shall it be supposed to be preferred by the counsel or solicitor without the party's privity, and therefore is evidence as to the confession and admittance of the truth of any fact by the party himself; and if the counsel hath mingled in it what is not true, the party may have his action. But, where a bill is exhibited, and there are no proceedings upon it, then it cannot be given in evidence, unless they prove a privity in the party, for a man may file a bill in another's name to rob him of his evidence by a sham confession; and therefore a bill filed without any proceedings upon it has not the force of an evidence, for no man can suppose that the party did himself file the bill, for the bill, without any proceedings to bring the adversary to answer it, is of no use to the party, and therefore it must be supposed rather to be filed by a stranger to do him an injury. This is accounted to stand in point of credibility in the same circumstances, as a confession by letter under the party's own hand where nobody saw the writing of it; though some have ranged it in an inferior degree, because the one is the party's own immediate confession, and the other is only the counsel's draught; yet it seems the allegation in a court of justice, that amounts to the confession of any fact, ought to have more weight and authority with it than any private owning.

Chan. Cas. 64, 65; 1 Sid. 221; Eq. Abr. 227, pl. 1; Nels. Ch. Rep. 102. *g* *Owens v. Dawson*, 1 Watts, 149; *Rankin v. Maxwell's Heirs*, 2 Marsh. Ky. R. 488; *Belden v. Davis*, 2 Hall, 444; *Francis v. Hazlerig's Ex'rs.*, 1 Marsh. Ky. R. 93; *Rees v. Lawless*, 4 Litt. 218; 1 Phil. Ev. 358; *Gresl. Eq. Ev.* 322. *g* 1 Sid. 221; *Keb.* 780; *L. E.* 105, pl. 55.

But a mere general suggestion of facts, in order to a discovery, shall not be read in evidence; for this is no more than a surmise of the counsel, in order to come at facts; otherwise, of a fact stated in the bill on which the plaintiff founds his prayer for relief.

Bull. N. P. 235. {It is not evidence even of such a fact. 2 Esp. Rep. 496; 7 Term, 2, *Doe v. Sybourn*; *Ibid.* 3, n., *Taylor v. Cole*.}

If a patron sues a simoniacal bond, and the parson prefers a bill in Chancery to be relieved, the bill and proceedings upon it shall be given in evidence on ejectment to make void the parson's living.

*Keb.* 780; 1 Sid. 221.]

||The general rule now is, that a bill in Chancery will not be evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses. It is not to be received in proof of any facts alleged or denied in it. (a) Lord Kenyon indeed is reported to have admitted a bill in Chancery, (b) filed by an ancestor, to be evidence of a pedigree therein stated, as a declaration in the family. But it was resolved by the judges in the Banbury peerage case, on a question put to them by the House of Lords, that a bill in equity, nor depositions, cannot be received in evidence in the courts below, on the trial of an ejectment, against a party not claiming or deriving in any manner under the plaintiff or defendant in the Chancery suit, either

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as evidence of the facts therein deposed to, or as declarations respecting pedigree.

Ph. Ev. 263; Lord Ferrers v. Shirley, Fitzg. 196; Bull. N. P. 235; Doe v. Sybourn, 7 T. R. 3; Bennet v. Neale, Wightw. 324, 685. (a) Banbury peerage case, 2 Selw. N. P. 685. (b) Taylor v. Cole, 7 T. R. 3, n.

In the Banbury peerage case, where C D's legitimacy was in question, the claimant offered in evidence a bill filed in C D's name by E F, his uncle and next friend, stating his legitimacy; but there was no proof that E F was his uncle. The judges being referred to for their opinion, were unanimous, that extrinsic proof of the relationship was essential, and the bill, which was 150 years old, was rejected.||

[But, though the bill be not evidence against the complainant, the answer is evidence against the defendant, and carries a great weight along with it, because it is delivered in upon oath.

Godb. 326; L. E. 106, pl. 57. {The exception of *res inter alios acta* does not apply to an answer. An admission contained in it may be read against the defendant in another action against him, though the bill was filed by other creditors. Peake, N. P. 203, Grant v. Jackson.}

But, when you read an answer, the confession must be all taken together, and you shall not take only what makes against the defendant, and leave out what makes for him; for the answer is read as the sense of the party himself, and if it is to be taken in this manner, you must take it entire and unbroken.

Brochman's case, Trin. Ass. 1701, *per* Gold; 5 Mod. 10. See Roe v. Ferrars, 2 Bos. & Pull. 542, 548.] β A party's answer in Chancery is always evidence against him, when pertinent, whoever may have been the parties in the suit, because it is considered as a confession. Kiddie v. Debrutz, 1 Hayw. 420; Mims v. Mims, 3 J. J. Marsh, 103; Hunter v. Jones, 6 Rand. 541; Rowe v. Brenton, 3 Mann. & Ry. 271; Grant v. Jackson, 1 Peak. Cas. 203. An answer is not evidence in an action at law, for the party who made it, unless his antagonist make use of it. Nourse v. Gregory, 3 Litt. 378. See Hickson v. Aylward, 3 Moll. 33; and Greel. Eq. Ev. 323.g

||If, on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read to explain what he swore in his first answer.

R. v. Carr, 1 Sid. 418; Bull. N. P. 237.

The answer is evidence not only against the party who made it, but against all claiming under him. An answer to a bill in the Exchequer on a claim of tithe hay by a vicar against the rector and others, (occupiers of lands in the parish,) will be evidence in an action by a succeeding rector, for not setting out the tithe, against the defendant who claims under one of those occupiers; and it will be so, though it be not shown that a decree was made in the cause. Proof of an examined copy will be sufficient proof of the answer.

Lady Dartmouth v. Roberts, 16 East, 334.||

[An infant's answer by his guardian shall never be admitted in evidence against him on a trial at law; for the law has that tenderness for the affairs of infants, that it will not suffer them to be prejudiced by the guardian's oath, for the authority the law gives to the guardian is for the infant's benefit, and not to his prejudice, and therefore the infant cannot be hurt by the guardian's oath.

2 Vent. 72; 3 Mod. 529; Carth. 79; 3 P. Wms. 237; L. E. 106, pl. 59.]

||The guardian being sworn and not the infant, it is in reality the guardian's answer; and therefore an answer purporting to be the answer of an



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infant by his mother and guardian, may be read against the mother in another cause in which she is defendant in her own capacity.

*Beasley v. Magrath*, 2 Sch. & Lefr. 34.

Whether an answer by a married woman can be used as evidence against her in an action after her husband's death, nowhere appears. In the case of *Wrottesly v. Bendish*, (where it was argued, that the wife was not bound to answer, on the ground that the answer could not be read against her husband, nor against herself, as she is supposed to be under the control of her husband, and not to answer freely,) Lord Chancellor Talbot said, "he would not give any opinion, whether the answer may be read against the wife, when discoverd; but, as in all times heretofore, the wife as well as the husband had been compelled to answer, he would not overthrow what had been the constant practice."

3 P. Wms. 237. || See *Barron v. Grilliard*, 3 Ves. & Bea. 166. g

[The answer of the trustee can in no case be admitted as evidence against the *cestuy que trust*.

Bull. N. P. 237.]

{The answer of one defendant is not evidence against another defendant, because he has no opportunity of cross-examining.

12 Ves. J. 355, *Morse v. Royal*; 1 Cain. Er. 121, *Grant v. U. S. Bank*; 1 Johns. Rep. 572, *Bebee v. Bank of New York*.}

[A bill was brought by creditors against an executor, to have an account of the personal estate; the executor sets forth by answer, that there was 1100*l.* left by the testator in his hands, and that, coming afterwards to make up his accounts with the testator, he gave bond for 1000*l.*, and the other 100*l.* was presented to him as a gift for his trouble and pains taken in the testator's business, and there was no other evidence in the case, that the 1100*l.* was deposited, but merely the executor's own oath. It was argued that the answer, though it was put in issue, should be allowed, since there is the same rule of evidence in equity as at law; and therefore if a man was so honest as to charge himself when he might roundly have denied it, and no testimony could have appeared, he ought to find credit when he swears in his own discharge.

*Anon.*, Hil. Vacat. 1707, *per* Cowper. {But if the cause is heard on bill and answer, the latter must be considered as true in every part. 1 Wash. 163, *Kennedy v. Baylor*. See *Taylor*, 318, *Salter v. Speir*.} || *Clark's Ex'rs. v. Van Riemedyk*, 9 Cranch, 152; *Leeds v. The Marine Ins. Co.*, 2 Wheat. 380; *Field v. Holland*, 6 Cranch, 8; *Dade's Adm'r. v. Madison*, 5 Leigh, 401; *Hayward v. Carroll*, 4 Harr. & Johns. 518; *Mosely v. Armstrong*, 3 Monr. 287; *Harrison's Heirs v. Johnson*, 3 Litt. 286; *Daniel v. Ballard*, 2 Dana, 296; *Jones v. Bullock*, 3 Bibb, 467; *Phoenix v. Ingraham's Assignees*, 5 Johns. 412; *Rundlet v. Jordan*, 3 Greenl. 47; *Hoomes v. Elliot*, 1 Wash. 389; *Timberlake v. Cobbs*, 2 J. J. Marsh. 136; *Fanning v. Pritchett*, 6 Monr. 79. g

But it was answered and resolved by the court, that when an answer is put in issue, what is confessed and admitted need not be proved, but it behooved the defendant to make out by proofs what was insisted upon by way of avoidance. But this was held under this distinction; where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, there, he ought to prove the matter of his defence, because it may be probable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him so far as to pass for truth, whatever he says in avoidance. But, if it had been one fact, as, if the defendant had said the testator had given him 100*l.*, it ought to have been allowed unless disproved, because nothing of the fact charged is admitted,

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and the plaintiff may disprove the whole fact as sworn, if he can do it. But it was urged that here the probability was on the defendant's side, because he did not take a bond for this sum as for the residue. But the chancellor said there was some presumption in that, but not enough to carry so large a sum without better attestation.

{See 7 Ves. J., 404, *Ridgway v. Darwin*; *Ibid.* 587, *Thompson v. Lambe*; 1 Johns. Rep. 580, *Green v. Hart*.}

In an information for perjury, an answer may be given in evidence without any person to prove that the defendant swore it, for the identity may be proved by many things out of the answer itself: besides, the party is obliged to sign his answer; and the perjury may be further illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof, that out of the answer itself evinces the identity of the person.

3 Mod. 116. Vide *infra*.

Although an answer is good evidence against a defendant, yet it is not against his alienee; nor is it any evidence for the defendant in a court of law, (except so ordered on an issue out of Chancery,) unless the plaintiff make it evidence by producing it first. As, where on an issue out of Chancery to try the terms of an agreement, which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under the necessity of producing the bill and answer in order to read his deposition, and by that means made the whole answer evidence, which was accordingly read by the defendant. But, where an answer in Chancery of the witness was produced to show him incompetent, he having there sworn that he had an annuity out of the land in question, and Serjeant Maynard insisted to have the answer read through, the court refused it, as it was produced only to show that he was not a competent witness in the cause, and not to prove the issue.

Bull. N. P. 237, 238. βSee 2 Caines, Cas. Er. 70; Taylor, 318; 6 Cranch, 9; 4 Litt. 218. γ *Bourn v. Sir Thomas Whitmore*, Salop. 1747; *Sparin v. Drax*, M. 27 Car. 2, C. B. at bar.]

||The answer of one defendant, generally speaking, is not evidence against a codefendant; for if that were allowed, a plaintiff might make one of his friends a defendant, for the purpose of procuring an answer in his favour against a codefendant, who would have no opportunity of cross-examination.

*Wych v. Meal*, 3 P. Wms. 310; 12 Ves. 361.

As an admission by one of two partners, concerning joint contracts during the partnership, is good evidence to charge the other partner in an action against him alone; so, in an action by a creditor against some of the partnership firm, the answer of another partner to a bill filed by other creditors, has been received in evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those who are as one person with him in interest.

*Wood v. Braddick*, 1 Taunt. 104; *Grant v. Jackson*, Peake's N. P. C. 203.]

[Analogous to this is a man's own voluntary affidavit, which may also be given in evidence against him.

*Brochman's case*, Trin. Ass. 1701; *per Gould*. Str. 35.

But there is a very great difference between the evidence of an answer and that of a voluntary affidavit.

An answer cannot be given in evidence without producing the bill, because without the bill there does not appear to be a cause depending. But, if there be proof by the proper officer that the bill has been searched for

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diligently in the office, and cannot be found, there, the answer hath been allowed to be read without a sight of the bill. And this Lord Chancellor Broderick allowed, though the loss of the bill was not proved by the proper officer, but by the clerk only who wrote in the office, and swore he searched carefully with the officer and could not find the bill.

Michaelmas Term, 1714, in *Canc. inter Roch and Rix, Administrators of Howard et al.*

An answer is proved by showing the allegations in the court, viz., by showing the bill, which is the charge, and the answer, which is as it were the defence of the bill; and this in civil cases shall be intended to be sworn, because the proceedings upon such defence are upon oath. And since the proceedings of any court of judicature within the kingdom are good evidence in other courts, and the proceedings in this case are upon oath, it follows of consequence, that in all civil cases the answer is to be taken as an oath, without any further proof but from the proceedings in the cause.

Hill. Ass. 1700.

But a voluntary affidavit is not part of any cause in a court of justice, and therefore it must be proved to be sworn; for if you only prove it signed by the party, the proof goes no farther than to suppose it as a note or letter, and as such you may not give it in evidence without more proof, for a note or letter is a bare acknowledgment under the hand of the party, and this is no more unless you prove it to be sworn also, for it cannot be presumed to be sworn, being not filed as an oath in a court of justice.

*Smith v. Goodier*, 3 Mod. 36; L. E. 121, pl. 92.

Such are the affidavits made before a master in Chancery by the vendor of an estate for the satisfaction of the purchaser, that the estate is free from all charges and encumbrances.

In an action of covenant brought against two, the affidavit of one of them was given in evidence as an acknowledgment of them both, because the acknowledgment of one of them where they had a joint interest was to be looked upon as a truth relating to them both, and the consideration of the matter is to be left to the jury how far it is evidence against the other.

*Vicary's case* in the Exch. {See Peak. N. P. 16, *Thwaites v. Richardson*; *Ibid.* 203, *Grant v. Jackson*; 1 Dall. 141, *Woods v. Courter*.}

The second difference between them is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot; the reason is, because the answer is an allegation in a court of judicature, and being matter of public credit, the copies of it may be given in evidence for the reason formerly mentioned. But a voluntary affidavit hath no relation to any court of justice, and therefore is not entitled to public credit, and being a private matter, the affidavit itself must be produced as the best evidence. Besides, it must be proved to be sworn, which it cannot be unless it be produced. Therefore, where in an action for a malicious prosecution, the plaintiff, to increase damages, offered the office copy of an affidavit made by the defendant in Chancery of his being worth 2500*l.*; Lord Raymond refused to let it be read, and the plaintiff was obliged to send for the original, which was filed in Chancery. And notwithstanding the office copy of an answer may be given in evidence in a civil suit, yet it will not be sufficient on an indictment for perjury, though perhaps such copy would be sufficient (*a*) for the grand jury to find the bill; but upon the trial the original must be produced, and positive proof made that the defendant was sworn by a witness acquainted with him. But proof that a person calling himself J S was sworn, and that he signed the answer, (or affidavit,) and

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proof also by another witness of the handwriting, would be sufficient. So an answer being brought out of the proper office, and *jurat* under the master's hand, and proof of its being signed by the defendant by proof of his handwriting, is sufficient to prove it sworn by him even on an indictment for perjury. But no return of commissioners (or of a master in Chancery) of the party's swearing will be sufficient, without some other proof of the identity of the person.

3 Mod. 116; Ante, 54; Bull. N. P. 238, 239; Chambers v. Robinson, Tr. 13 G. 1. (a) It would not. 2 Burr. 1189; 3 Mod. 117.

But the voluntary affidavit of a stranger can by no means be given in evidence, because the opposite party had not the liberty to cross-examine.

Style, 446.

The next thing is the depositions: and here we must in the first place consider what rank they stand in, in point of credibility. To enlighten this matter we must give an account of their original use. They evidently came over to us from the civil law. It is very plain that the parties exhibited their interrogatories upon their several allegations, but that the witnesses were privately examined upon these interrogatories by the same judge that tried the cause; so that the course anciently among the Romans is very different from the modern pleadings of the Chancery, where the sense of the witness is stated by the examiner, on which the chancellor is to judge.

That this which I have mentioned was the ancient course of the civil law, is very plain from Adrian's epistle to Varus, the legate of Cilicia, *Tu magis scire potes quanta fides habenda sit testibus; qui, et cujus dignitatis, et cujus aestimationis sint: et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint; an ad ea, quæ interrogaveras, ex tempore verisimilia responderint.*

Dig. lib. 22, tit. 5, § 3, de Test.

Now these examinations were first made privately, that the judge might in the first place be possessed of the naked fact, and the sense of these witnesses was after taken in writing, and then publication passed, that the judge might have all due assistance from the observation of the advocate, if he had not sufficiently compared and weighed the examination. As the trials of the civil law thus stood, when the judges viewed the behaviour of the witnesses, there is very little difference between this trial and that of the jury, save only that this sort of trial by jury is much more speedy, and the evidence is more entire, whilst in the other way the judges take up the evidence at one time and the gloss at the other, and such breaking of the evidence may be dangerous to a weak and less considering judge. Besides, the judge not being of the neighbourhood, cannot so easily distinguish the credit of the witnesses, and upon this account also the trial by jury is preferable to the examination of the civil law when under the best regulation.

And, no doubt, in our Chancery proceedings the witnesses were formerly examined by the masters, who sat in the court to inform the chancellor of their credibility, till causes so multiplied, that the masters were employed in other affairs, and so the examination of witnesses was left to the examiners.

Now, since this practice has been used, no doubt, but that the credit of depositions *ceteris paribus* falls much below the credibility of a present examination *viva voce*, for the examiners and commissioners in such cases often dress up secret examinations, and give a quite different air to them from what they would have, if the same testimony had been plainly delivered under the strict and open examination of the judge at the assizes.

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But, though the depositions fall short of examinations *vivâ voce*, yet they seem superior to what a witness said at a former trial; for what is reduced to writing by an officer sworn to that purpose from the very mouth of the witness, is of more credit than what a stander-by retains in memory of the same oath; for the images of things decay in the memory, by the perpetual change of appearances; but what is reduced to writing continues constantly the same; so that we cannot be certain on a verbal attestation, but that some circumstances of the fact may be lost in the recollection. We must in the next place see in what cases depositions may be read.

1st, They may be read where the witnesses are dead; for where the witness is living, they are not the best evidence the nature of the thing is capable of, and therefore cannot be read; but, where the witness is dead, the deposition is allowable. For as records are the invention that perpetuate the decisions of law, so are depositions the only method to perpetuate the memory of the fact, and therefore they must be trusted where the witness is not in being.

Godb. 193, 326; 9 Str. 920; Barnard. K. B. 348; Salk. 278, 281, 286; 4 Mod. 146, S. C.; Show. 363; 2 Salk. 555. ¶ The 19th article of the declaration of rights, which provides that in criminal cases the accused shall have the right "to meet the witnesses against him face to face," is not violated by the admission of testimony to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace. *Commonwealth v. Richards*, 18 Pick. 434. See *Reg. v. France*, 2 M. & Rob. 207.g

2dly, Where a witness is sought and cannot be found, you may, upon oath of the matter, use his depositions; for when it appears by oath that he cannot be found, it is the best evidence that possibly can be had of the matter; for when a witness is sought and cannot be found, he is in the same circumstances as to the party that is to use him, as if he were dead.

Godb. 326; L. E. 106, pl. 27. ¶ *Collins v. Lowry*, 2 Wash. 75.g

3dly, If it be proved that a witness was subpoenaed and fell sick by the way, his deposition may be allowed to be read; for in this case the deposition is the best evidence that possibly can be had, and answers what the law requires.

Mod. 283; L. E. 180, pl. 13; 11 Mod. 210, 225, 226, 263; Fitzgib. 197; 12 Mod. 215, 231, 305, 319, 339, 375, 403, 607; Will. Rep. 288, 289, 414, 415, 557; 2 Will. Rep. 563; Ld. Raym. 729, 730, 734, 735; 2 Ld. Raym. 873, 1166, 1371; Vern. 331, 413; Pre. Ch. 64; Eq. Abr. 227; 2 Stra. 920; L. E. 180, pl. 13. {2 Hen. & Mun. 31, *Minnis v. Echols*.}

But depositions taken thirty years since were admitted to be read in Chancery, though the parties were not the same, inasmuch as the cause related to the same land, and the terretenants were parties to it, and those witnesses were since dead, the plaintiff's title then not appearing. And this is an indulgence of the Chancery beyond the strict rules of the common law, and is admitted for the pure necessity, because evidence should not be lost. Besides, Chancery hath great faith in its own (a) examiners, who are supposed indifferent persons, that by themselves take the sense of the parties strictly, so that by that means the depositions stand the fairer to be read at any time. *Quere*.

*Chan. Cas. 73*; Eq. Abr. 227, pl. 2. (a) ¶ Its faith in its fixed and regular examiners would not seem to be very great at present. "Upon my own observation," said Lord Chancellor Loughborough, "the depositions are abominably taken in the Examiner's Office. I have again and again observed it. I spoke to the master of the rolls upon it. The mode of taking depositions there tends to perplex the evidence, and creates great expense, making the witness negative one after the other all the circumstances

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of the interrogatory, of which he knows nothing." 3 Ves. 605. See too st. 50, G. 3, c. 164.]]

4thly, A deposition cannot be given in evidence against any person that was not party to the suit, and the reason is, because he had not liberty to cross-examine the witnesses, and it is against natural justice that a man should be concluded in a cause to which he never was a party.

Hard. 472.

5thly, A man shall never take advantage of a deposition that was not party to the suit; for if he cannot be prejudiced by the deposition, he shall never receive any advantage from it. For this would create the greatest mischief that could be; for then a man that never was party to the Chancery proceedings, might use against his adversary all the depositions that made against him, and he in his own advantage could not use the depositions that made for him, because the other party, not being concerned in the suit, had not the liberty to cross-examine, and therefore cannot be encountered with any depositions out of the cause.

Hard. 472. But in cases of customs and tolls, and, in general, in all cases where hearsay and reputation are evidence, depositions, under these circumstances, may be given in evidence.

6thly, Depositions before an answer put in are not admitted to be read, unless the defendant appears to be in contempt, for if a cause do not appear to be depending, then, are the depositions considered as voluntary affidavits; for unless a suit is shown to be commenced, it doth not appear that the adverse party had liberty to cross-examine: but, if the adverse party be in contempt, (a) then the depositions of the witnesses shall be admitted, for then it is the fault of the objector that he did not cross-examine the witnesses, since he would not join the examination of the witnesses.

Raym. 335; L. E. 114, pl. 76. (a) It appears now to be clearly settled, that depositions are not allowed to be read in evidence, before answer put in, or before the party is in contempt, unless he has had an opportunity of cross-examining; but, if he has had such an opportunity, and has omitted to avail himself of it, he cannot afterwards make that a ground for objecting to the depositions as evidence. *Cazenove v. Vaughan*, 1 M. & S. 4.]]

When the bill is dismissed, the rule as to the reading of the depositions is this: where the bill is dismissed because the matter is not proper for equity to decree, yet the depositions on the fact in the cause may be read afterwards in a new cause between the same parties. For though the matter is not proper for equity to decree, yet there was a cause properly before the court; for it is proper for the jurisdiction of equity to consider how far the law ought to be relaxed and moderated; and where there is a cause properly before the court, for whomsoever that cause be decided, yet the depositions in it must be evidence, as well as in all others.

*Backhouse v. Middleton*, Ch. Ca. 175; *Smith v. Veale*, 1 Ld. Raym. 735.

But, if a cause in equity be dismissed, for the irregularity of the complaint, the depositions in that cause can never be read; as where a devisee, on a suit pending by his devisor, brings a bill of revivor, and several depositions are taken, and then the cause on the hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor: in this case, and on a new original bill exhibited, the devisee cannot use the former depositions; for in the first cause, mistaking the bill that he ought to bring, there was no complaint before the court, since the court doth not allow any devisee to complain in that manner by right of

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representation; and there being no cause regularly before the court, there could be no depositions in it.

Cha. Cas. 175.

In cross causes in equity an agreement was proved in one of the causes, and in that cause it was not set forth in the allegation of the bill or answer: in the other cause the agreement was set forth in the bill, and not proved in the cause; and an order was obtained before publication, that the same depositions should be read in both causes. And by the better opinion this might be; but since the order was before publication in the second cause, the defendant had liberty to cross-examine the witnesses on which particulars he pleased, and the sight of the depositions was to his advantage.

Cha. Cas. 236.

If a witness, after his deposition taken, become interested, his deposition shall not be read; for the intent of taking such deposition is only to perpetuate his testimony in case the witness die.

Tilly's case, 1 Salk. 286; Baker v. Ld. Fairfax, 1 Str. 101; Holcroft v. Smith, 1 Eq. Ca. Abr. 224. ¶ But the practice of courts of equity is contrary. Goss v. Tracy, 2 Vern. 699; 1 P. Wms. 287; Haws v. Hand, 2 Atk. 615; Glyn v. Bank of England, 2 Ves. 42. Nor do courts of law, in all cases, adhere strictly to the principle of refusing to admit depositions in evidence, when the witness is still living; for they may be read when he is beyond the reach of judicial process; Ld. Altham v. Ld. Anglesey, Gilb. Eq. Ca. 16; 11 Mod. 210, S. C.; or where he cannot be found, or is sick, and unable to attend. Fry v. Wood, 1 Atk. 445. They also admit other proof in some cases where a witness, who is alive, becomes incompetent from interest; as, where the only surviving witness to a bond becomes administrator or executor to the obligee. Godfrey v. Norris, 1 Str. 34; Goss v. Tracy, 1 P. Wms. *ubi supra*.]

If a witness be examined *de bene esse*, and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power to cross-examine him, and the rule of the common law is strict to this, that no evidence shall be admitted but what is or might be under the examination of both parties.

Hard. 315; L. E. 111, pl. 72. Vide *supra*.

But in such cases as these, the way is to move the Court of Chancery, (a) that such a witness's depositions be read, and if the court see cause they will order it, and this order will bind the parties to assent to the reading of such depositions, though it doth not bind the court of *nisi prius*: and this is thought just, because the witnesses are examined by the officers of the court, who are supposed to favour neither party.

2 Jon. 164; L. E. 113, pl. 74. (a) ¶ It is the common practice of the Court of Chancery, when an issue or trial at law is directed, to make an order that the depositions of witnesses shall be read in evidence, if it be satisfactorily proved at the trial that the witnesses are unable to attend in person. Corbet v. Corbet, 1 Ves. & Beam. 340. But this order is not made for the purpose of making that admissible in evidence which is not strictly admissible in courts of common law, but for the convenience of the parties. For if depositions are offered at the trial without such an order, the whole record, bill, answer, &c., must be proved: but, if there is an order for reading the depositions, the court of law will read them without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. Palmer v. Lord Aylesbury, 15 Ves. 176.]]

Formerly they did not enrol their bill and answer, but as it seems the bill was left loose in the office with the clerks of the office, and was thereby subject to be lost; and therefore ancient depositions may be given in evidence without the bill and answer. So, depositions taken by the command

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of Queen Elizabeth, upon petition, without bill and answer, were, upon a solemn hearing in Chancery, allowed to be read.

2 Keb. 31; L. E. 113, pl. 75; Hob. 112.

The ancient practice was also, that they never published the depositions in the lifetime of the witnesses, because the depositions in *perpetuam rei memoriam* were of no use till after the death of the witnesses. But this practice was found very inconvenient, because witnesses became thereby secure in swearing whatsoever they pleased, inasmuch as they could never be prosecuted for perjury, the effect of their oaths not being known till after their deaths.

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On an information for perjury, the depositions in Chancery signed by the commissioners are not sufficient evidence without proof that the party swore them; for there is no proof of the identity of the person, but by the comparison of hands, which is not a sufficient evidence in a criminal case, (a) for another man might personate me, and thereby subject me to the penalty of perjury.

3 Mod. 116, 117. (a) *Sed vide infr.*

From what has been said it is evident, that a voluntary affidavit before a master in Chancery is no evidence between strangers, because here is no cross-examination, since there appears to be no cause depending; and therefore such evidence cannot be admitted, except in those cases where a confession of the person making the affidavit would be evidence, as, where a widow came for administration, the marriage being contested, an affidavit of the man himself was read. So, on an issue directed out of Chancery to try the legitimacy of the plaintiff, the father's oath before the judges on a private bill was allowed to be evidence.

Styl. 446; Sacheverel and Sacheverel, 5 Mar. 1716, before the Delegates; May and May, K. B. at bar.  $\beta$  An affidavit taken *ex parte*, and without notice, is not in general good evidence. Layton v. Cooper, 1 Pen. 65; Lummis v. Strattan, 1 Pen. 245; Goldsmith v. Bane, 3 Halst. 87; Plunkenhorn v. Cave, 2 Yeates, 370; Sturgeon v. Wagh, 2 Yeates, 476; Patterson v. Maryland Ins. Co., 3 Harr. & J. 71; Lewis v. Bacon, 3 H. & M. 89; Armstrong v. Boylan, 1 South. 76; Skillman v. Quick, 1 South. 102; 3 Wash. C. C. R. 109. But an affidavit made abroad may be admitted to prove pedigree. Fogler v. Simpson, 2 Dall. 117; 1 Yeates, 17, 152. An affidavit made in another state would not, it seems, be admitted to prove pedigree. Douglass v. Sanderson, 2 Dall. 116.

As the spiritual courts are not of record, depositions taken in them cannot be read in evidence, though the witnesses be dead.

Bull. N. P. 242; 2 Roll. Abr. 679; Litt. Rep. 167.

Depositions taken before commissioners of bankrupts cannot be read in evidence, because there cannot be a cross-examination. However, by the statute 5 G. 2, c. 30, § 41, which directs proceedings on commissions of bankrupt and the certificates to be entered of record, true copies signed and attested as therein required are to be given in evidence. Therefore an office copy of the deposition of the witness who swore to the act of bankruptcy was admitted, after the witness's death, to be evidence to prove the precise time when the act of bankruptcy was committed. And where an examinant produces a deed before the commissioners, under which he claims a title to the bankrupt's goods, the examination may be used afterwards in a question between him and the assignees as evidence against him to prove the execution of the deed, without calling him to prove the subscribing witness.

1 Lev. 180; Sir T. Jones, 53; Janson v. Willson, Dougl. 257; Bowles v. Langworthy, 5 T. R. 366.]



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By 49 G. 3, c. 121, § 10, in any action brought by or against an assignee, the commission and the proceedings of the commissioners are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless the other party in the action, if defendant, at or before the time of pleading to the action, and if plaintiff, before issue joined, give notice in writing to such assignee, that he intends to dispute the same. And by § 11, in all suits in equity by or against any assignee, the commission and proceedings are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, against all the other parties in the suit, unless such parties, some or one of them, within ten days after rejoinder in the cause, give notice in writing to the assignee that they intend to dispute the same.

This statute applies only to those cases where the assignees are parties to the action. In suits between third persons, if the validity of a commission comes incidentally in question, as a ground of defence, it must be regularly proved, as it would have been before the passing of the statute.

*Doe v. Liston*, 4 Taunt. 741.

But the statute is not confined to cases where the assignees are named as such upon the record, but applies where the opposite party knows that they make out their title under the commission.

*Simmonds v. Knight*, 3 Campb. 251.

To make the proceedings evidence under this act, it is enough to show that they come out of the proper custody, viz., that of the solicitor to the commission, or to prove the signature of one of the commissioners before whom they were taken. Such evidence is necessary, although there has not been any notice of an intention to dispute the commission.

*Collinson v. Hillier*, 3 Campb. 30; Ph. Ev. 275.

In an action by a bankrupt against the assignees he may call witnesses to contradict the depositions respecting the petitioning creditor's debt, the trading, or the bankruptcy, although he has not given such notice under this act to the assignee; for the words of the act being, that "the commission and the proceedings of the commissioners are to be received as evidence of, &c., unless the other party give notice in writing that he intends to dispute the same," the proceedings are *prima facie* evidence, but not conclusive.

*Ellis v. Shirley*, 3 Campb. 424.

In an action of *assumpsit* for a creditor's share, under an order of commissioners of bankrupt for a dividend, the proceedings of the commissioners are conclusive evidence against the assignees; for after the debt is liquidated before the commissioners, it cannot be litigated but by application to the great seal.

*Brown v. Bullen*, Dougl. 407.

On an indictment for perjury charged to have been committed by the defendant in passing his examination before the commissioners, strict evidence of the bankruptcy seems to be necessary, and the commission and proceedings until it will not be sufficient proof; for the authority of the commissioners to administer the oath takes its root, not in the commission, but in the bankruptcy.

*R. v. Punston*, 3 Campb. 96.

By 1 & 2 P. & M. c. 13, § 5, "every coroner, upon an inquisition before him found, whereby any person shall be indicted of murder or manslaughter, or as accessory before the murder, shall put in writing the effect of the evi-

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dence given to the jury before him, being material, and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had."

On this statute it has been resolved unanimously by all the judges, that in case any of the witnesses, who have been examined before the coroner, are dead, or unable to travel, or kept out of the way by the means or procurement of the prisoner, their depositions may be read on his trial, the coroner first proving that they are the same which he took upon oath, without any addition or alteration. And proof (a) that the witness has been inquired after and is not to be found, has been thought sufficient to authorize the reading of the depositions.

Ph. Ev. 280; Lord Morley's case, Kel. 55; Thatcher's case, Sir T. Jon. 53; Bromwick's case, 1 Lev. 180; Gilb. Ev. 124. (a) Admitted *per Cur.* in Harrison's case, *cor.* Holt, C. J., Atkins, J., and Nevil, J. 4 St. Tr. 496; *Contr.* 4th res. in Lord Morley's case, Kel. 55.

The depositions taken before the coroner would seem to be evidence, though the prisoner be absent at the time.

Bull. N. P. 242; R. v. Eriawell, 3 T. R. 713. <sup>2</sup>The voluntary deposition of A, on oath before a coroner, upon an inquest on the body of B, although he was then in custody, was held admissible against A on an indictment for rape on B. Reg. v. Owen, 9 C. & P. 83.

It is now settled, that an inquisition of *felo de se*, taken before the coroner *super visum corporis*, is not conclusive evidence of the fact against the executors or administrators of the deceased, but that they may remove it into the King's Bench, and traverse it.

1 Saund. 362, n. 1.

By 1 & 2 P. & M. c. 13, § 4, "Justices of the peace, when any person is brought before them for manslaughter or felony, being bailable by law, shall, before any bailment, take the examination of the prisoner, and the examination of them who bring him, of the fact and circumstances thereof, and the same, or as much as may be material to prove the felony, shall put in writing, before they make the bailment; which examination, with the bailment, the said justices shall certify at the next general jail-delivery to be holden within the limits of their commission." And by 2 & 3 P. & M. c. 10, "the justice, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing within two days after the said examination; and the same shall certify in such manner and form, and at such time, as he should and ought to do, if such prisoner so committed or sent to ward had been bailed or let to mainprize, &c.

Before these statutes, a deposition taken before a justice of the county where a felony was committed, would not have been evidence, even though the witness had died, or was unable to travel; but it seems to be now settled in the construction of them, that a deposition of a witness, taken upon oath, (b) in the presence of the prisoner, (c) who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved upon oath, to the satisfaction of the court, that the informant is dead, (d) or not able to travel; (e) or that he is kept away by the means and contrivance of the prisoner; (g) provided also, that the deposition offered in evidence be proved

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to be the same which was sworn before the justice, without any alteration.<sup>(h)</sup>

3 T. R. 710, 722; Ph. Ev. 277; Hawk. P. C. b. 2, c. 46, § 15. (b) 1 Hal. P. C. 305, 586; 2 Hal. P. C. 52, 120, 284; Bull. N. P. 242. (c) R. v. Payne, 5 Mod. 163, cited by Ld. Kenyon, in 3 T. R. 723; Woodcock's case, 2 Leach's Cr. Ca. 566; R. v. Vipont, 2 Burr. 1163. (d) 4th res. in Lord Morley's case, Kel. 55; Bromewick's case, 1 Lev. 180; Adm. *per Cur.* in Payne's case, 1 Salk. 281; Bull. N. P. 242; Case of Flemming v. Windham, 2 Leach's Cr. Ca. 996; Westbeer's case, 1 Leach's Cr. Ca. 14. (e) 1 Hal. P. C. 305, 586; 2 Hal. P. C. 52; Kel. 55. (g) Kel. 55; Fost. Disc. p. 337. (h) 1 Hal. P. C. 305; 2 Hal. P. C. 52; Kel. 55.

It is not requisite that the deposition should be signed by the deceased witness.

Case of Flemming and Windham, *ubi sup.*

The information of witnesses, taken before justices of the peace, cannot be given in evidence on an indictment for a misdemeanor, or in civil actions, or on an appeal for murder. Nor can a conviction for petty treason (a) be grounded on such evidence. But, as a prisoner may be convicted of murder on an indictment for petty treason, the depositions are admissible in evidence to support a conviction of the murder, though not sufficient to support a conviction of the petty treason.

R. v. Payne, 1 Ld. Raym. 729. (a) Fost. Disc.; Radbourn's case, 2 Leach's Cr. Ca. 512; Swan's case, Fost. Disc. 106.

Where the felon is taken and examined by a magistrate in a county in which the offence was not committed, the examinations and depositions are to be transmitted into the county where the felon is indicted, and may there be read in evidence against him, though the justice is directed by the words of the statute "to certify the examination taken before him at the next general jail-delivery within the limits of his commission."

2 Hal. P. C. 285.

Where the informant himself gives evidence, these informations may be used, on the part of the prisoner, to contradict his testimony; one of the objects of the legislature in passing the statutes being to enable the judge and jury, before whom the prisoner is tried, to see whether the testimony of the witnesses at the trial is consistent with the account given by them before the committing magistrate.

Lambe's case, 2 Leach's Cr. Ca. 633; 3 St. Tr. 131; Hawk. P. C. b. 2, c. 46, § 22.||

[Another way of perpetuating the testimony of a person deceased is by giving the verdict in evidence, and the oath of the party deceased. Where you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine: besides, otherwise you cannot regularly give the verdict in evidence; and where you cannot give the verdict in evidence, you cannot give the oath on which it was founded; for if you cannot show that there was such a cause, you cannot show that any person was examined in that cause, and without showing there was a cause, no man's oath can be given in evidence, inasmuch as it appears to be merely a voluntary affidavit.

12 Mod. 318. See Str. 162; Barnard. K. B. 243. {5 Esp. Rep. 56, Strutt v. Bovingdon; 2 Johns. Rep. 17, Jackson v. Bailey.}

What a man himself that is living has sworn at one trial, can never be given in evidence at another trial to support him; though what the witness has said in discourse may be given in evidence to support him; because the same oath at another trial is no evidence of the truth of any man's swearing, for if a man be of that ill mind to swear falsely at one trial, he may do the

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same on the other on the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him. But, if a man hath sworn at one trial different from what he hath at another, this is good evidence as to his discredit.

19 Mod. 318; 4 St. Tri. 265 to 272; 2 Hawk. P. C. 430, § 9, 12; 2 Keb. 384.

A witness was sworn in a trial at bar in C. B., between the same parties on the same issue, and he was subpoenaed by the defendant to appear at a second trial in K. B., and his charges were given him; but he not appearing, persons were admitted to give evidence of what he swore in C. B.; for the court said, they would presume he was kept away by the plaintiff's practice. This presumption was strengthened by his having been produced by the plaintiff at the former trial.

Green v. Gatewick, Mich. 24 Car. 2; Bull. N. P. 243.

On an appeal of murder, the appellant cannot give in evidence the indictment, and what a person deceased swore at the trial; for in this case we have already shown that the indictment cannot be given in evidence against the defendant, and, by consequence, the oath cannot be given in evidence on the indictment: besides, the appeal is tried as a new cause, and therefore it is necessary to have his accusers face to face.

2 Sid. 325; 2 Hawk. P. C. 430, § 8; L. E. 31, pl. 66; 2 Ro. Rep. 460, 461. See 2 Keb. 384.

If the indictment be given in evidence for the prisoner, and the oath of a person deceased, the account of that oath must be upon oath; for nothing can be given in evidence as an oath but upon oath.

Sid. 325; L. E. 31, pl. 66.

A decree in Chancery may be given in evidence between the same parties, or any claiming under them; for their judgments must be of authority in those cases where the law gives them a jurisdiction; for it were very absurd that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be a full proof, for that were to suppose they were incompetent judges, where they had jurisdiction.

2 Mod. 231; L. E. 125, pl. 101.

So, a decretal order in paper with proof of the bill and answer, or without such proof (if they are recited in the order) may be read.

1 Keb. 31.

Wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter; and in case the determination be final in the court of which it is a decree, sentence, or judgment, such decree, sentence, or judgment will be conclusive in any other court having concurrent jurisdiction. But here the following distinctions must be attended to.—The judgment of a court of concurrent jurisdiction *directly upon the point*, is as a plea, a bar, or as evidence conclusive *between the same parties, upon the same matter directly in point* in another court. And the judgment of a court of exclusive jurisdiction *directly on the point* is in like manner conclusive *upon the same matter, between the same parties coming incidentally* in question in another court for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within

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their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment.

Bull. N. P. 244; Ambl. 756. {Vide 1 Johns. Ca. 492, 502, 510, *Le Guen v. Gouverneur and Kemble*.} *Per De Grey, C. J.*, 11 St. Tr. 261; Carth. 225; Lane v. Degberg, H. 11 W. 3; Bull. N. P. 244; 2 Show. 232; Carth. 32; Cowp. 315; Bull. N. P. 244, 245; 1 Salk. 290; 1 Show. 6.]

{In an action of trespass and false imprisonment against the defendant, who was a justice of the peace, and had committed the plaintiff for unlawfully returning to a parish from which he had been removed, the warrant issued by the defendant and the conviction before him on which it was founded are evidence in his favour which cannot be controverted. For as he had a competent jurisdiction in the matter, his judgment is conclusive till reversed or quashed.

7 Term. 631, n., 633, n., *Strickland v. Ward*, in 1767, *coram Yates, J.*

When a statute provides that the judgment of commissioners appointed under it shall be final, their decision (if the authority given to them is pursued) is conclusive and cannot be questioned collaterally.

2 Bos. & Pul. 391, *The Earl of Radnor v. Reeve*. Vide 7 Term, 367, *Patchett v. Bancroft*; 1 East, 64, *Davison v. Gill*; 8 East, 394, *Welsh v. Nash*; 1 Bin. 352, *Godshall v. Mariam*; 8 Term, 286, *The King v. The Conservators of the river Tone*.

The judgment of a *foreign* court is also binding and conclusive upon the parties, and is never re-examined except in one instance; which is, when the aid of our courts is asked to enforce it by a direct suit on the judgment. The foreign judgment is then held to be only *prima facie* {1} evidence of the demand. But in all other cases the sentences of foreign courts receive entire faith and credit, and are considered as conclusive.

Doug. 1, *Walker v. Witter*; Ibid. 4, n. (1), *Sinclair v. Fraser*; Ibid. 6, n. (2), *Galbraith v. Neville*; 2 H. Black. 410, *per C. J. Eyre*, in *Phillips v. Hunter*; 3 Johns. Rep. 168, *Smith v. Lewis*; 4 Cran. 442; 1 Johns. Ca. 345; 1 Cain. 467. {} It is not even *prima facie* evidence, but is a nullity, if obtained by default against a party who on the face of the proceedings appears to have been summoned only by nailing a copy of the declaration at the court-house door, and who was at the time domiciled abroad and not subject to the jurisdiction of the court; though such a proceeding was authorized by the law of that country: for it could not bind the subjects of other countries. 9 East, 192, *Buchanan v. Rucker*; 5 Johns. Rep. 37, *Kilburn v. Woodworth*: see 1 Day, 168, *Smith v. Rhoades*. And in *Jackson v. Jackson*, 1 Johns. Rep. 424, where a citizen of New York married in that state, and his wife, after living with him more than a year, left him, went into Vermont, and obtained a divorce and decree for alimony under the laws of that state, on the ground of ill treatment and severe temper, and then returned to New York, where she afterwards resided, it was determined that she could not maintain in New York an action for the alimony decreed to her; for her domicile continued to be in New York, as she was incapable during coverture of acquiring one distinct from that of her husband, and her conduct was an attempt to evade the laws of that state, which did not allow a divorce for the same causes. An act done *in fraudem legis* cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed.—*Quære*, whether, in the United States, the judgment of a court of one of the states is conclusive evidence of the demand in an action brought on that judgment in the court of another state, or is to be considered as a foreign judgment, and therefore only *prima facie* evidence:—on which point different opinions have been expressed. See Cons. U. S. a. 4, s. 1; 1 Laws U. S. 115; 1 Dall. 261, *Phelps v. Holker*; Kirby, 119, *Kibbe v. Kibbe*; 2 Dall. 302, *Armstrong v. Carson's Ex'rs.*; 1 Cain. 360, *Hitchcock v. Aicken*; 3 Cain. 30, 36, *Post v. Neafie*; 1 Johns. Rep. 424, *Jackson v. Jackson*; 5 Johns. Rep. 27, *Kilburn v. Woodworth*; 1 Mass. T. Rep. 401, *Bartlet v. Knight*; 1 Day, 168, *Smith v. Rhoades*; 1 Penn. 399, *Curtis v. Gibs*. As to the sentences of foreign courts of admiralty, see *Policies of Insurance* under title *Merchant and Merchandise*.}

{A judgment of condemnation in the Court of Exchequer, where proceedings *in rem* have been instituted, is conclusive evidence in any other

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court, as to all the world, that the goods were liable to be seized; the jurisdiction of that court being not only competent, but sole and exclusive. And though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of his property, by the proclamations according to the course of the court, and by the writ of appraisement.

*Scott v. Shearman*, 2 Bl. Rep. 979. *Per* Lord Kenyon, in *Geyer v. Aguillar*, 7 T. R. 696.

Whether an acquittal in the Court of Exchequer be conclusive evidence of the illegality of the seizure would seem to be questionable, though so considered by Lord Kenyon. (a)

*Cooke v. Sholl*, 5 T. R. 255. (a) See also a case in Vin. Abr. tit. *Evidence*, (A. b. 22.), pl. 1, *coram* Price, B. acc.

A conviction by a justice of the peace, who has competent jurisdiction, is, till reversed or quashed, conclusive evidence in favour of the justice in an action against him for false imprisonment. *Secus*, where he has no jurisdiction. (b)

*Strickland v. Ward*, at Winchester assizes, *coram* Yates, J., 7 T. R. 633, n.; 12 East, 75; 16 East, 21. (b) *Hill v. Bateman*, 2 Str. 710; *Crepps v. Durden*, Cowp. 640; *Morgan v. Hughes*, 2 T. R. 225.

¶ An inquisition taken under a writ *de lunatico inquirendo*, is admissible, though not conclusive evidence to prove the lunacy of an obligor of a bond.

*Hart v. Deamer*, 6 Wend. 497.g

Where a statute provides, that the judgment of commissioners thereby appointed shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding.

*Moody v. Thurston*, 1 Str. 481; *Lane v. Hegberg*, Bull. N. P. 19; *Earl of Radnor v. Reeve*, 2 B. & P. 391.¶

As to the proceedings in the spiritual court, these are in cases matrimonial and testamentary, and all other ecclesiastical causes. How these courts gained the jurisdiction in causes testamentary, which were originally of temporal consuance, is not here to be considered further than is necessary to determine the weight of credibility that is to be given to their sentences. The way of authenticating testaments by the civil law was this: The testator and his witnesses subscribed the will, bound it up and sealed it with their seals: after the decease of the testator it was opened in the presence of the prætor, and he delivered copies of it, and kept the original in a public treasury; and hence it is, that the spiritual court keeps the original will, and gives out the probate, which is but a copy of the will under their seals.

But originally among the Germans, the goods as well as the feud itself belonged to the lord: afterwards it was thought fit that the feudary should dispose of them, and then the will was proved in the country courts before the alderman and bishop, and if any man died intestate, they were distributed among his kindred. But after the Conquest, the probate of the will and the commission of administration was indulged to the bishop, who never had it in the times of the empire, under pretence that the provision would be better made for the souls of the deceased. If the spiritual courts exceed their commission, they have plainly no authority, and therefore they must confine themselves to the bequest of the personal estate: for the feud was not devisable until the 32 H. 8, for reasons mentioned in another place.

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Therefore, if a man devise lands by force of the statute of wills, or by custom, the probate of the will in the spiritual court cannot be given in evidence; for all their proceedings, so far as they relate to lands, are plainly *coram non judice*.

Ro. Abr. 678. Nor will an exemplification of the will under the great seal be evidence of it. Comb. 46. In questions relative to lands devised, the original will ought always to be produced. {If the original will is proved to be lost, the record of the probate may be given in evidence. 2 Cain. 363, Jackson v. Lucett. See Taylor, 93; 1 Dall. 2, 66.}

But the probates of wills of the personal estate are the records of that court, and therefore a copy of them under the seal of that court must be good evidence. And this is still the more reasonable, because it is the use of the court to preserve the original will, and only to give back to the party the copy of that will under the seal of the court.

Ro. Abr. 678; 4 T. R. 258.

The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted: therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. So would the book of the ecclesiastical court, wherein was entered the order for granting administration. || So, an examined copy of the act book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. || So would the copy of the probate of the will be evidence of J S being executor; but a copy of the will would not be evidence of it.

Kempton v. Cross, || Ca. temp. Hardw. 108; Garret v. Lister, 1 Lev. 25; Elden v. Keddell, 8 East, 187; 16 East, 209; Bull. N. P. 246; Davis v. Williams, 13 East, 232; Ray v. Clark, Ibid. 238, n. (a.); || Smartle v. Williams, Bull. N. P. 246.

Where a person in ejectment would prove the relation of father and son by his father's will, he must have the original will, and not the probate only; for where the original is in being, the copy is no evidence, and the probate is no more than a true copy under the seal of the court of a private instrument; and the law, which seeks the best evidence, will not allow of the copy only. Besides, this is not proved to be a true copy, for the seal doth not prove the truth of the copy, unless the suit relate to the personal estate only.

Polhill and Polhill, Hil. 1701.

But the ledger-book is evidence in such case, because these are not considered merely as copies, but they are the rolls of the court itself; and though the law doth not allow these rolls to prove a devise of lands where the claim is by the words of the devise, for the reasons already given; yet, when the will is only to prove a relationship, the rolls of the spiritual court, which hath authority to enrol all wills, are sufficient proofs of such testament.

Polhill and Polhill, Hil. Ass. 1701. Under particular circumstances the ledger-book may be evidence even in the devise of a real estate: as, where in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, that belonging to the devisee of the land; but producing the ordinary's register of the will, and proving former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged. Cas. K. B. 375.

But the copy of the ledger-book was not allowed to be read in this case, because common practice had prevailed that it should not; though my Lord Holt said that since the original would have been read as a roll of the court without further attestation, it was fit the copies should be read, and that the

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practice should be altered. And the practice seems to be founded on the mistake, that the ledger-book is read as a copy, and so the copy of that is but the copy of a copy, whereas the ledger-book is read as a roll of the prerogative court.

In a suit relating to a personal estate, the probate of the will under the seal of the court is sufficient evidence; and no evidence contrary to it can be given, that such will was not the last will and testament of the party deceased, for the spiritual court are the proper judges of what is, and what is not the will of the testator; and since the authority of judging is committed to them, the temporal courts are bound by their judgments.

Raym. 404 to 406; 2 Sid. 359; Lev. 235; 2 Keb. 337, 343, 641; Comyns, 150; Anon., Ld. Raym. 262; Str. 481; Will. Rep. 388; L. E. 125, pl. 103.

But the adverse party may give in evidence, that the probate is forged, because such evidence supposeth that the spiritual court hath given no judgment, and so there is no reason for the temporal court to be concluded, since the spiritual court hath made no judgment in this matter, for a forged probate is none at all.

Raym. 404 to 406; 2 Sid. 359.

So, they may also give in evidence, that such probate was obtained by surprise, for that is as much as to say, that the spiritual court hath made no legal decision in the matter, and therefore that the temporal court ought not to be concluded by their authority.

Raym. 404 to 406; 2 Sid. 359.

So, if letters of administration be showed under seal, you may give in evidence, that they were revoked; for this is in affirmance of the proceedings in the spiritual court, and doth not at all controvert the righteousness of their decisions.

2 Sid. 359. ¶ To prove that the probate of a will was revoked, an entry of the revocation in a book of the prerogative court, in which all causes were entered by the registrar, and which was kept as the only record of such proceedings and of the decree of the court, was admitted to be good evidence. Ramsbottom's case, 1 Leach's Cr. Ca. 30, n. (e).]

A will that hath partly the form of a will, and partly the form of a deed, may be given in evidence as a will; for if the intent of the party sufficiently appear to make a disposition after his decease, the informality of the words shall not vitiate it.

Mod. 117; Vent. 257; 3 Keb. 310; 2 Danv. Abr. 539; L. E. 89, pl. 18.

Where a will remains in Chancery, by order of that court, a copy may be given in evidence; for then it becomes a roll of that court, and, by consequence, a copy of it is sufficient evidence.

Keb. 40, 117. See L. E. 276, pl. 106.

{The proceedings of a court created by a statute, and which is not a court of record, but in the nature of special commissioners, cannot be read in evidence by a defendant justifying under them in an action of trespass, on proof of the signatures of the members, without proving also that it was constituted agreeably to the statute, and had pursued its directions in all material points. Thus if a militia court of appeals is directed to be composed of three commissioned officers, appointed by the commanding officer of the regiment, and to be under oath or affirmation to perform their duty with fidelity and impartiality, and power is given to them to remit, for certain causes, fines which have been incurred, this is not a court of record, as it has not the power to fine and imprison, but only to *remit* fines: and its pro-



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ceedings cannot be read in evidence without proving that it was regularly constituted; which can be done only by producing the commission of the commanding officer of the regiment, and the commissions of the officers composing the court, and showing their appointment by him, and that they took the oath or affirmation prescribed.

2 Bin. 209, *Wilson v. John.*

The rolls of a court baron are evidence; for they are the public rolls, by which the inheritance of every tenant is preserved, and they are the rolls of the manor court, which was anciently a court of justice relating to all property within the district.

Hil. Ass. 1701; 4 T. R. 670.

A copy of a court-roll under the steward's hand is good evidence to prove the copyholder's estate.

1 Keb. 567, 720; Comb. 138.

So, an examined copy of the court-roll is good evidence, if sworn to be a true one.

Comb. 337; 12 Mod. 24.

If copyhold rolls make mention of a surrender to the use of the tenant's last will, and then admit A as devisee under the will, yet this is no evidence of the seisin or title of A without the will itself; because the land doth not pass by the surrender without the will, and therefore the will must be shown as the best evidence of A's possession and title.

*Jenkins v. Barker, per Tracy*, 1705.

An entry in the court rolls of a manor is admissible evidence of the mode of descent of lands in the manor, although no instances of any person having taken according to it be proved.

*Roe v. Parker*, 5 T. R. 26; *Roe v. Jeffery*, 2 M. & S. 92.

A customary of a manor, which appeared to be of great antiquity, and had been delivered down with the court-rolls from steward to steward, was admitted to be good evidence to prove the course of descent within the manor, notwithstanding it was not signed by any one.

*Denn v. Spray*, 1 T. R. 466.

|| So, in an action by a copyholder against a freeholder of a manor for surcharging the common, an old writing found among the muniments of the manor, and purporting to be signed by many of the copyholders, stating that the copyholders of the manor had an ancient unlimited right of common, but that they had agreed to a certain stint, was holden to be admissible evidence of the state of the manor at that time, as to the general prescriptive right, against the limited right insisted on by the plaintiff. And although it was not proved that the instrument had been signed by a majority of the copyholders, or that the plaintiff held the copyhold tenement under any one of those who had signed, yet that circumstance could not affect its admissibility, as it was offered, not on the footing of an agreement, but as evidence of tradition, and the received opinion within the manor.

*Chapman v. Cowlan*, 13 East, 10.||

[The register of christenings, marriages, and burials is good evidence, or a copy of it. The register began in the 30 H. 8, by the instigation of the Lord Cromwell, who at that time was vested with all the authority which the pope's legates formerly had, under the title of vicar-general to the king, and all wills above the value of two hundred pounds were to be proved in this court; and therefore it served his purpose to set on foot a registry of all

persons that were christened and buried. And this might be very well appointed by the king's authority, as supreme head of the church, since christening and burying are ecclesiastical acts: and when a book was appointed by public authority, it must be a public evidence. This was afterwards confirmed by the injunction of Edward 6, and of Elizabeth, and the particular manner of registering appointed; as that the registering should be in the presence of the parson and churchwardens on Sunday, and that the book should be kept locked in the church, to which the vicar and churchwardens should have keys. || And the marriage act, (26 G. 2, c. 33, § 14,) after directing registers to be kept as public books in every parish, for the purpose of registering marriages, enacts, that "immediately after the celebration of every marriage, an entry thereof shall be made in such register; in which entry or register it shall be expressed, that the marriage was celebrated by banns or license; and if both or either of the parties married by license be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses." By the canons in 1603, (canon 70,) copies of parish registers in every diocese ought to be regularly transmitted once in every year to the diocesan or his chancellor, a regulation extremely important for the purpose of guarding the evidences of title and pedigree, but which was so generally neglected, as to make it necessary for the legislature to pass an act for their better preservation. It is therefore, by the statute 52 G. 3, c. 146, § 7, enacted, that copies of the register books, verified by the officiating minister of the parish, shall be transmitted annually by the churchwardens, after they or one of them shall have signed the same, to the registrars of the diocese within which the church is situated.

Sid. 71; Noy, 146; Brownl. 207; 2 Ro. Abr. 115, pl. 11; Cro. Eliz. 411; Moore, 451; Salk. 281; 12 Mod. 86; L. E. 81, pl. 2; Godolph. 164. β An entry in an old account of burial fees, received by the sexton of a parish, by which he charged himself with the receipt of a certain sum for the burial of one Joseph Lloyd, described as "in Wells street," was admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in Wells street. Lloyd v. Wait, 1 Turn. & Phil. 61. § In Queen Elizabeth's reign a protestation was appointed to be made and subscribed by ministers at institution, one head of which was, *I shall keep the Register Book according to the Queen's Majesty's Injunctions.* || Gibs. Cod. 229.

The registers are in the nature of records, and need not be produced, nor proved by the subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two persons describing themselves by such and such names and places of abode, though it does not prove the identity. As to that, whatever is sufficient to satisfy a jury is good evidence of it, as proof of the similarity of the handwriting of the parties, or proof by the bellringers, that they rung the bells, and were paid by the parties immediately after the marriage; or proof by persons who were present at the wedding-dinner, &c.

Birt v. Barlow, Dougl. 174. || β Although not originally intended for the purposes of evidence, public registers are, in general, admissible to prove the facts which are set down there. In Pennsylvania the registry of births, &c., made by any religious society in the state, is evidence by act of assembly, but it must be proved as at common law. 6 Binn. 416. A copy of the register of births and deaths of the Society of Friends in England, proved before the Lord Mayor of London by an *ex parte* affidavit, was allowed to be given in evidence to prove the death of a person; 1 Dall. 2; and a copy of a parish register in Barbadoes, certified to be a true copy by the rector, proved by the oath of a witness, taken before the deputy secretary of the island and notary public,

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under his hand and seal, was held admissible to prove pedigree; the handwriting and office of the secretary being proved. 10 Serg. & Rawle, 383. In North Carolina, a parish register of births, marriages, and deaths, kept pursuant to the statute of that state, is evidence of pedigree. 2 Murphey's R. 47. In Connecticut, a parish register has been received in evidence. 2 Root, R. 99. See 15 Johns. R. 226. Vide 1 Phil. Ev. 305; 1 Curt. R. 755; 6 Eng. Eccl. R. 453; Cov. on Conv. Ev. 304. And an almanac, in which a father wrote the nativity of his son, was admitted to prove the non-age of the son. *Herbert v. Tuckal*, Raym. 84. See *Lewis v. Marshall*, 5 Pet. 471.

[Though it appear in evidence that the register was made from a daybook kept by the minister for that purpose, yet the daybook will not be admitted to contradict the entry in the register, *e. g.* to prove a child base-born, where no notice is taken of it in the register, which would therefore be evidence to prove him legitimate.

*May v. May*, 2 Str. 1073.

On an indictment for entering a false marriage in the register book, the defendant was fined two hundred marks; for since the register is public evidence, it must be guarded by the law, that it be not counterfeited.

2 Sid. 71. The stat. 21 Geo. 2, c. 33, § 16, makes this a capital offence.]

|| By stat. 26 G. 3, c. 60, and 34 G. 3, c. 68, public registers are required to be kept for the registering of ships: and the register and certificate of register are conclusive evidence of want of title against those who are not named in the register. But the register (*a*) is not considered as a public document to prove the ownership, and is not evidence to fix the parties therein named, as owners, in actions against them, unless it be shown to have been made by their assent or recognised by them. Nor is it evidence (*b*) that the ship is British built, as there described. Nor (*c*) in an action brought by the plaintiff as agent, on a policy of insurance, is it evidence to prove an averment, that the interest in the ship is in the persons there described; for though the registration be necessary to complete a title, it is not of itself proof of title; property in a ship being to be proved now, as it was before these statutes were passed.

*Camden v. Anderson*, 5 T. R. 709. (*a*) *Tinkler v. Walpole*, 14 East, 226; *Cooper v. Sturm*, 4 Taunt. 802; *Fraser v. Hopkins*, 2 Taunt. 5; *Smith v. Fuge*, 3 Campb. 456; *Flower v. Young*, *Ibid.* 240. (*b*) *Reusse v. Myers*, *Ibid.* 475. (*c*) *Pirie v. Anderson*, 4 Taunt. 652.

By 17 G. 2, c. 38, § 13, the parish books, containing true copies of all rates and assessments for the relief of the poor, directed by this act to be made, are to be open to the inspection of persons assessed, or liable to be assessed, and are to be produced at the quarter sessions, when any appeal is to be heard or determined.

By 46 G. 3, c. 46, § 1 & 3, the registers of parish indentures of apprenticeship thereby appointed to be made, are to be open to public inspection, and are declared to be sufficient evidence of the existence of such indentures, and of the several particulars respecting them specified in the registers, in case it shall be satisfactorily proved, that the indentures are lost or destroyed.

On a prosecution for a libel on a person in his office of treasurer of a parish, an entry in the vestry book stating that he was elected at a vestry duly holden in pursuance of notice, was admitted as sufficient evidence to support the allegation in the indictment, that he was duly elected treasurer.

*R. v. Martin*, 2 Campb. 100.

So, in an action for disturbing the plaintiff in the use of a pew in a church, an old entry in the vestry book signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage, under whom

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the plaintiff claimed in consideration of his using it, was admitted as evidence of his right.

Price v. Littlewood, 3 Campb. 288.

¶ The memoranda of a deceased notary of the demand and notice of non-payment of a promissory note, are *prima facie* evidence of the fact.

Butler v. Wright, 2 Wend. 369; Bank v. Cooper's Adm'r. 1 Harring. 10.g

The register of the navy office, with proof of the method there used to return all persons dead, with the mark Dd, has been admitted to prove the death of a sailor.

Bull. N. P. 249; Rhodes's case, 1 Leach's Cr. Ca. 29; Wallace v. Cook, 5 Esp. N. P. C. 117. See Barber v. Holmes, 3 Esp. N. P. C. 190.

So, the book from the master's office in the Court of King's Bench, has been admitted to prove a person one of the attorneys of that court.

R. v. Crossley, 2 Esp. N. P. C. 524.

So, the log-book of a man of war, which convoyed a fleet, has been admitted to prove the time of the convoy's sailing.

D'Israeli v. Jowett, 1 Esp. N. P. C. 427. ¶ See Kitland v. Lebering, 3 Wash. C. C. 201; Miller v. The Resolution, 2 Dall. 23; United States v. Mitchell, 3 Wash. C. C. 95; United States v. Sharp, 1 Pet. C. C. 118; 1 Sumn. 373; 2 Sumn. 19, 78; 4 Mason, 544.g

¶ In an action against a justice of the peace by a parent, to recover a penalty given by act of assembly for marrying his minor son, the entry in the family Bible of the son's birth, proved by the oath of the plaintiff, is competent evidence of the minority of the son.

Carskadden v. Poorman, 10 Watts, 82.g

The bank books are evidence to prove the transfer of stock: and the day-book of a public prison,(a) containing a narrative of the transactions of the prison, is proof of the time of a prisoner's commitment or discharge; though not of the cause of his commitment.(b)

Breton v. Cope, Peake's N. P. C. 30; Marsh v. Colnet, 2 Esp. N. P. C. 665. ¶ A bank book of one of the parties is evidence; but the handwriting of the clerk of the bank who made the entry must be proved, in case of his death. Patton v. Ash, 7 S. & R. 116. An entry made by a clerk in a book of a bank, of a deposit made by a customer, immediately before an entry made by him in the customer's bank book, and supported by the oath of the clerk, is evidence which, together with the customer's book and the testimony of the clerk, should be submitted to the jury. The Farmer's and Mechanic's Bank v. Boraef, 1 Rawle, 152.g (a) R. v. Aickles, 1 Leach's Cr. Ca. 436. (b) Salter v. Thomas, 3 B. & P. 188.||

¶ An entry in the books of the Merchant Tailor's Company, that T C was admitted a freeman of the company by the description of "T C of S. street, son of J C, deceased," is admissible evidence, in a question of pedigree, to prove not only that T C was admitted a freeman, but that the company received him by that description.

Collins v. Maule, 8 C. & P. 502.g

The pope's license without the king's has been admitted as good evidence of an impropriation, because anciently the pope was held to be supreme head of the church, and therefore was allowed to have the disposition of all spiritual benefices with the concurrence of the patron, without any leave of the prince of the country; and these ancient matters must be admitted according to the error of the times in which they were transacted. A pope's bull is no evidence on a general prescription to be discharged of tithes, because that shows the commencement of such a custom, and a general pre-

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scription shows that there was no time or memory of things to the contrary, so that the bull doth itself contradict such prescription.

Palm. 427. See L. E. 6, pl. 20; Palm. 38.

But the pope's bull is evidence on a spiritual prescription, when you only say the lands belonged to such a monastery as was discharged of tithe at the time of the dissolution, for then they continue discharged by act of parliament.

Palm. 38.

But the copy of the bull will not be allowed in evidence; the bull itself must be produced.

Brett v. Ward, Winch. 70.

If the question be, whether a certain manor be ancient demesne or not, the trial shall be by Domesday book, which shall be inspected by the court. Ancient demesnes are the socage tenures that were in the hands of Edward the Confessor, which William the Conqueror, in honour of him, endowed with several privileges: Domesday book was a terrier or survey of the king's lands, which was made in the time of the Conqueror, and which ascertains the particular manors which had this privilege.

Hob. 188.

To know whether any thing be done in or out of the ports, there lies in the Exchequer a particular survey of the king's ports, which ascertains their extent.

Term. Pasch. 1701, in *Scaccario*.

An old terrier or survey of a manor, whether ecclesiastical or temporal, may be given in evidence, for there can be no other way of ascertaining old tenures or boundaries.

Gilb. Ev. 69.  $\beta$  See Jackson v. Witter, 2 Johns. 180.

A terrier of glebe is not evidence for the parson, unless signed by the churchwardens as well as the parson; nor even then if they be of his nomination: and though it be signed by them, yet it seems to deserve very little credit, unless it be likewise signed by the substantial inhabitants. But in all cases it is strong evidence against the parson.

Bull. N. P. 248.  $\beta$  See Earl v. Lewis, 4 Esp. 3. $\gamma$

|| Regularly, it should be signed by the minister of the parish; but it is admissible in evidence, though it wants his signature.

Illingworth v. Leigh, 4 Gwill. 1615.

$\beta$  A town record of an ancient grant, made in 1664, of lands and a dwelling-house, by the town to an individual in consideration of his settling among them in the ministry; his last will devising his homestead to his five sons; their deed of the lands and tenements given to them by said last will; and the testimony of living witnesses acquainted with the monuments, that the land lies in part of the town recently incorporated as a separate town, are competent evidence to show that the first grantee resided within the new town.

Bridgewater v. West Bridgewater, 7 Pick. 191. $\gamma$

A terrier derives its authority from its being found either in the bishop's registry, or in that of the archdeacon (*a*) of the diocese. Unless it comes from one of these repositories, it cannot, in general, be admitted in evidence; there must be some particular circumstances to induce the court to receive it, if found in any other place.

Atkins v. Hatton, 2 Anstr. 386; Allott v. Wilkinson, 4 Gwill. 1593. (*a*) Potts v. Durant, 3 Anstr. 789; Miller v. Foster, 2 Anstr. 387, n.

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And the survey is admissible, although the commission, under which it was taken, is not to be found.

*Bagshaw v. Bishop of Bangor*, cited in *Underhill v. Durham*, 9 Gwill. 549. *See Leazure v. Hillegas*, 7 S. & R. 313.*g*

Surveys of the church and crown lands were taken by commissioners in the time of the Commonwealth, under the authority of acts and ordinances of the parliament; and copies of them were deposited in many of the cathedrals. The originals would have been good evidence, as having been made by the authority and order of the government of the country, on public occasions and on subjects of public interest; but, as they were destroyed in the fire of London, the copies have been admitted as evidence, provided they have been kept in unsuspected places. These parliamentary surveys stand very high in estimation for accuracy; and therefore the silence of one of these documents as to a supposed *modus* has been considered as strong evidence against its existence.

*Underhill v. Durham*, *ubi sup.*; *Roe v. Ireland*, 11 East, 284; *Blundell v. Howard*, 1 M. & S. 292.*||*

[A survey of religious houses taken in 1563, upon the dissolution of monasteries, was allowed to be good evidence to prove a vicar's right to small tithes.

1 Wils. 170.

An old map of lands was allowed to be evidence, where it came along with the writings and agreed with the boundaries adjusted in an ancient purchase.

*Yates and Harris*, Spring Ass. 1702.] *See Biddle v. Shipman*, 1 Dall. 19; *Commonwealth v. Alburger*, 1 Whart. 469; *Jones v. Bache*, 3 Wash. C. C. 199; *Robinson v. Gibbons*, 2 Rawle, 45.*g*

A public history or chronicle may be given in evidence to prove a matter relating to the kingdom in (b) general, because the nature of the thing requires it.

*Skin. 623*; *Salk. 271*. (b) So, a Year-book may be evidence to prove the course of the court. *Salk. 281*.—So, *Speed's Chronicle* was given in evidence to prove the death of Isabel, Queen Dowager to E. 2. *Skin. 15*. {Historical facts and matters of public notoriety relating to the nation may be noticed by the courts without any evidence. 2 East, 464, *The King v. The Bishop of Exeter*; 3 Johns. Rep. 385, *Jackson v. Hudson*. See 9 Ves. J. 347; 10 Ves. J. 354. Thus the courts take notice of a war in which their own country is engaged, without proof: but a war between foreign countries must be proved. 11 Ves. J. 292, *Dolder v. Lord Huntingfield*.—The agreement between Thomas and Richard Penn and Lord Baltimore of 4th July, 1760, admitted in evidence without proof, as an ancient deed ascertaining the boundaries of the then provinces of Pennsylvania and Maryland, and being considered in the light of a state paper well known to the courts of justice. 1 Bin. 399, *Lessee of Ross v. Cutshall*.} *See Commonwealth v. Alburger*, 1 Whart. 469.*g*

But these will not be admitted as evidence to prove a particular right; and therefore where the question was, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or in a certain place only; and on a trial at bar, Camden's *Britannia* was offered in evidence; it was refused.

*Salk. 281*; *Stainer v. Burgessess of Droitwich*; *Skin. 623*, S. C., so ruled.

*||* So, where the question was, whether a particular abbey was of the inferior order, Dugdale's *Monasticon* was refused, because the original records might be had in the Augmentation Office.

*Skin. 623*, S. C.

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So, it has been determined, that Dugdale's Baronage is not evidence to prove a descent.

*Piercy v. —*, Sir T. Jon. 164.]

But the books of heralds are admitted as evidence to prove pedigrees, because the nature of the thing will not admit of better evidence. Also, this is their proper business, and about which they are conversant, and therefore their books deserve the more credit.

But for this vide 2 Ro. Abr. 686; Yelv. 34; 2 Jon. 164, 224; Salk. 281; Comb. 63, and Skin. 623, where it is said, that, from the negligent manner of keeping them, they deserve but little credit.\*—\*This is certainly true, yet there are exceptions, as a visitation made by heralds, entered in their books, and kept in their office, has been admitted evidence of a pedigree. *Pitton v. Walter*, H. 5 G. Str. 162.—So, the minute-book of a former visitation, signed by the heads of the several families, and found in a private library (*Lord Oxford's*). *Ibid*.

An (a) almanac is sufficient evidence to prove a day Sunday, &c.

*Cro. Eliz.* 227; *Leon.* 242, S. C. and S. P.; *Sid.* 300; 6 Mod. 41, S. P. (a) That the almanac to go by is that annexed to the Common Prayer book; 6 Mod. 81. β See *Herbert v. Tuckal*, *Raym.* 84.γ

So, an almanac, in which the father wrote the nativity of his son, was admitted and allowed to be strong evidence at a trial at bat, to prove the nonage of the son.

*Raym.* 84, *Herbert and Tuckal*.

[So, an entry, in a father's family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion, are evidence in questions of pedigree.

*Cowp.* 594.]

Where books belong to a public company, a party concerned in interest may, on motion, have copies of them to be made use of as evidence; for, being transactions of a public nature, the public is concerned in them.

7 Mod. 129; *Ld. Raym.* 744; *Geery and Hopkins*, on a motion for copies of the books of the East India Company, and vide 5 Mod. 395; *Ld. Raym.* 337. [It is essential, in motions of this kind, that the party applying should be concerned in interest. He must therefore be a member of the company, or tenant of the manor, the books of which he applies to inspect. *Hodges v. Atkis*, 3 Wils. 398; 2 Bl. Rep. 887, S. C.; *Mayor, &c., of Exeter v. Coleman*, *Barnes*, 228; *Anon.*, 3 Ves. 620; *Shelling v. Farmer*, 1 Str. 646; *Murray v. Thornhill*, 2 Str. 717; *Rex v. Dr. Bridgman*, *Ibid.* 1203; *Allan v. Tap*, 2 Bl. Rep. 850; *Bishop of Hereford v. Duke of Bridgewater*, *Bunb.* 269; *Smith v. Davis*, 1 Wils. 104; *Smith v. Tillebois*, cited 3 Term Rep. 142. But in *Mayor of Lynn v. Denton*, 1 Term Rep. 689; *Corporation of Barnstaple v. Lathey*, 3 Term Rep. 303, and *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bl. 211, the courts seem to have overruled the cases of *Hodges v. Atkis*, 3 Wils. 398, and *Mayor, &c., of Exeter, &c., v. Coleman*, *Barnes*, 228, and to have holden, that in such actions as are brought to support claims of duties made by a corporation upon the public, of the validity of which the best evidence must be in the documents of the corporation, and of which documents equity would grant an inspection; such, for instance, as claims of tolls; that, in these cases, individuals who are interested to dispute the claims have an interest in the books which will entitle them, upon motion, to an inspection of the entries relating to the subject-matter of the dispute. {Those cases were however, reviewed and overruled in *The Mayor, &c., of Southampton v. Graves*, 8 Term, 590; and *Hodges v. Atkis* referred to and confirmed.}—Or if the party applying be not a member, the books must be the common evidence of the transactions between him and the body in whose custody they are, so as to be for this purpose the books of both. Such are the cases of entries in the custom-house books, of the India Company, bank-stock, and transfer books. *Gerry v. Hopkins*, 2 Ld. Raym. 851; *Warriner v. Giles*, 2 Str. 954; *Crew v. Saunders*, *Ibid.* 1005. But the courts will not grant these motions unless the evidence contained in the books be directly material in the cause, nor will they permit the party applying to inspect and copy any more than what relates to himself. *Benson v. Port*, cited 1 Wils. 240; 1 Bl. Rep. 40, S. C.; *Mayor, &c.,*

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of *London v. Swinland*, 1 Barnard. 455; *Crew v. Saunders*, 2 Str. 1005; *Rex v. Fraternity of Hostmen, &c.*, Ibid. 1923. Tenants of a manor seem to have a right to a general inspection of the court rolls. *Rex v. Shelly*, 3 Term Rep. 141. How far corporators have such right with respect to the corporation books seems doubtful. *Rex v. Babb*, 3 Term Rep. 581. Nor will the courts permit an inspection for the purpose of collecting evidence to support a criminal prosecution. *Rex v. Worsenham*, 1 Ld. Raym. 705; *Crew v. Saunders*, 2 Str. 1005; *Rex v. Cornelius*, Ibid. 1210; *Rex v. Mead*, 2 Ld. Raym. 927; *Rex v. Dr. Parnell*, 1 Wils. 329; 1 Bl. Rep. 37, S. C.; *Rex v. Heydon*, 1 Bl. Rep. 351; *Roe v. Hanway*, 4 Burr. 2489.]

{The prison books are admissible evidence to prove the time of the commitment and discharge of a prisoner, but not to prove the cause of the commitment. No other document of the former facts exists; but the committitur itself is better evidence of the cause than the book; the entry in which is taken from the committitur.

Leach's C. L. (3d ed.) 435. *The King v. Aickles*, 3 Bos. & Pul. 188; *Salte v. Thomas*.}

|| Corporation books, containing an account of the privileges or public transactions of the body, are evidence in a suit between the several members, on the same footing with manor books between the tenants of a manor. But they are not evidence in favour of the corporation to support a claim of right against a stranger; and before they can be admitted in any case, it ought to be shown that they have been regularly kept by the proper officer.

Ph. Ev. 319. *Union Canal Company v. Lloyd*, 4 Watts & Serg. 393. *Mayor of London v. Mayor of Lynn*, 1 H. Bl. 214, n.; *R. v. Mothersell*, 1 Str. 93; *Case of Thetford*, Vin. Abr. tit. *Evidence*, (A. b. 15,) pl. 16, seems S. C. || *β* The books of a corporation are evidence against itself, and between its members, but not in its favour, in a suit against it by a stranger. *Mayor, &c., of Tuscaloosa v. Wright*, 2 Porter, 230; 2 Yeates, 190; 3 S. & R. 29; *Owings v. Speed*, 5 Whart. 424. But such books are not admissible against third persons. *Gochenhauer v. Good*, 3 Penna. R. 280. *g*

*β* The by-laws of a corporation cannot be proved by parol.

*Lumbard v. Aldrich*, 8 N. H. Rep. 31. *g*

|| The inspecting of court rolls was the original of these motions; but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. And now the party applying must be a member of that body, or tenant of that manor, of the books of which he seeks the inspection; a stranger having no more right to inspect the books of a corporation, than he has to inspect those of a private person. (*a*)

*Crew v. Saunders*, 2 Str. 1005; *Hodges v. Atkis*, 3 Wils. 398; 2 Bl. Rep. 877, S. C.; *Mayor, &c., of Exeter v. Coleman*, Barnes, 278; *Anon.*, 2 Ves. 620; *Shelling v. Farmer*, 1 Str. 646; *Murray v. Thornhill*, 2 Str. 717; *R. v. Bridgman*, Ibid. 1903; *Allan v. Tap*, 2 Bl. Rep. 850; *Wood v. Whitcomb*, Vin. Abr. tit. *Evidence*, (F. b.) pl. 9; *Lewis v. Baker*, 1 Barnardist. 100; *College of Physicians v. Dr. West*, Gilb. Rep. B. R. 134; *Bishop of Hereford v. Duke of Bridgewater*, Bunb. 269; *Smith v. Davis*, 1 Wils. 104; *Talbot v. Villebois*, cited 3 T. R. 142; *Cox v. Copping*, 1 Ld. Raym. 337; 5 Mod. 395, S. C.; *Mayor of Southampton v. Graves*, 8 T. R. 590. (*a*) A different practice for some time obtained in courts of law, upon the ground that, as the Court of Chancery would order inspection merely for asking, it would only cause unnecessary expense to send the parties thither. *Mayor of Lynn v. Denton*, 1 T. R. 689; *Corporation of Barnstaple v. Lathey*, 3 T. R. 303; *Mayor, &c., of London v. Mayor, &c., of Lynn*, 1 H. Bl. 211. But the courts of law having discovered that such an order is not quite so much of course in a court of equity as they had supposed it to be, have returned to their old practice; and the rule now is, that in disputes between several members of a corporation an inspection will be granted, because each has a right to inspect them; but an inspection will not be granted in the case of a corporation, which would be refused, if the suit were between private persons: nor is there any difference in this respect between a corporation aggregate and a corporation sole, nor between a



corporation sole and a private person suing in his individual capacity. Mayor of Southampton v. Graves, *ubi sup.*

But, if the parties applying are not members of the body, the books must be the common evidence of the transactions between them, so as in fact to be for this purpose the books of each. Such are the cases of entries in the custom-house books, in the books of the East India Company, and the transfer books of the Bank.

Geery v. Hopkins, *ubi sup.*; Warriner v. Giles, 2 Str. 954; Crew v. Saunders, *ubi sup.*

The evidence contained in the books must be directly material to the cause; and the liberty to inspect and copy must be restrained to such papers as relate to the matter in dispute. And this though the party applying be a member of the corporation.

Benson v. Port, cited in 1 Wils. 240, and 1 Bl. Rep. 40, S. C.; Mayor, &c., of London v. Swinland, 1 Barnardist. 455; Crew v. Saunders, *ubi sup.*; R. v. Babb, 3 T. R. 579; R. v. Fraternity of Hostmen in Newcastle-upon-Tyne, 2 Str. 1223.

The court will not permit an inspection for the purpose of collecting evidence to support a criminal prosecution. But they will not withhold it from a relator in an information in the nature of a *quo warranto*, (a) if he be a member of the corporation; for it is in the nature of a civil proceeding.

R. v. Worsenham, 1 Ld. Raym. 705; Crew v. Saunders, *ubi sup.*; R. v. Cornelius, 2 Str. 1005; Regina v. Mead, 2 Ld. Raym. 927; R. v. Purnell, 1 Wils. 239; 1 Bl. Rep. 37, S. C.; Rex v. Lee, cited in 1 Wils. 240; Bradshaw v. Philips, cited in 1 Bl. Rep. 39; R. v. Heydon, 1 Bl. Rep. 351; Roe v. Harvey, 4 Burr. 2489. (a) R. v. Shelley, 3 T. R. 141.

Tenants of a manor (b) seem to have a right to a general inspection of the court rolls: and in that case, upon an affidavit that the party was a tenant of the manor, and that application had been made to the lord for leave to inspect, which he had refused, the rule was made absolute in the first instance.

R. v. Shelley, 3 T. R. 141, R. v. Lucas, 1 East, 235; Roe v. Aylmar, Barnes, 236. (b) *Qu.* as to corporators. R. v. Babb, 5 T. R. 579.

The motion has been refused in an action against a corporation upon a right of toll, *because issue was not joined*, so that it could not appear whether the inspection would be necessary. In the case of a mandamus the rule for inspecting will not be granted, until the first rule is made absolute, and a return made to the mandamus. (c) And it has been thought the more convenient practice, where a rule *nisi* for a *quo warranto* information has been obtained, not to permit the inspection, till the information is granted. (d)

Hodges v. Atkis, 3 Wils. 398; 2 Bl. Rep. 877, S. C.; Dr. Groenvelt v. Dr. Burwell, Carth. 421. (c) *Per Cur.* in R. v. Justices of Surry, Say. Rep. 144. (d) *Per* Ashhurst, J., 3 T. R. 581; R. v. Hollister, Ca. temp. Hardw. 245.

The books of a private company cannot be inspected any more than those of a private individual.

Smith v. Huggins, Barnes, 236; Regina v. Mead, 2 Ld. Raym. 927; Charitable Corporation v. Woodcroft, Ca. temp. Hardw. 130.

By 32 G. 3, c. 58, § 4, a penalty of a hundred pounds is incurred by any officer of the corporation, having the custody of the corporation records, who shall refuse to allow any other officer or member to inspect books and papers, wherein are entered the admission or swearing in of the freemen, burgesses, and members of the corporation, and to take copies or minutes of such admission, &c. ||

By the 7 Ja. 1, c. 12, reciting, That whereas divers men of trades, and handicraftsmen keeping shop-books, do demand debts of their customers

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upon their shop-books, long time after the same hath been due, and when, as they have supposed the particulars and certainty of the wares delivered to be forgotten, then either they themselves, or their servants, have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered; and this of purpose to increase, by such undue means, the said debt; and whereas divers of the said tradesmen and handicraftsmen, having received all the just debt due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors, or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof by writing or witnesses, of the said payment, that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payment; it is therefore enacted, "That no tradesman, or handicraftsman keeping a shop-book as aforesaid, his or their executors or his administrators, shall be allowed, admitted, or received to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done."

Although the statute says a shop-book shall not be evidence after the year, yet this does not make it evidence of itself within the year, without some circumstances. 2 Salk. 690. As, in an action by a brewer, his manner of dealing was proved to be, that the draymen came every night to the clerk of the brew-house and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands, and that the drayman who had so set his hand was dead; but that this was his hand which was set to the book; and this was held good evidence of a delivery; otherwise, of the shop-book itself singly, without more. Salk. 285; 2 Ld. Raym. 873; 6 Mod. 264, Price v. The Earl of Torrington.—So, in an *indebitatus assumpsit* on a tailor's bill, a shop-book was allowed for evidence, it being proved that the servant who wrote the book was dead, and that this was his hand, and he accustomed to make the entries therein. 2 Salk. 690, Pitman and Madox, ruled by Holt, C. J.—[But when the plaintiff, to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his handwriting; Lord C. J. Raymond would not allow it, saying, it differed from Lord Torrington's case, because there the witness saw the drayman sign the book every night. Clerk and Bedford, M. 5 C. 2; Bull. N. P. 282.]—|| And Lord Kenyon ruled, in an action for the hire of a pair of horses, that an entry by the plaintiff's servant, since dead, stating the terms of the agreement of the defendant, ought not to be admitted. Calvert v. Archbishop of Canterbury, 2 Esp. N. P. C. 646.] [Upon an issue out of Chancery to try whether eight parcels of Hudson's Bay stock, bought in the name of Mr. Lake, were in trust for Sir Stephen Evans, his assignees (the plaintiffs) showed, first, that there was no entry in Mr. Lake's books relating to this transaction. Secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas (Sir Stephen's book-keeper) to the book B. B. of Sir Stephen Evans. Thirdly, Jeremy Thomas was proved to be dead; and upon this the question was, Whether the book of Sir Stephen Evans referred to, in which was an entry of the payment of the money, should be read. And the Court of K. B., at a trial at bar, admitted it not only as to the six, but likewise as to the other two in the hands of Sir Biby Lake, the son of Mr. Lake.] || Bull. N. P. 282, 283. In this case, (which Lord Hardwicke, in *Glyn v. Bank of England*, 2 Ves. 43, has observed upon, as "new and having gone a great way,") the entry was not offered by the assignees, as evidence of payment against the

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seller of the goods, but as corroborating evidence to show that, while the books of the other party concerned took no notice whatever of the goods, those of Sir Stephen Evans, under whom the plaintiffs claimed, treated them as bought on his account. Ph. Ev. 197.¶ The following brief view of the form, proof, and effect of an original entry in a shop-book is copied from Bouv. L. D. tit. *Original Entry*.—§ 1. To make a valid original entry it must possess the following requisites, namely: 1. It must be made in a proper book; 2. It must be made in proper time; 3. It must be intelligible and according to law; 4. It must be made by a person having authority to make it.—1. In general the books in which the first entries are made, belonging to a merchant, tradesman, or mechanic, in which are charged goods sold and delivered, or work and labour done, are received in evidence. There are many books which are not evidence, a few of which will be here enumerated. A book made up by transcribing entries made on a slate by a journeyman, the transcript being made on the same evening, or sometimes not until nearly two weeks after the work was done, was considered as not being a book of original entries. 1 Rawle, R. 435; 2 Watts, R. 451; 4 Watts, R. 258; 1 Browne's R. 147; 6 Whart. R. 189; 5 Watts, 432; 4 Rawle, 408; 2 Miles, 268. A book purporting to be a book of original entries, containing an entry of the sale of goods when they were ordered but before they were delivered is not a book of original entries. 4 Rawle, 404. And unconnected scraps of paper, containing, as alleged, original entries of sales by an agent, on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries. 13 S. & R. 126. See 2 Whart. R. 33; 4 M'Cord, R. 76; 20 Wend. 72; 2 Miles, R. 268; 1 Yeates, R. 198; 4 Yeates, R. 341.—2. The entry must be made in the course of business, and with the intention of making a charge for goods sold or work done; they ought not to be made after the lapse of one day. 8 Watts, 545; 1 Nott & M'Cord, 130; 4 Nott and M'Cord, 77; 4 S. & R. 5; 2 Dall. 217; 9 S. & R. 285; and a book in which the charges are made when the goods are ordered is not admissible. 4 Rawle, 404; 3 Dev. 449.—3. The entry must be made in an intelligible manner, and not in figures or hieroglyphics which are understood by the seller only. 4 Rawle, 404; and a charge made in the gross as "190 days' work," 1 Nott & M'Cord, 130, or "for medicine and attendance," or "thirteen dollars for medicine and attendance on one of the general's daughters in curing the whooping cough," 2 Const. Rep. 745, were rejected. An entry of goods without carrying out any prices, proves, at most, only a sale, and the jury cannot, without other evidence, fix any price. 1 South. 370. The charges should be specific and denote the particular work or service charged, as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price and value to each item. 2 Const. Rep. 745; 2 Bail. R. 449; 1 Nott & M'Cord, 130.—4. The entry must of course have been made by a person having authority to make it, 4 Rawle, 404, and with a view to charge the party. 8 Watts, 535.—§ 2. The proof of the entry must be made by the person who made it. If made by the seller, he is competent to prove it, from the necessity of the case, although he has an interest in the matter in dispute. 5 Conn. 496; 12 Johns. R. 461; 1 Dall. 239. When made by a clerk, it must be proved by him. But, in either case, when the person who made the entry is out of the reach of the process of the court, as in the case of death, or absence out of the state, the handwriting may be proved by a person acquainted with the handwriting of the person who made the entry. 2 Watts & Serg. 137. But the plaintiff is not competent to prove the handwriting of a deceased clerk who made the entries. 1 Browne's R. App. liii.—§ 3. The books and original entries, when proved by the supplementary oath of the party, is *prima facie* evidence of the sale and delivery of goods, or of work and labour done. 1 Yeates, 347; Swift's Ev. 84; 3 Verm. 463; 1 M'Cord, 481; 1 Aik. 355; 2 Root, 59; Cooke's R. 38. But it is not evidence of money lent, or cash paid. Ibid.; 1 Day, 104; 1 Aik. 73, 74; Kirby, 289. Nor of the time a vessel laid at the plaintiff's wharf, 1 Brown's Rep. 257; nor of the delivery of goods to be sold on commission. 2 Wharton, 33.¶

"Provided that this act shall not extend to any intercourse of traffic, merchandising, buying, selling, or other trading or dealing for wares delivered, or to be delivered, money due, or work done, or to be done, between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for any thing directly falling within the circuit or compass of their *mutual* trades and merchandise; but that for such things only they and every of them shall be in case as if this act had never been made; any thing herein contained to the contrary thereof notwithstanding.

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[Besides the case of shopkeepers' books, there are other cases where entries in private books or memorials are admitted in evidence to affect the rights of third persons, upon proof that the writer is dead, and that they are in his handwriting. Any entry under such circumstances is admissible, when it is in restraint, not in advancement of the right of the party who made it; as, where the party charges himself by the entry with the receipt of money; for the entry in this case derives its authority from the improbability that he would commit a falsehood to writing which must operate to his disadvantage. An entry is again admissible in those cases where hearsay evidence of the writer's declarations respecting the same fact would be received in evidence.<sup>(a)</sup> And in the case of ecclesiastical dues, it is every day's practice to admit entries in the parson's books as evidence for his successor.<sup>(b)</sup>

*Smartle v. Williams*, Bull. N. P. 283; *Comb.* 249, S. C.; 1 *Ld. Raym.* 745; *Barry v. Bebbington*, 4 *T. R.* 514; *Stead v. Heaton*, *Ibid.* 669; 5 *T. R.* 123. In the case of *Searle v. Lord Barrington*, 2 *Str.* 826, the endorsement of the payment of interest made under the hand of the obligee within the twenty years from the date of the bond, was admitted as evidence in an action on the bond by the representative of the obligee to repel the presumption arising from length of time of its being satisfied. 2 *Ves.* 43. (a) *Lill. Pr. Reg.* 552; *Woodnoth v. Lord Cobham*, *Bunb.* 180; *Glyn v. Bank of England*, 2 *Ves.* 40; *Outram v. Morewood*, 5 *T. R.* 123; {2 *Str.* 1129, *Warren v. Grenville*; 2 *Burr.* 1071, 1072, *Goodtitle v. Duke of Chandos*; 2 *Esp. Rep.* 646, *Calvert v. Archbishop of Canterbury*; 7 *East*, 279, *Roe v. Rawlings*. See 2 *Wash.* 151, *Brown v. Brown's Admx.*; 3 *Johns. Rep.* 226, *Jackson v. Walsh*; 4 *Johns. Rep.* 461, *Sluby v. Champlin.*} In a recent case in the Exchequer, the effect of this kind of evidence was very attentively considered. The plaintiff claimed the lands in question as part of old enclosures demised for ninety-nine years under a rent reserved to the lord of the manor, which term was alleged to be expired. In support of his title, he produced the rental of the family of fifty years' date, which charged the steward with the receipt of such and such sums, and expressed that thirteen shillings and fourpence had been annually received for these premises by the name of enclosure on lease. The defendants contended, that the rentals were evidence only of the receipt of so much money, but were not admissible to prove in what right it was received, whether as a conveyance or a quit-rent. And it was urged, that if they were admitted to that extent, a steward of a manor, by such insertions in his rentals, might convert all the quit-rents in the manor into conveyance rents on terms for years, and might even express when such terms would expire, and so get all the freeholds into the possession of the lord. But the court, viz. *Smithe*, chief baron, *Perrott*, *Eyre*, and *Burland*, barons, said fraud is not to be presumed; and the rentals are admissible not only to prove the receipt of the money, (which was agreed on all hands,) but also to show in what right it was received. For otherwise the receipt of a gross sum of money proves nothing; it must be allowed to show that it was in respect of certain lands, which is evidence of tenure; and therefore it may show the particular kind of tenure. The rentals in the hands of executors are evidence to charge or discharge them, which they could not do, unless they were allowed to show the particular right in which the money was received. The steward, if living, would be a competent witness: as he is dead, this is the next best evidence, and therefore admissible. *Harpur v. Brook*, *Tr.* 14 *G.* 3, on a motion for a new trial. 3 *Wooddes*, 332.—(b) 2 *Ves.* 43; *Bunb.* 46.

If A be seised of the manors of B and C, and during his seisin of both, he cause a survey to be taken of the manor of B, and afterwards the manor of B be conveyed to E, and after a long time there be disputes between the lords of the manors of B and C, about their boundaries; this old survey may be given in evidence. *Secus*, if the two manors had not been in the hands of the same person at the time the survey was taken.

*Bridgman v. Jennings*, 1 *Ld. Raym.* 734.] See *Peake*, N. P. 18.

On a contest in Chancery concerning a promise made by the Lord Abigney, to settle lands on the Lord Clifton and his lady, who was the daughter

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of the Lord Abigney ; the king's certificate under his sign manual, signifying the purport of the said promise, was held sufficient evidence of it.

Lord Abigney v. Clifton, Hob. 213; Godb. 119, S. P.; but Rolle, referring to the case in Hobart, says, it *seems* not to be evidence. Ro. Abr. tit. *Trial*, (H.) pl. 1.

[With respect to deeds, the general rule is, that where any person claims by a deed in the pleadings, there, he ought to make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be shown.

The deed consists of three things: 1st, Of sealing by the parties. 2dly, Of delivery to the party to whom the deed is made. 3dly, Of a right transferred or obligation created.

1st, The seal was very ancient in the Roman and Grecian governments, and from them it came to the northern nations, who anciently passed all manner of right, by the actual tradition of the thing itself. The seal followed from the invention of coins, and is a derivation from the same convenience; for as coins were invented as tickets to facilitate the exchange of all manner of commodities, so, when coin was wanting, or not ready for payment, tickets were given by impression in wax, and these passed instead of the coin itself. And these impressions were made with great distinction, for they contained the arms or some notorious symbol of the person contracting. Now when such distinctions were taken up and found of use, they were at last required in the authenticating of all manner of written contracts, and from hence the law grew, that there could be no solemn contract without the distinction of the seal.

§ See Perk. 129, 134. In Pennsylvania, New Jersey, and the southern and western states generally, the impression upon wax has been somewhat disused, and a circular, oval, or square mark opposite the name of the signer has the effect of a seal. 2 S. & R. 503; 1 Dall. 63; 1 S. & R. 72; 1 Watts, 322; 2 Halst. 272; 3 M'Cord, 583; Doly v. Beasley, 2 Bibb, 14; Jackson v. Wood, 12 Johns. 73; Jackson v. Phipps, 12 Johns. 418; Warren v. Lynch, 5 Johns. 239; Meredith v. Hinsdale, 2 Caines, 362.

2dly, The delivery was always a solemn sign used by the northern nations in the transferring of right; and as they anciently delivered the thing itself, and by that delivery made the alienation; so, when contracts took the place of the things themselves that were to be delivered, they annexed the solemnity to the contract, and the contract was completed by the delivery, and from thence it became necessary that a delivery should be made of all contracts.

§ Delivery of a deed is a question of fact for the jury, and the circumstances from which it is to be inferred are to be submitted to them. Vanhook v. Barnett, 4 Dev. 268. A delivery is the parting with the deed by the grantor in such a manner as to deprive him of the right to recall it. Kirk v. Turner, 1 Dev. Eq. 14. Where the grantor signed and executed the deed, and left it on the table, where it remained all night, and the next morning he took it and put it away, he was held not to have delivered the deed. Ward's Ex'rs. v. Ward, 2 Hayw. 226. The delivery may be made to a third person for the benefit of the bargainee, and this will be good until the latter dissents. Tate v. Tate, 1 Dev. & Bat. Eq. 22; Church v. Gilman, 15 Wend. 666. See as to delivery of a deed the following cases: Cook's Admr. v. Hendricks, 4 Monr. 500; Hinman v. Beoth, 21 Wend. 267; Jackson v. Roberts, 1 Wend. 478; Jackson v. Leek, 12 Wend. 105; Jackson v. Richards, 6 Cowen, 617; Gardner v. Collins, 3 Mason, 398; Southard v. Steele, 3 Monr. 438; Keirsted v. Avery, 4 Paige, 9.

3dly, In every contract there must be some right transferred, or obligation created, and therefore there must be apt words to show what right was transferred, and to whom, to show what obligation was created, and to whom. And the sense and signification of the words must be expounded by the law, since it is the province of the law to determine the forms and

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solemnities, and operation of all manner of contracts ; for the operation and effect of a contract cannot be determined but by the rules of law that are appointed as the measures of transferring right, and of creating obligations ; and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge or jury, who might construe or refine upon it at pleasure.

β *Atty v. Parrish*, 4 Bos. & Pull. 104.g

There must therefore be a profert made of all solemn contracts in any action founded on such contracts,

1st, For the security of the subject, that what right is transferred, or what obligation is created, may be judged of according to the rules of law.

2dly, Because all allegations in a court of justice must set forth the thing demanded : now the thing demanded cannot be set forth without the instrument shown upon which the demand arises, for since the demand is by the instrument, there can be no demand at all without showing that from which it arises.

Therefore parties to a deed cannot found any claim without showing a deed to the court.(a)

Co. Litt. 226. β The devisees of *Robinson v. Maclin*, 3 Hayw. 70, acc.g (a) || This may be dispensed with in pleading, where the deed has been lost by time or accident. *Read v. Brookman*, 3 T. R. 151 ; *Bolton v. Bp. of Carlisle*, 2 H. Bl. 259 ; or it may be pleaded that the deed is in the hands of the opposite party, or destroyed by him. *Totty v. Nesbitt*, 3 T. R. 153 n.(c). But, if a plaintiff, instead of declaring upon the deed, as lost or destroyed, pleads with a profert, and the defendant pleads *non est factum*, the plaintiff will not be allowed to prove the loss at the trial, and must be nonsuited. *Smith v. Woodward*, 4 East, 585.||

Nor can privies in estate take any advantage of a deed without showing it.

Co. Litt. 267 ; 10 Co. 92.

As, if there be tenant for life, remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it without showing the deed ; for since the right passed merely by the deed, to say any person released without deed will not be a good plea.

10 Co. 93.

When a man shows a title in himself, every thing collateral to that title shall be intended, whether it be shown or not ; for though the law requires an exactness in the derivation of the title, yet when that title is shown, it will presume all collateral circumstances in favour of right ; for when lawful conveyances, which are made with care, and on consideration, are brought forward, it would create too great nicety to require an exactness in the showing of every collateral matter, and would tend to the entangling of right with too many difficulties, and therefore, by the benignity of justice, they shall be intended. Besides, a matter collateral to a title is what doth not enter into the essence or being of a title, but arises *abundè*, so that there must be a good derivation of your right without it.

6 Co. 38 a.

As, when a man declares of a grant or feoffment of a manor, the attornment shall be intended : for when a title is shown to the manor, attornment of the tenant, which is collateral to that title, shall be intended till the contrary is shown on the other side.\*

Co. Litt. 310 ; Cro. Eliz. 401. \* See 4 Ann. c. 16, § 9, whereby all attornments of tenants are taken away.

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So in trespass, the defendant conveys the house in which, &c., by feoffment from J S, and justifies damage feasant; the plaintiff replies, that J S before the feoffment made a lease to J N, who assigned to him; the defendant rejoins, that the lease was made on condition, that if J N assigned over without license, by deed from J S, that then J S should re-enter; the plaintiff surrejoins, that J S did give license by deed, without any profit of the deed: and yet this surrejoinder was good, because the plaintiff's title was by assignment of the lease from J N, and, consequently, the license from J S is but a matter collateral to the assignment, and, by consequence, the deed must be intended to be well and legally made, though it be not shown to the court.

6 Co. 38; Cro. Ja. 102.

But, if the matter be collateral to the plaintiff's title, then there is another difference, and that is where the deed is necessary *ex provisione hominis*, and where it is necessary *ex institutione legis*. For where the deed is necessary *ex institutione legis*, there, you must show it, for it is repugnant that the law should require a deed, and not put you to show that deed when it is made; as, if you are obliged to show the attornment of a corporation, there you must show a deed, inasmuch as corporeal bodies, by the rules of the law, cannot act but by corporeal instruments; for the body consists in agreement and union, by creation of law, by patents or instruments under seal, and there is no act of the aggregate body but in the same manner; so that there can be no attornment without a deed; and the law cannot allow the attornment of such a body without it; therefore no attornment is shown, unless a deed is shown also.

6 Co. 38.

But, when a deed is necessary *ex provisione hominis*, there, when it is collateral, as in case of the license before mentioned, it need not be shown, for the private act of the parties shall not control the judgment of the law, that intends all such collateral matters without showing.

6 Co. 38.

There is a difference to be taken between things that lie in livery, and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed must be shown.

1st, Of things in livery,—It is well known that livery was the ancient conveyance, which was a solemn delivery of land in sight of the inhabitants; and because this was done *coram paribus curie*, and the tenant ever after resided in the possession, it was reckoned the most notorious way of conveyance; and since this was the ancient Gothic way, and because they reckoned it of itself most manifest, the solemnities of a deed were not necessary.

And therefore a man may plead that J S enfeoffed him without saying *per indenturam*, and yet give the indenture in evidence, because the indenture is not the feoffment, but the feoffment is made by the livery, and by that only the party is invested with the feud, and the indenture is only evidence of such feoffment.

2 Ro. Abr. 682.

But, if a man pleads, that J S had enfeoffed him *per fail*, whether he may give a parol enfeoffment in evidence, hath been reasonably doubted, because he has bound himself up to a feoffment by deed; and if the jury have only evidence of a parol feoffment, and yet find the issue, the deed may be used by way of estoppel ever after, where in truth there was no such deed.

2 Ro. Abr. 682.

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So, a demise may be had without deed, as well as a feoffment, for here the party resides in the possession, and therefore the old way of contracting governs in this case. And so a man may plead a demise without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract that would be good, whether there was any indenture or not. But, if the demise were laid by indenture, it seems that they could not give a parol demise in evidence.

2 Ro. Abr. 682.

Livery also is an estoppel, and is by Coke called an *estoppel in pais*, because it is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony; for when solemnities are settled for transferring a possession, they ought to be held as sacred by the law; and therefore a man is concluded from destroying that of which he himself is the author, or from impeaching that which is held as sacred to transfer all possessions.

Co. Litt. 352.

Therefore, if the defendant pleads the livery and the seisin of the plaintiff, the plaintiff cannot reply that the livery was conditional, without showing the deed; inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only.

Co. Litt. 225; Litt. § 365.

But the jury are not estopped on the general issue, from finding such a conditional feoffment, for the jury are men of the neighbourhood that are supposed to be present at the solemnity, and they are sworn *ad veritatem dicendam*, and therefore they cannot be estopped from finding the truth of the matter, and, by consequence, may exhibit the condition of the feoffment.

Co. Litt. 226; Litt. § 366.

But since the use of these solemnities before the men of the country had ceased, by allowing secret liveries only in the presence of two witnesses, therefore the statute of frauds and perjuries hath enacted, that no leases, estates, or interests of freehold, or for a term of years, or uncertain interest (not being copyhold) shall be assigned, granted, or surrendered, unless it be by deed or note in writing, under the hand of the party or his agent thereunto lawfully authorized in writing, or by act and operation of law; so that by this statute the ceremony of livery is not sufficient to pass estates of freehold or terms for years. But it is not necessary to set forth such contract on the pleadings, for they are, as they were formerly, *feoffavit et demisit*.

Buck's case, Trin. 1701.

A man may plead a condition to determine an estate for years, without deed; for this begins without any livery, and therefore the party is not estopped by any notorious ceremony from averring the condition.

Co. Litt. 225; Litt. § 365.

But where a man sets out a feoffment, the other party may reply, that it was by deed, and show the condition, for then there is an estoppel; and so the matter is in equal balance, and therefore must be determined according to truth.

2dly, Of things lying in grant,—And these are all rights, as fairs, markets, advowsons, and rights to lands, where the owner is out of possession; and these being rights, they cannot possibly pass by investiture of the possession, because they cannot possibly be delivered over, or possessed, and therefore they must pass by the next sort of grants that holds the second place in point of solemnity, and that is by grant under the hand and seal of the party.

Now a person that claims any thing lying in grant, must show his deed



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from the party that had the original grant, or otherwise he must prescribe in the thing he pretends to, and the prescription, being immemorial and supposing a grant, supplies the place of the grant.

He also that has a particular estate, by the agreement of the parties, must show not only his own conveyance, but the deeds paramount; for there can be no title made to a thing in agreement, but by showing such agreement, and the particular tenant ought to covenant to have the power of the deeds, inasmuch as he has no title, unless he can derive the estate that arises in agreement, up to the first original grant.

10 Co. 94.

But, where any person claims any estate, by particular act in law, there he may make his claim without showing the deeds; as tenant in dower, or by elegit, or the guardian in chivalry, may claim an estate in a thing lying in grant without the deed; for when the law creates an estate, and yet doth not give the particular tenant the property of the deeds, it must be allowed that the estate be defended without them, otherwise the creation of the estate were altogether in vain.

10 Co. 93.

So, they may plead a condition without showing the deeds, because they claim an estate by the act of the law, and therefore are not estopped by the livery; so that they may claim an estate defeated by the condition without a deed. Also, they are not supposed to have the deeds and muniments of the estate, and therefore, for the reason formerly given, may do it without deed.

Co. Litt. 225.

But tenant by the curtesy cannot claim an estate lying in grant, without deed, because he has the property in and custody of the deeds, in right of his wife, and that property cannot be divested out of him, during the continuance of his estate.

10 Co. 94; Co. Litt. 226 a. ¶ But 10 Co. 94 b, does not warrant this distinction between tenant in dower, and tenant by the curtesy generally, but only in the case of a release made to the wife.

So also he cannot defeat an estate of freehold without showing the deed, nor can the lord by escheat do it without showing the deed; for the act of livery is an estoppel that runs with the land, and bars all persons to claim it by virtue of any condition, without the condition appears in a deed; for the notoriety and solemnity of the act is that which makes it obligatory to all persons, so that they cannot impeach it, without showing a precedent title, for that livery cannot be defeated, but by showing something equally notorious; and since in both these cases the custody of the deeds resides with them, they must show the condition.

10 Co. 94; Co. Litt. 226 a.

So that the general rule is, where any person ought to have the custody of the deeds, there, where such person is compelled to show his title, he ought to make a profert of those deeds to the court; for every man ought to have his deeds, and cannot take advantage of his own negligence in losing them; therefore in the case formerly put, of tenant for life, the remainder in fee, and a release is made to him in remainder, in such case tenant for life ought to make a profert of the deed, for in this case they have both parts of the same feud, and therefore tenant for life is supposed to be equally entitled to the deeds as he in remainder.

Co. Litt. 267; 10 Co. 94 b.

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But, where a person is an utter stranger to any deed, there, in pleading, he is not compelled to show it; for where he is not supposed by the law to have the custody of the deeds, he cannot be compelled in pleading to show such deeds to the court, for that were to compel the party to impossibilities.

Co. Litt. 226; Styl. Regr. 205.

As, if a man mortgageth his land, and the mortgagee leaseth the land for years, reserving a rent, and then the condition is performed, the mortgagor re-enters; the lessee in bar of an action of debt shall plead the condition and re-entry, without showing the deed, for the lessee was never, nor could be, entitled to the custody of the deed, and therefore it were altogether unjust to compel him to produce it.

Co. Litt. 226 a.

So, if a man bring a *precipe* against A, he shall plead that he was only a mortgagee, and that the mortgage was satisfied, so that he hath no longer seisin of the estate, and this without showing the deed; for upon performance of the condition, the property of the deed was no longer in the mortgagee, but it ought to be rebailed to the mortgagor, and having no longer any title to the deed, he may plead the condition, without showing it.

Co. Litt. 226.

So, in an action of waste, or in discharge of the arrears of rent, the tenant pleads a grant of the reversion and attornment, after such waste committed, or such arrear due, the tenant cannot show the grant, *causa qua supra*.

10 Co. 94.

A deed enrolled must be offered to the court in pleading, though the deed be enrolled in the same court in which the plea is depending, for this is no record, but a deed recorded: for a record must be the act of the court, and therefore the decisions of justice by the court, that lie as precedents for future observation, are the record of the court; and letters patent, which are the king's acts, are the highest sort of records; but a deed enrolled is only a private act of the party authenticated in court. And from thence this difference is drawn, that letters patent enrolled in the same court, or records of the same court, need not be proffered to the court, but a deed enrolled must; for all records that are public acts, and that lie for the direction of the court, in matters of judicature, must be taken notice of, and therefore they need but refer to it with a *prout patet per recordum*, for the court will take notice of the course and orders of court, upon reference to them; but deeds are no more than the private act of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of its authority to give them credit; and therefore the court doth not take notice of them, unless they be pleaded. But the letters patent of another court the court doth not take notice of, unless they be offered; for since they are none of the records that are directed to this court of justice, it is not the office of the court to take notice of them, and therefore it is their duty to offer them as they do all other allegations.

5 Co. 74 b; 10 Co. 92; Stra. 520.

To a deed acknowledged in court, a man cannot plead *non est factum*, for being done in the court, the truth of the fact is so far to be credited, that he shall never deny the deed; but he may avoid the operation of the deed by pleading *riens passa par le fait*, for that doth not impeach the credit of the court in which it was acknowledged.

Since the term, to avoid the entering up the several continuances of

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business, is reckoned as one continued law-day, therefore deeds pleaded shall be in the custody of the law during the whole term, this being considered as the day wherein they are pleaded; and being then before the court, anybody may take advantage of them. But since they belong to the custody of the party, if the deed be not denied, it shall go back to the party, after the term is over, and then nobody can take advantage of it, without a new profert; for then it is not before the court; and therefore the plaintiff in the King's Bench may take the advantage of a condition in a deed in his replication, because it is *et prædictus A dicit*, as of the same term; but he cannot take advantage in a replication of a deed in the Common Pleas, because they enter an imparlance to another term: but, where the deed comes in, and is denied, it remains in court forever, because that is the only point in debate on which the decision of the court is founded, and therefore, like all other decisions, it must remain among the other records of the court; and because it is tied up to this court, and is impossible to be removed, it shall be pleaded in another court without showing.

5 Co. 74, 75.

As no party shall take advantage of his own negligence, in not keeping his deeds, which in all cases ought to be fairly produced to the court; so his adversary shall not take any advantage of his violent detaining of them; for the one by a violent taking away of the deeds gives a just excuse to the other for not having them at command, and no man can ever make any advantage of his own injury; and therefore it is a good plea for one party to say, that the other entered and took away the chest wherein the deeds were.

Co. Litt. 226; 9 Stra. 1186, 1198.

In an action of debt upon a bond, it is matter of substance to make a profert of the deed, because this is the contract on which the court are to found their judgment, and therefore it ought to be exhibited to the court.

Cro. Ja. 32.

It is not matter of substance to show letters of administration; for whether they are legally granted or not belongs to the spiritual courts, who are governed by the rules of the civil law, and therefore their legality cannot be weighed at common law, since it has different measures of judicature.

2 Saund. 402; 3 Keb. 61. ¶ It is now expressly made matter of form by 4 Ann., c. 16, § 1, and must be specially demurred to.¶

*Evidence of Deeds.*

Secondly, of giving deeds in evidence to the jury,—And here the general rule is, that where any thing is to be proved, the deed itself must be given in evidence, and not the copy of it; and the deed must regularly be proved by one witness at least.

10 Co. 92 b, 93. A deed cannot be given in evidence in ejectment, unless some paper title be first shown in the grantor; but any evidence of title, however small, is sufficient. *Zeigler v. Hantz*, 8 Watts, 380. But the rule is relaxed to some extent, as to a deed containing an executory contract between the parties, for the future procurement and conveyance of a title of land. *Chew v. Parker*, 3 Rawle, 283. See *Murphey v. Lloyd*, 3 Whart. 538.¶

This is now to be understood where the deed is of a late date; for if the deed be of thirty years' standing, which now makes an ancient deed, and the person to whom the deed was made, or those deriving under him, have been in possession under the deed, such ancient deed shall be read, without

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proof, though the witness to it be alive. And this the Lord Chief Baron Gilbert declared to be the rule of evidence at *nisi prius*. And if the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the ancient deed, unless the contrary be proved.

Mich. 1718, in the Exch. *per Curiam*. *β* M'Ginnis v. Allison, 10 S. & R. 199; Everly v. Stoner, 2 Yeates, 162; Thomas's Lessee v. Horlocker, 1 Dall. 14; Winn v. Patterson, 9 Pet. 674, 675; Duncan v. Beard, 2 N. & M'Cord, 400; Jackson v. Burton, 11 Johns. 64; Bennett v. Robinson's adm'r., 3 Stewart & Porter, 229; Clarke's Lessee v. Courtney, 5 Pet. 319; Knox v. Silloway, 1 Fairf. 217; Jackson, ex dem. Lewis v. Laroway, 3 Johns. Cas. 283, 286; Jackson, ex dem. Burhans v. Blanshaw, 3 Johns. 292; Jackson, ex dem. Van Schaick v. Davis, 5 Cowen, 123; Hewlett v. Cock, 7 Wend. 371; Jackson, ex dem. Bradt v. Brooks, 8 Wend. 426; Roberts's widow v. Stanton, 2 Munf. 129; Thompson v. Bullock, 1 Bay, 364; Joco's Lessee v. Harris, 1 Harr. & M'H. 196; Hoddy's Lessee v. Harryman, 3 Harr. & M'H. 581; Waldron v. Tuttle, 4 N. H. Rep. 371; Tolman v. Emerson, 4 Pick. 162; Arnold v. Gorr, 1 Rawle, 223; Zeigler v. Houts, 1 Watts & Serg. 533; Shallor v. Brand, 6 Binn. 436.g

First, the deed ought to be given in evidence, and not the copy only, for though in records the copy was admitted in evidence, yet the law will not regularly allow it in private deeds, for they are not within the same reason as copies of records, for a record is fixed in a certain place, and therefore the original cannot be had, and, by consequence, the copy is the best evidence.

But deeds are only private evidences, and not fixed or confined to a certain place, but are lodged in the custody of the party, and not of the law, and therefore they must be produced in evidence; for the law requires the best evidence which the nature of the thing is capable of, and the deed is much better evidence than the copy of it; for the rasure and interlineation that might vacate the deed, might appear in the deed itself; and the very offering a copy carries a presumption, as if the original were defective, and therefore the copy is not to be admitted. Besides, since the deeds are in the custody of the party, the deeds themselves must be produced; for a man cannot make his own fault in losing the deeds any part of his excuse.

But there are some exceptions out of this general rule.

1st, And that is where they prove the deeds themselves to be burnt, for the proof of this matter will excuse the deed from being produced to the jury. But, notwithstanding, a profert is necessary to the court, for there is that convenience in keeping to known rules, that they cannot be broken, though they tend to the mischief of particular persons; and there cannot be a more convenient rule, than that the cause of every complaint ought to be shewed to the court.

10 Co. 92 b, 93; Mod. 4, 266; L. E. 99, pl. 31. We have already seen that a deed may be pleaded as lost and destroyed by time and accident without a profert. Read v. Brookman, 3 T. R. 151. {See 5 Ves. J. 238; 6 Ves. J. 812, 813; 7 Ves. J. 19, 20, 249; 9 Ves. J. 466, 467. If it is pleaded with a profert instead of being stated to be lost or destroyed, secondary evidence of it cannot be admitted, on proof of the loss. But leave will be given to amend and plead it as lost. 4 East, 585, Smith v. Woodward; 3 Term, 153, n., Totty v. Nesbit and Matison v. Atkinson; 1 Saun. 9 a, note (1) by Serj. Williams.}

Now to prove the import of the deed, that it was in such a house, and that the house was burnt, is the best evidence that can be had of such deed, and gives reasonable grounds for the jury to find it.

2dly, A copy of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; for when the original is in the defendant's hands, the copy is the best evidence. For the presumption that

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opposes the copy is, because the original deed is, or ought to be, in the party's hands that would produce the copy. Now that presumption is destroyed where the plaintiff proves the deed itself to be in the hands of the defendant, for then it cannot be presumed that there was any better evidence, or that there was any interlineation that obliged the plaintiff to cover it; for if the copy were not perfect and exact, it would be overthrown by the defendant's producing the original.

Mod. 266; Gilb. Ev. 13, *Garnons v. Swift*, 1 Taunt. 507.

A copy of an agreement between the abbot of Quarrer and the monks of Lyra was produced in evidence; to which it was objected that it could not be read, being neither a record nor a public instrument. But a copy of the Oxford Statute (a) was exhibited, forbidding any book to be taken out of the Bodleian library: and then the court allowed the copy of this agreement, though they considered it as not within the general rules of evidence, but received it on the very particular circumstances of this case.

Bunb. 191. (a) This statute, it seems, should have been proved by a sworn copy.

But the copy of a deed must be proved by a witness that compared it with the original, for there is no proof of the truth of the copy, or that it hath any relation to the deed, unless there be somebody to prove its comparison with the original.

See Mod. 4, 94, 114; 6 Mod. 248; 2 Vern. 471, 603; L. E. 104.

Where the effect or contents of a deed are proved, and where the deed is afterwards given in evidence, and they disagree, there, the deed itself shall control the other evidence. So it is, where the jury on a special verdict collect the contents of a deed, and yet afterwards find the deed *in hæc verba*, the court, there, is not to regard the collection they have made of the substance of the deed, but the deed itself; for that collection derives its authority from the deed, and therefore must of itself fail and come to nothing, when it is opposite to the deed of which it is a collection.

Vaugh. 77.

3dly, Where the possession has gone along with any deed for many years, there, a very old copy of the deed may be given in evidence, with proof also that the original is lost. And that is according to the rule of the civil law, *Si vetustate temporis et judicariæ cognitione sint roboratæ*; for possession could not be supposed to go along in the same manner, unless there had been originally such a deed, and so executed as the copy mentions; and the copy cannot be supposed to be only offered in evidence to avoid sight of the original, since it is so ancient that the antiquity alone prevents all suspicion of its being counterfeit, and the antiquity is known from the ancientness of the possession. But,

Qu. Whether such a copy shall be received without the proof of its being a true copy, by comparison with the deed itself?

4thly, The inspection of a deed enrolled shall be given in evidence. Where the deed needs enrolment, there, the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deed by enrolment is also empowered to take care of the fairness and legibility of it, and therefore the copy of such enrolment must be sufficient; for when the law hath appointed them to be made public acts, the copy of such public acts shall be, like all other public acts, a sufficient attestation.

Gilb. Ev. 86; 5 Co. 54; Style, 445; Keb. 117; Tri. *per* Pais, 355; Salk. 280. *ſ* *Yarborough v. Beard*, 1 Taylor, 25. See *Molton v. Harris*, 2 Esp. 549. *ſ* Notwith-  
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standing that deeds of bargain and sale enrolled have frequently in trials at  *nisi prius* been given in evidence without being proved; yet the law may well be doubted. In support of the practice, the case of Smartle and Williams, in Salk. 280, is much relied on; but that case is wrong reported; for it appears by 3 Lev. 387, that the acknowledgment was by the bargainor, and so it is stated in Salk. MSS. Besides, it appears from both the books that it was only a term that passed, and, consequently, it was no enrolment within the statute. Bull. N. P. 255, 256.

But, where a deed needs no enrolment, there, though it be enrolled, the *inspezimus* of such enrolment is no evidence, because, since the officer hath no authority to enrol it, such enrolment cannot make it a public act, and, consequently, cannot entitle the copy to be given in evidence, because such practices may be improved to very ill purposes; for then, if the deed were doubtful, it were but to enrol it, and bring the copy or inspection of it in evidence, and thereby avoid the giving in evidence a deed that was any way suspicious.

5 Co. 54; Style, 445; Keb. 117; Tri. *per* Pais, 355; Salk. 280; 2 Vern. 471, 591. However, though the deed needs no enrolment, yet if it be enrolled, it is now the practice to admit it in evidence without proof of its execution. 1 Ventr. 296, 297. In the case of Smartle and Williams, Salk. 280, the deed did not need enrolment, yet being enrolled on the acknowledgment of the bargainor, it was read against him without being proved. Bull. N. P. 256. 23 Johns. 480. See 1 Johns. Cas. 402; 2 Johns. 77, 230; 3 Johns. 300; 1 Dall. 1, 63, 66, 93; 1 Wash. 319; 2 Wash. 280; 1 Bay, 495. *g* It would seem, that a copy of an enrolment of a bargain and sale of freehold in lands, &c., is as good evidence as the original itself; but that a copy of the enrolment is not evidence of a bargain and sale of a chattel interest, or of the contents of any other deed enrolled for safe custody, except as against the party acknowledging the deed; and that against such party, and against all claiming under him, a copy of the enrolment of any deed is admissible in evidence. Ph. Ev. 355; Lady Holcroft v. Smith, 2 Freem. 259. See 14 East, 231; 2 Taunt. 5; and *Hobhouse v. Hamilton*, 1 Sch. & Lefr. 207. See also tit. "*Bargain and Sale*," *supr.* *||*

But the *inspezimus* on an ancient deed may be given in evidence, though the deed need no enrolment; for an ancient deed may be easily supposed to be worn out or lost, and the offering the *inspezimus* in evidence induces no suspicion that the deed is doubtful; for it hath a sanction from antiquity, and if it had been ill executed, it must be supposed to be detected when it was newly made.

Style, 445.

5thly, The recital of one deed in another is no evidence of the deed recited, though the deed containing the recital be well proved, because there still wants an attestation of the first deed. But, if the person, objecting to the evidence of the recited deed, claims under the person who executed the deed that recites the former deed, the reciting deed is evidence against him of the reality of the recited deed, because he that claims under me stands in my place, and therefore what is evidence against me, must be evidence against him.

*||* Ford v. Gray, 1 Salk. 285. *||* 1 Dall. 67, *Morris's Lessee v. Vanderer*; 3 Cain. 300, 307, *Jackson v. Reeves*. *}*

Thus in the case of Fitz-Gerald and Eustace; Eustace, the plaintiff, claimed in equity a debt on the defendant's estate, by virtue of a power reserved in the grandfather's settlement on the defendant's father, to charge the estate for payment of debts and younger children's portions. There, defendant objected that there were not proper parties, because the grandfather had made a mortgage, pursuant to that power, to one Cox, who was not party to the bill, and did not produce the original mortgage, but only an assignment thereof to Wybrants, to which the grandfather was party; yet the court allowed it to be evidence of the original mortgage, because

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the plaintiffs claimed under the grandfather, who was party to the assignment.

Mich. 1718, in the Exchequer, *per* Gilbert, Chief Baron; Gilb. Ev. 87; *β* Skipwith v. Skipwith, 1 Ves. J. 64.*g*

And in the following case, the recital of a bond in a deed executed by the same party who was the obligor in the bond, was allowed to be sufficient evidence of the bond. A gave a bond to B for payment of 2000*l.* within a year after his death, he having seduced her and had a child by her, and afterwards A, by deed-poll, reciting that he had given such bond, agreed the 2000*l.* should be laid out in an annuity for the use of B and the child for their lives. A died. B sued the administratrix on the bond, but there being only one witness to it, and (though his handwriting was proved, yet) he swearing that he did not see the bond sealed and delivered, B was nonsuited, upon which she brought her bill to be paid out of the assets. Lord Chan. King held, that the recital in the deed that A had given such a bond was sufficient evidence of there having been such, that it was a confession by the obligor himself, and stronger than a verbal confession, being under his hand and seal; and his lordship decreed accordingly.

Marchioness of Annandale v. Harris, 2 P. Wms. 432. || See also Shelley v. Wright, Willes, 11.*||*

|| Where an examined copy of a deed cannot be had, parol evidence may be given of its contents. But a ground must be laid for the introduction of such evidence. If it be, that the original has been lost, it must be shown that all due inquiry has been made, and the person, into whose possession it has been last traced, should be called to give some account of it. But, if such person be dead, and he had stated, in answer to inquiries made of him in his lifetime respecting it, that it was destroyed while in his possession, any further search would be unnecessary. If there have been two or more parts of a deed executed, the loss or destruction of all the parts should be proved before the secondary evidence can be received. The original deed too should be proved to have been duly executed, unless such proof would be dispensed with if the original itself were produced, or unless the want of the original is occasioned by the default of the other party, in which case the execution may reasonably be presumed against him. Where an original note of hand is lost, a copy cannot be read in evidence, unless the note is proved to be genuine.

Ph. Ev. 347; R. v. Castleton, 6 T. R. 236; R. v. St. Sepulchres, 2 Bott. 353; R. v. West Riding of Yorkshire, Ph. Ev. 348; Bull. N. P. 254; R. v. Castleton, *ubi sup.*; R. v. Culpepper, Skin. 673, *per* Holt, C. J.; Goodier v. Lake, 1 Atk. 446. *β* Sometimes proof of the loss of a written instrument is made by positive testimony, as where the witness saw it destroyed; but it more frequently occurs that proof of such loss is made by evidence of collateral circumstances, as when the house in which it was contained has been destroyed by fire, or a public enemy. Jackson, *ex dem.* Taylor, v. Cullum, 2 Blackf. 228; Jackson, *ex dem.* Livingston, v. Neely, 10 Johns. 374; Fallis v. Griffith, 1 Wright, 305; Rochell v. Holmes, 2 Bay, 487; Franklin v. Creyon, Harp. Eq. R. 243; Jeffrey's Ex'rs. v. Parsons, 2 Verm. 456; Peay v. Pickett, 3 M'Cord, 322. Proof that the instrument was put in the post office, directed to a particular person whom it never reached, is sufficient evidence of loss. Bank of the United States v. Sill, 5 Conn. 106; Champion v. Terry, 3 Brod. & Bing. 295; or put in a letter bag which was thrown overboard. Anderson v. Robeson, 2 Bay, 495. Proof that the paper has been diligently sought for and cannot be found is sufficient. Renner v. Bank of Columbia, 9 Wheat. 581; Taunton Bank v. Richards, 5 Pick. 436; Proprietors of Brain-tree v. Battles, 6 Verm. 399; United States v. Doebler, 1 Baldw. 519; Commonwealth v. Snell, 3 Mass. R. 82.*g*

Proof by a witness, that the paper in question was thrown aside as useless,

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and that he believes it to be lost or destroyed, will be sufficient to let in the secondary evidence. And where it appeared, that the defendant had acknowledged the receipt of a letter of a particular date, which he refused to produce at the trial, an entry in a letter-book (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality) was admitted as evidence of the contents of the letter in question.

*R. v. Johnson*, 7 East, 66; 8 East, 284; *Pritt v. Fairclough*, 3 Campb. 305.¶

2dly, As to the second part of the rule, the deed must be proved to the jury by one witness at least; for though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is no full proof of the deed, for the delivery is necessary to the essence of the deed, and the deed takes effect from the delivery, so that unless the delivery be proved, there is no perfect proof of the deed, and there is no proof of the delivery but by a witness who saw the delivery.

{As to what is sufficient evidence of the execution to go to the jury, see 1 Esp. Rep. 97, *Powell v. Blackett*; 3 Esp. Rep. 171, *Park v. Mears*; 2 Bos. & Pul. 217, *S. C.*; *Peake, N. P.* 146, *Grellier v. Neale*; 10 Ves. J. 470, *Burrowes v. Locke*; 1 Bin. 436, *Pigott v. Holloway*.}

¶ So strictly is this rule observed, that an acknowledgment of the obligor himself (a) that he executed a bond, and even an admission (b) by the defendant in an answer to a bill filed against him for a discovery, will not dispense with the testimony of the subscribing witness. The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself, who made it, or against a third person; or whether the deed is an existing instrument, (c) or cancelled; or whether it is the foundation of the action, (d) or comes in collaterally as part of the evidence in the cause. And this rule applies to all written instruments, which are attested; as, if an attested notice to quit (e) has been given to the defendant, which it becomes necessary to prove in an action of ejectment, the subscribing witness must be called to prove it, or his absence must be accounted for: it is not enough to prove that it was served on the tenant, that he read it, and did not object to it. If indeed a party to a suit agrees that the other party shall act upon the instrument, as if the witness were produced, that will dispense with his testimony.

(a) *Abbot v. Plumb*, Dougl. 216. (b) *Coll v. Dunning*, 4 East, 53. (c) *Breton v. Cope*, *Peake's N. P. C.* 30. (d) *Manners v. Postan*, 4 Esp. N. P. C. 239. (e) *Doe v. Dunford*, 2 M. & S. 62; *Laing v. Kaine*, 2 Bos. & Pull. 85. ¶ It is a general rule that the subscribing or attesting witness must be produced. *Henry v. Bishop*, 2 Wend. 576; *M'Pherson v. Rathbone*, 11 Wend. 136; *Willoughby v. Carleton*, 9 Johns. 136; *Clark v. Sanderson*, 3 Binn. 194; *Petit v. M'Adam*, 2 S. & R. 420; *Clarke's Lessee v. Courtney*, 5 Pet. 519; *Whitaker v. Salisbury*, 15 Pick. 534; *Ingram v. Hall*, 1 Hayw. 206; *Jackson v. Waldron*, 13 Wend. 178; *Handy v. The State*, 7 Harr. & Johns. 42; *Hogeland v. Sebring*, 2 South. 105; *M'Murtry v. Frank*, 4 Monr. 39; *Whitemore v. Brooks*, 1 Greenl. 59; *Cooke v. Woodrow*, 5 Cranch, 13; *Simmons v. The State*, 7 Ham. 116; *Hatfield v. Montgomery*, 2 Porter, 58; *Bennett v. Robinson's Adm'rs.*, 3 Stewart & Porter, 227; *Beale's Ex'rs. v. The Commonwealth, &c.*, 11 S. & R. 305. See also *Drew v. Wadleigh*, 7 Greenl. 94.¶

If the attesting witness is dead, or blind, (g) or incompetent to give evidence, from insanity, (h) from infamy of character, (i) or from interest acquired after the execution of the deed, (k) or if he is absent in a foreign country, (l) or out of the jurisdiction of the superior English courts, so as not to be amenable to their process, (m) or if he cannot be found after strict and dili-



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gent inquiry, (n) in all these cases, proof of his handwriting will be sufficient proof of the execution; and that without proof of the handwriting of the party to the deed. (o)

(g) Wood v. Drury, 1 Ld. Raym. 744. (h) Vin. Abr. tit. *Evidence*, (T. b. 48,) pl. 12; Burnett v. Taylor, 9 Ves. 381. (i) Jones v. Mason, 2 Str. 833. (k) Goss v. Tracey, 1 P. Wms. 287; Godfrey v. Norris, 1 Str. 34; Swire v. Bell, 5 T. R. 371. (l) Coghlan v. Williamson, Dougl. 93; Wallis v. Delancey, 7 T. R. 266; Adam v. Kerr, 1 Bos. & Pull. 361. (m) Prince v. Blackburn, 2 East, 250. (n) Anon., 12 Mod. 607, per Holt, C. J.; Cunliffe v. Sefton, 2 East, 183; Crosby v. Percy, 1 Taunt. 365; Parker v. Hoskins, 2 Taunt. 223; Wardel v. Fermor, 2 Campb. 282. (o) Prince v. Blackburn, *ubi supr.*; Adam v. Kerr, *ubi supr.*; Wallis v. Delancey, *ubi supr.*; Lord Kenyon, *contr.*

But, if there is no subscribing witness on the deed, or (which is in fact the same) the subscribing witness denies having any knowledge of the transaction, (a) or the name of a fictitious person is inserted; (b) or, if the attesting witness was interested at the time of the execution of the deed, and continues so at the time of the trial; (c) or, if the person, who has put his name as subscribing witness, did so without the knowledge or consent of the parties; (d) or, if, after diligent inquiry, nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his handwriting proved; or, if at the time of the execution he was of such an infamous character, as to make him incompetent to give evidence; in all these cases, the execution may be proved by proof of the handwriting of the party to the deed; or by any person present at the execution, though his name is not endorsed as witness; (e) or by proof of an admission of the party himself, that he executed the deed. The proof of the party's handwriting is a sufficient ground for presuming, that the deed was, as it purports to be, sealed and delivered. (g)

Ph. Ev. 363. (a) Grellier v. Neale, Peake's N. P. C. 145; Ley v. Ballard, 3 Esp. N. P. C. 173; Fitzgerald v. Elsee, 2 Campb. 635; Lemon v. Dean, *Ibid.* 636, n. See Phipps v. Parker, 1 Campb. 412, *contr.* β When the attesting witness fails to prove the execution of the instrument, the fact may be established by other evidence. Sigfried v. Levan, 6 S. & R. 308; Taylor v. Meekly, 4 Yeates, 79; Whitaker v. Salisbury, 15 Pick. 534; Patterson v. Tucker, 4 Halst. 322; Hall v. Philips, 2 Johns. 452; Holloway v. Lawrence, 1 Hawks, 49; Booker v. Bowles, 2 Blackf. 90; Handy v. The State, 7 Harr. & Johns. 42. g (b) Fassett v. Brown, Peake's N. P. C. 23. β Handy v. The State, 7 Harr. & Johns. 49; Allen v. Martin, 1 N. Car. L. Repos. 373. g (c) Swire v. Bell, *ubi supr.* β Nelius v. Brickell's adm'r., 1 Hayw. 19; Hamilton v. Marsden, 6 Binn. 50; Lantermilch v. Kneagy, 3 S. & R. 202. g (d) M'Craw v. Gentry, 3 Campb. 232; 4 Taunt. 220. (e) Com. Dig. tit. *Evidence*, (B. 3.) (g) Grellier v. Neale, *ubi supr.*; Burrowes v. Lock, 10 Ves. 474. β The attestation of a mulatto, who is by law an incompetent witness, will be considered as no attestation at all. Gilliam's adm'r. v. Perkinson's adm'r., 4 Rand. 325. See 13 Wend. 183; *Ibid.* 196; 11 Wend. 123; 3 Rawle, 318; 1 Harring. 22; 1 Greenl. 57; 1 Hawks, 49; 5 Pet. 319; 1 Leigh, 483; 3 Stew. & Port. 229. g

In the case of a deed executed in the East Indies, and attested by a witness resident there, the stat. 26 G. 3, c. 57, § 30, enacts, "that it shall be sufficient to prove the handwriting of the party to the deed, and of the attesting witness, and that the witness is resident in the East Indies."

Signing was not an essential part of a deed at common law; though the legislature has since made it as necessary as sealing. But even now, that all deeds are signed, the old form of attestation obtains, viz., "sealed and delivered by the party in the presence of us;" to which memorandum the witnesses set their names. It has been lately questioned, whether, where a power is required to be executed by a deed signed *and attested* by witnesses, it is well executed by a deed with this old form of attestation, in which the fact of signature is omitted. And the Court of Common Pleas, (h) *dissent.* Mansfield, C. J., have holden that it is not, and their opinion has been

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adopted in two subsequent cases (i) by the Court of King's Bench. These decisions have induced the legislature to pass an act to amend the law in this respect; and by 54 G. 3, c. 168, it is enacted, "that every deed or other instrument *already made* with the intention to execute any power, authority, or trust, or to signify the consent or direction of any person, whose consent or direction might be necessary to be so signified, should (if duly signed and executed, and in other respects duly attested) be from the date thereof, and so as to establish derivative titles, if any of the same validity and effect, and no other, at law and in equity, and proveable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto; and the attestation of the witness or witnesses thereto, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing or any other form of attestation, shall not exclude the proof or the presumption of signature."

(A) *Wright v. Wakeford*, 4 Taunt. 213; 17 Ves. 454. (i) *Doe v. Peach*, 2 M. & S. 576; *Wright v. Barlow*, 3 M. & S. 512. See this question very ably discussed by Mr. Sugden in his *Treatise of Powers*, and see also his observations upon this act in the same book, p. 231 to 250.—The act, though occasioned by the decisions in *Wright v. Wakeford* and *Doe v. Peach*, yet treats the points as doubtful, and recognises the established practice in these cases to be, to express the facts of sealing and delivery only in the memorandum of attestation. § Evidence of the signature of an obligee of a sealed instrument, is *prima facie* evidence of its execution by him. *Conard v. The Atlantic Insurance Company*, 1 Pet. 386.†

Where the deed executing the power was required to be signed in the presence of witnesses, but they were not required to attest the signature, and the word "signed" was omitted in the attestation; but in the body of the deed actually executed, it was stated to be signed by the donee in the presence of the witnesses, according to the power; Lord Eldon said, that upon the question, whether after execution it ought to be taken that the donee did sign in the presence of the witnesses attesting the sealing and delivering, there would be a miscarriage in a judge directing a jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses as it professed to be. That attestation therefore, he added, was good. And his lordship has since observed, that he thought this case rightly decided. That was the case of powers to be executed in the presence of witnesses; and in one instance, with this farther requisite expressed, to be attested by witnesses. The power, actually exercised by the deed, upon which the question arose, was to be exercised in the presence of witnesses. The deed, said to be an execution of the power upon the face of it, was expressed to be executed in the presence of the witnesses; and so far from determining, that attestation of the sealing was attestation of the signing, I merely said, added his lordship, there would be a miscarriage in a judge, if he did not direct the jury to presume that the deed was signed, as it professed to be on the face of it, in the presence of the witnesses, who attested the sealing and delivery; a way of putting it that, so far from deciding, expressly avoided, the question, whether attestation of the sealing and delivery is to be taken as attestation of the signing also.

*M'Queen v. Farquhar*, 11 Ves. 467; 17 Ves. 457.

Although sealing be essential to the validity of a deed, yet any seal may be used, and any number of persons may use the same seal, or one may seal for the rest with their consent, and the deed will be as binding as if every one had put his several seal.

*Perk. c. 2, § 134*; *Ball v. Dunsterville*, 4 T. R. 313.

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Where a bond, having been executed by A, and attested by one witness, was carried into an adjoining room, and shown to B, who was desired to attest it also, which he accordingly did in the presence of A, and it appeared that B knew A's handwriting, and that A knew he was acquainted with it, and that B himself had acknowledged the instrument; it was holden that the whole might be considered as one transaction, and that there was sufficient proof of the execution.

*Parke v. Mears*, 2 Bos. & Pull. 217; Ph. Ev. 361, 362, S. C.

So, where the subscribing witness to a deed being called, said, that she did not see it executed, but that the defendant brought it to her, and desired her to put her name to it as a subscribing witness, which she did; this was deemed sufficient proof of the execution.

*Grellier v. Neale*, *Peake's N. P. C.* 146.

Witnesses are not to prove instruments by a general phrase; not merely to say that they were present at the execution, that they saw the party execute; but they must state circumstances, what actually passed, that the deed was sealed and delivered, or the will signed, published, and declared in their presence.

*Burrowes v. Lock*, 10 Ves. 470.]

But to the above rule there are several exceptions.

First, if the deed be (a) forty years' old, it may be given in evidence, without any proof of the execution of it, for the witnesses cannot be supposed to live above forty years, and forty years is proof sufficient of a prescription; for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient to understand the nature of right and wrong, and the general forms of contracting; so that after forty years, the witness must be supposed to be dead; (b) and therefore since no person living can be supposed to be coeval with such deeds, therefore they may be offered in evidence without proof.

*Trin. Ass. in Kent*, 1700; *Tri. per Pais*, 339, 346; *L. E.* 101, pl. 40; *Sid.* 146; *Co. Litt.* 6 b; *Keb.* 877; 2 *Keb.* 526; *Skin.* 239; 2 *Mod.* 320, 323; 3 *Salk.* 154. See *Lev.* 25. (a) Now reduced to thirty years. (b) The antiquity of the deed must be made out by proof; the party cannot rely on the date of the instrument as proof of that fact. *Robinson v. Craig*, 1 *Hill*, 389; *Blair v. Miller*, 2 *Dev.* 407; *Forbes v. Wale*, 1 *Black. R.* 532; *Jackson, ex dem. Lewis, v. Laroway*, 3 *Johns. Cas.* 287. But when such instrument is not impeached, it need not be proved by the subscribing witness. *Hinde v. Vattier*, 1 *McLean*, 115. (b) Suppose the witness to be alive, and in a state to be produced, *Yates, J.*, would not let him be called, considering the limit as fixed beyond which proof of execution would not be required. *March v. Cobnett*, 2 *Esp. N. P. C.* 65. But *Perrot, B.*, held that he must be produced, the rule being founded only on a presumption, which of course must fall, when the contrary is made to appear. *Rees v. Mansel, Selw. N. P.* 492. An ancient writing (not being a deed) proved to have been found amongst deeds and muniments of an estate, may be given in evidence, although the due making of it cannot be ascertained; for it is difficult to develop ancient facts, and finding these instruments and memorials in such a place, affords a presumption, that they were fairly obtained, and preserved for use. *Tri. per Pais*, 370. {See 7 *East*, 279, *Roe v. Rawlings*. And on an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representative of his predecessor, as papers belonging to the parish found in the late incumbent's possession, are evidence. 4 *Esp. Rep.* 1, *Earl v. Lewis*.} || *Forbes v. Wall*, 1 *Esp. N. P. C.* 278. Some account ought to be given of the place where they were found. *Bull. N. P.* 255. But this rather applies to those cases, where the character and authenticity of old writings depend in some degree on the nature of the place or custody in which they have been kept; for where the old instrument purports to belong to the party producing it in evidence, it will be admitted without showing where it has been kept. *R. v. Ryton*, 5 *T. R.* 259; *R. v. Netherthong*, 2 *M. & S.* 337, 338. But an admittance into

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a tenement, holden of a manor, purporting to be under the steward's hand, though above forty years old, was rejected in evidence, because they could not prove the steward's hand. Fort. 43. {A will, thirty years old (and not less) from the death of the testator, and under which the possession has been taken and enjoyed, may be read without proof. 9 Ves. J. 5, *M'Kenire v. Fraser*; 3 Johns. Rep. 292, *Jackson v. Blanshan*. So, of a bond of thirty years' standing, if found among the papers of a public company, or of the obligee, who is deceased. 1 Esp. Rep. 275, *Governor, &c., of Chelsea Water-works v. Cowper*, and *Henchett v. Wall*, cited, p. 277. And in *The King v. Inh. of Ryton*, 5 Term, 259, it was determined that the production of a parish certificate of that age was sufficient, without giving any account of it. See also 2 Term, 466, *The King v. Inh. of Farringdon*; 2 Day, 280, *Mallory v. Aspinwall*.}

But it has been ruled, that if a deed be forty years old, and possession have not gone along with the deed, some account of the deed ought to be given, because the presumption fails that was raised in behalf of such deeds, where there is no possession; for it is no more than old parchment, if no account of its execution be given.

Ass. 1702, *per Hasset*.

But, if there be any blemish in the deed, by rasure or interlineation, then the deed ought to be proved, though it be forty years old; if the witnesses be living, it ought to be proved by the witnesses; but, if the witnesses be dead, the hands of the witnesses should be proved; for though there must be (as is said) a presumption in favour of the deed when it was worn out of the memory of the witnesses, yet that presumption is encountered by another presumption from the blemishes of the deed itself, and therefore the credit of the deed ought to be restored by the proof of the execution of it.

Trin. Ass. 1700, in *Kent*.

So that if the deed imports a fraud, as, where a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title, there, the first deed must be proved, though forty years old; for the presumption from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed to be guilty of so manifest a fraud; and therefore here also the credit of the first deed must be restored, by proving a fair execution of it.

Chattle and Pound, Hil. Ass. 1701, in *Kent*.

If a deed of feoffment be proved, and the possession have gone along with the deed, there, the livery shall be presumed, though it be not proved; for when there has been possession in the manner which the deed sets forth, it founds a very strong presumption, that such possession was delivered in that manner; for that there should be a contract to transfer possession, and that possession should go according to that contract, are such concurring circumstances as cannot be accounted for, unless the possession was transferred according to the contract, and, consequently, the livery and seisin must be supposed by the jury.

Ro. Rep. 132; Tri. *per Pais*, 440, 455.

But, if possession have not gone along with the deed, then the livery must be proved upon the feoffment; for since the livery is to give the possession on the deed, where no possession is, the presumption is, that there was no livery, and, consequently, the livery must be proved to encounter that presumption.

But, if the jury find the deed of feoffment, and that the possession hath gone along with the deed, yet the judges, upon such finding, cannot adjudge it a good conveyance, for the jury are judges of the fact, and what is probable, and what is improbable; the court are only judges of what is law,

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and have nothing to do with any probabilities of fact; therefore it is the jury only that are to make the conclusions and deductions as to the truth of the fact; the court cannot make any conclusions or deductions of the truth of facts, if they are not drawn by necessary consequence out of the words of the verdict; for to the court the rule is, *De non apparentibus et non existentibus eadem est ratio*; therefore they cannot conclude that there was a lawful conveyance, unless the jury find the delivery of the deed

Ro. Rep. 132; Tri. *per Pais*, 440.

A deed of feoffment without livery may be given in evidence as a release; for where the party is in possession already, the deed only will be a sufficient contract to transfer a right.

Tri. *per Pais*, 454.

Secondly, A deed may be given in evidence on a rule of court, without proving it; for the consent is conclusive, and the jury are only to try such facts as are in issue between the parties.

1 Sid. 269; Tri. *per Pais*, 446.

It has been holden, that a deed which comes out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and is to be received in evidence without proof of the execution; for the other party, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution. || But this decision has been overruled. In general, an instrument produced at the trial by one party in consequence of notice from the other party must be proved by the party calling for it by the subscribing witnesses, as in ordinary cases. It is only, where the party out of whose possession the instrument comes, takes a beneficial interest under it, that the necessity of proof is dispensed with. (a) The objection that the party calling for the instrument is ignorant of the names of the attesting witnesses, and therefore cannot come prepared to prove it, may be obviated by procuring a rule of court, or a judge's order, to inspect the instrument before the trial. (b)

Rex v. Inhabitants of Middlezoy, 2 T. R. 41, and the cases there cited. Gordon v. Stereten, 8 East, 548; Wetherston v. Edington, 2 Campb. 94. (a) Pearce v. Hooper, 3 Taunt. 62. (b) Cooke v. Stocks, 1 Tidd's Pr. 431, 4th ed.; Blakey v. Porter, 1 Taunt. 386. In this last case, the plaintiff had commenced an action of covenant on an indenture of assignment of lease, one part only of which had been executed, and that was in the hands of the defendant; and the Court of Common Pleas granted the plaintiff a rule for reading and taking a copy of that part. So, Bateman v. Phillips, 4 Taunt. 157; King v. King, Ibid. 666. But these decisions have been considered as supportable (if they can be supported at all) only upon this principle, that the person called upon for the production of the instrument held it as a trustee for the other party; a principle, however, which would seem not to apply to the case of Bateman v. Phillips. And therefore, where an instrument was executed by two parties, each keeping one part, and the one was lost, the Court of C. P. refused to compel the other party to produce his part, in order to support an action against him on the instrument. Street v. Brown, 1 Marsh. 610.

*As to Rasure, Interlineation, and Addition.*

Formerly, if there were any rasure or interlineation, the judges determined, upon the profert of the deed and view of it, whether the deed was good or not; for the very contrivance of those solemn contracts, such as deeds are, and their preference to verbal contracts, was founded on this, that the intent of the parties is there manifestly settled in express words, and notoriously authenticated, and, there, such contracts are totally referred to the court, if the truth of the solemnities, viz., of the seal, and of the delivery, be admitted,

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and therefore must be dissolved by a contract of equal solemnity, because how they are destroyed and avoided must appear to the same judges that are by the law to determine of them. From hence also it came to pass, that if a deed was rased or interlined, they adjudged it a void deed, because it did not certainly appear to the court, who were judges of those solemn contracts, whether the mind of the party was contained in such a mangled contract or not.

10 Co. 92.  $\beta$  Some contrariety has taken place in the decisions respecting alterations made in an instrument; the ancient rule was that such alterations should be presumed to have been made before the execution, but in some cases this rule has been departed from. See *Prevost v. Gratz*, 6 Wheat. 481, 502; *Helfinger v. Shultz*, 16 S. & R. 47; *Cumberland Bank v. Hall*, 1 Halst. 215; *Jackson, ex dem. Gibbs, v. Osborn*, 2 Wend. 555; *M'Micken v. Beauchamp*, 2 L. R. 290.*g*

But, as the manner of conveyancing swelled from short little deeds to large and voluminous ones, so vast room was left to the misprisions of the clerks, that must be amended, or the deed with greater labour and expense of time written over again; and from thence the court thought it necessary not to discharge the deeds rased or interlined as void, upon the demurrer; but they referred to the jury upon the issue of *non est factum*, whether the deed, thus rased and interlined, was the individual contract delivered by the parties.

10 Co. 92.

If a deed be altered by a stranger without the consent of the obligee, in a point not material, this doth not avoid the deed; but otherwise it is, if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party that sealed and delivered it, when there is any material difference from the sense of the contract. But, if the contract contain the sense of the parties, the witnesses may well swear it to be their act; for an immaterial alteration doth not change the deed, and, consequently, the witnesses may attest that very deed without danger of perjury.

11 Co. 27; 2 Str. 1160. {See 6 East, 309, *Henfree v. Bromley*; 9 East, 351, *French v. Patton*.}

But, if the deed be altered by the party himself, though in a point not material, yet it will avoid the deed; for when the party himself makes any alteration in his own deed, it discharges the contract; for the contract hath the whole form from the words of the obligor: now when the obligee undertakes to supply it with new words, and to alter those the party hath fixed upon, this is (according to the rules of law, which takes every man's own act most strongly against himself) a new making and a new framing of the contract, and for a man to contract with himself is utterly void and ineffectual.

11 Co. 27.  $\beta$  *Cutts v. United States*, 1 Gall. 69, 71, *contr.*; 1 Dall. 67; *Whiting v. Daniel*, 1 Hen. & M. 390.*g*

Another reason of this interpretation of law might be, to add a sanction to deeds, that persons who had them in their custody might not alter them for fear of destroying their own securities.

If there be several covenants in the deed, and one of them be altered, this destroys the whole deed; for the deed is but a complication of all the covenants, so that the deed, which is the whole, cannot be the same, unless every covenant of which it consists be the same also.

11 Co. 28 b.

All interests, that pass without deed, would pass, though the deed was

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afterwards interlined or altered: (a) yet the interest once vested did not thereby return back again, since the deed is not absolutely necessary to the passing of the interest, but is only evidence that it was passed. But by the statute, it is necessary to show a writing under the hands of the parties.

2 Ro. Abr. 29. (a) *Quære*, whether that be not afterwards vacated by an interlineation?

If there be blanks left in an obligation in places material, and filled up afterwards by the assent of the parties, yet the obligation is void; for where there is a material part of the contract added after the sealing and delivery, it is not the same contract that was sealed and delivered. But, if there be a blank left in an obligation, and filled up afterwards with something immaterial, this doth not avoid the contract.

Ro. Rep. 39, 40; 2 Ro. Abr. 29. *§* Moore v. Lessee of Brickham and West, 4 Binn. 4; Marshall v. Gougler, 10 S. & R. 164; 5 Mass. 538. See 1 Anstr. 228; 4 Johns. 54. *g*

As, if a bond was made to C, with a blank left for Christian names and addition, which is afterwards filled up by the assent of the parties, yet this is a void bond.

Ro. Rep. 39, 40.

But, if any material part of the contract be added after sealing and delivery, yet if it is in effect the same contract, it shall not be avoided by these additions.

Zouch v. Clay, Vent. 185.

As, if A, with a blank left after his name, be bound to B, and after C be added as a joint obligor, yet this does not avoid the bond, because this does not alter the contract of A, for he was bound to pay the whole money without such addition.

Zouch v. Clay, Vent. 185; 2 Lev. 35, S. C., but puts it upon the consent of all the parties. 2 Keb. 872, 881, S. C.; Vide Moore, 547, 619, 835; Cro. Eliz. 627. *§* See 9 East, 353; 4 Cranch, 60. The alteration of a figure in the date of a note, proved only by inspection of the note, is not, of itself, evidence that the alteration was made after signature and delivery. Gooch v. Bryant, 1 Shepl. 386. *g*

Where a thing lies in livery, a deed formerly sealed may be given in evidence relating to it, though the seal be afterwards torn off; for the interest passed by the act of livery that invests the party with the possession, and the possession that was once transferred by the livery doth not return back again, though the deed was cancelled; and the deed is only an evidence of transferring possession, for by the act of livery the possession passes, and the deed without the seal (the livery being endorsed) is an evidence of such possession. So, if the conveyance was made by lease and release, the uses were once executed by the statute, and do not return back again by cancelling the deed.

Palm. 403; Mod. 11; Vent. 14, S. C.; 2 Keb. 556, S. C. But see now the statute of frauds.

But, if a man shows a title to a thing lying in grant, there he fails, if the seal be torn off from his deed; for a man cannot show a title to a thing lying in solemn agreement, but by solemn agreement, and there can be no solemn agreement without a seal; so that possession (a) alone is no good title, since the thing itself doth not lie in possession, but in agreement; therefore a man cannot claim a title to a watercourse, but by deed and under seal.

3 Bulst. 79. *§* Roll. Rep. 188. See 2 H. Black. 263. *g* (a) But from possession a deed may be presumed.

Where a contract creates an obligation, it cannot be pleaded, if the seal

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be taken off; for the seal is the essential part of the deed, and without a seal it is no longer a deed, nor to be pleaded, nor given in evidence as a deed, unless in the case above mentioned, where the interest vests, though the deed hath no continuance: but, where the deed is necessary to be shown, in order to acquire the interest, there, it must have the essentials of a deed, when it is shown as such.

1 Ro. Rep. 39, 40; 2 Bulst. 246; 2 Ro. Abr. 28, 29, 30.

If an obligation were sealed when pleaded, and after issue joined the seal be torn off, yet shall the plaintiff recover his debt, because the deed when proffered to the court was in the custody of the law, and therefore the law ought to defend it: besides, the truth of the plea, which is to be proved, must have relation to the time when the issue was taken, and at the time of the issue it had the essentials of a good deed, and therefore that is sufficient to maintain the issue.

Owen, 8 Cro. Eliz. 120; 5 Co. 119 b; 2 Bulst. 247; Dyer, 59, pl. 12, 13; Co. Litt. 283 a; Doct. Placit. 262; Ro. Rep. 39, 40; 2 Ro. Abr. 29.

Also, if the seal of a deed be broken off in court, it shall there be enrolled for the benefit of the parties, because, where any thing is impaired under the custody of the law, it shall be restored by the benignity of the law as far as possible.

2 Inst. 676.

If there be a joint contract or obligation, and one of the obligor's seals be torn off, it destroys the obligation, because they are both bound as one person, and if one be discharged, the other cannot stand obliged.

Noy, 112; 2 Ro. Rep. 30, 40; 5 Co. 23 a; Cro. Eliz. 546; Doct. Placit. 260, 262, 263; Poph. 161.

But, if two persons be bound severally, there, if the seal of one of the obligors be broken off, yet the obligation continues in the other, because there are several contractors, and several contracts, and therefore by destroying the obligation of one of them, the obligation of the other is not taken away.

5 Co. 23 a; Cro. Eliz. 546; Ro. Rep. 40; 2 Ro. Rep. 30, 149; Cro. Eliz. 406, 546, 576; 11 Co. 28 b; Doct. Placit. 260, 262, 263.

But, if two men are bound jointly and severally, and the seal of one of them is torn off, this is a discharge of the other, for the manner of the obligation is discharged by the act of the obligee, and therefore that is (according to the rule of law, that construes every man's own act most strongly against himself) a discharge of the obligation itself. Besides, since both are jointly bound as one person, the discharge of one of them is a discharge of both; a satisfaction is supposed by the very cancelling of it to be given for the whole debt, and no obligation can rest upon the other.

March. 29; 2 Show. 29.]

¶ A receipt is not in general conclusive, but that usually given for the purchase-money and endorsed on a deed for land is evidence of the lowest order.

Lingan v. Henderson, 1 Bland, 249. See Bouv. L. D. h. t., and the authorities there cited.

## (G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

It seems to have been agreed as a general rule, even (a) before the statute of frauds and perjuries, that no parol evidence could be admitted to control



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what appeared on the face of (b) a deed or will, not only from the danger of perjury, but from (c) a presumption, that whatever the parties at that time had in contemplation, was all reduced into writing.

5 Co. 68 a, b; 8 Co. 155 a; Keilw. 49. (a) For this vide tit. *Agreements*. β In an action on a promissory note, parol evidence that it was given for the piece of goods sold, and that, at the time of the sale, the plaintiff made a promise to the defendant in respect to the goods, which had been violated, is not objectionable as tending to alter, vary, modify, or impeach the note. *Batterman v. Peirce*, 3 Hill, 171.γ (b) As to records, it seems a general rule, that nothing can be admitted, though sworn by witnesses of the best credit, that contradicts them; for being things of the greatest credit, they can only be questioned by matters of equal notoriety with themselves. Ro. Abr. 757. (c) Vide Vern. 369. β Parol evidence may be received to apply and explain the writing, but not to add, contradict, or vary its terms. *Thompson v. White*, 1 Dall. 426; *O'Hara v. Hall*, 4 Dall. 340; *McDermott v. United States Ins. Co.*, 3 S. & R. 609; *Bertch v. The Lehigh Coal and Nav. Co.*, 4 Rawle, 130; *McKenna v. Henderson*, 1 Pennsylv. 417; *Austin v. Sawyer*, 9 Cowen, 39; *Rosevelt v. Stackhouse*, 1 Cowen, 122; *Vandervoort v. Smith*, 2 Caines, 161; *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. R. 282; *Stackpole v. Arnold*, 11 Mass. 27; *Washburn v. Cordis*, 15 Pick. 53; *Hovey v. Newton*, 7 Pick. 29; *Brigam v. Rogers*, 17 Mass. 573; *Hightower v. Ivy*, 2 Porter, 311; *Mead v. Steger*, 5 Porter, 504; *Somerville v. Stephenson*, 3 Stew. & Port. 275; *Brooks v. Maltbie*, 4 Stew. & Port. 96; *Cozens v. Whitaker*, 3 Stew. & Port. 322; *Bennett v. Hubbard*, 1 Alab. 270; *Bayton v. Towles*, 5 S. & R. 1; *McFarlane v. Moore*, 1 Overt. 174; *Tribble v. Oldham*, 5 J. J. Marsh. 141; *Perrine v. Cheeseman*, 6 Halst. 174; *Johnson v. Blackman*, 11 Conn. 350; *Cox v. Bennett*, 1 Greene, 170; *The State v. Perry*, 1 Wright, 662; *Edwards v. Richards*, 1 Wright, 597; *Reed v. Wood*, 9 Verm. 285; *Bradley v. Bentley*, 8 Verm. 243; *Franklin v. Long*, 7 Gill & Johns. 407; *Cox v. Moore*, 1 Harp. 401; *Falconer v. Garrison*, 1 M'Cord, 209; *Condict v. Stevens*, 1 Monr. —; *Veacock v. McCall*, 1 Gilp. 329; *Gilpins v. Consequa*, 1 Pet. C. C. R. 85; *Randall v. Phillips*, 1 Mason, 378; *Dunham v. Bay*, 2 Day, 137; *Small v. Quincy*, 4 Greenl. 497; *Phillips v. Keener*, 1 Litt. 329; *George v. Harris*, 4 N. H. Rep. 533; *Stine v. Sherk*, 1 Watts & S. 195; *Lighty v. Short*, 3 Penna. R. 450; *Beidelman v. Foulk*, 5 Watts, 308; S. C., 6 Watts, 339; *Selden v. Williams*, 9 Watts, 9.γ

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and evidence to inform the conscience of the court, viz., that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence.

2 Vern. 98, 337, 625. (a) || It is true, that a doctrine of this sort, that the court might receive evidence, which they thought, according to the strict rules of law, ought not to be offered to a jury, did at one time prevail. But evidence which ought not to be received as between the parties, to give a construction to a written instrument that is brought in dispute, seems to be no more admissible by a court than by a jury. In the several cases in Vernon, here referred to, the court refused to receive the evidence. 2 H. Bl. 524. ||

Also, to ascertain a fact, parol evidence hath been admitted to explain the intent of the testator: as, where the testator had two sons both named John, and he devised lands to his son John, (a) here parol evidence was admitted, to show which of his sons he meant; and it being proved, that one of his sons of that name had been absent several years beyond sea, and that the testator apprehended that he was dead, the devise was held good, and that the other should take; for without such evidence the will must be void.

5 Co. 68, Lord Cheney's case. (a) [Here there is a *latent* ambiguity; the words themselves *primâ facie* do not import an ambiguity; but the ambiguity ariseth from something *dehors*, some collateral matter out of the instrument itself. And as such ambiguity is made to appear by parol evidence, parol evidence must be admitted to explain it, as well as to raise it. See Bac. Max. Reg. 23.] β Parol evidence of the testator's intention is inadmissible where there is no latent ambiguity, but plain contra-

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dictory bequests. *Field v. Eaton*, Dev. Eq. R. 283. § {2 Bos. & Pul. 565; 4 Bos. & Pul. 113; 1 Mass. T. Rep. 69, 93; 4 Cran. 224, *Grant v. Naylor*; 7 Term, 138; 2 Bos. & Pul. 593; 6 Ves. J. 397; 4 Ves. J. 680, *Price v. Page*; 1 Day, 8, *Spalding v. Huntington*.} || So, where the deviser made one will in 1752, and another in 1756, without disposing of his personalty, or appointing executors by either; and by a codicil (reciting that *by his last will*, dated in 1752, he had made no disposition of his personalty) disposed of it, and appointed executors; it was holden, that there was no latent ambiguity, so as to let in parol evidence to show that the testator intended by the codicil to confirm the will of 1756, and not to republish that of 1752. *Lord Walpole v. Earl Cholmondeley*, 7 T. R. 138. But a blank in a will for the devisee's name is an apparent ambiguity, and parol evidence cannot be admitted to show what person's name the testator intended to insert. *Baylis v. Attorney-general*, 2 Atk. 239; *Castleton v. Turner*, 3 Atk. 257; *Hunt v. Hort*, 3 Br. Ch. Rep. 311. But on a bequest to a person, whose surname was mentioned with a blank left for the Christian name, the party who claimed the legacy was allowed not only to prove acts of kindness and constant affection on the part of the deceased, but to show further that the testator had said, "he would provide for him, and that he had left him something by his will." *Price v. Page*, 4 Ves. 680. And, where only one initial appeared in the will, (the bequest being to "Mrs. G." without any other description,) the chancellor referred it to the master, to receive evidence to show who was the person intended to be described by that initial. *Abbot v. Massie*, 3 Ves. 148. || § Where a clause in a will devising real estate has been omitted by mistake, parol evidence is admissible to supply it. *Webb's Heirs v. Webb*, 7 Monr. 629. §

So, where J S devised all his household goods, *as woollen, linen, pewter, and brass whatsoever, except a trunk under the chamber window*; and the question was, whether the parol proof of the person who drew the will should be admitted to explain these words; my lord keeper thought it might, notwithstanding the statute of frauds and perjuries; for here, it neither adds to, nor alters, the will, but only explains which of the meanings shall be taken; as, in case of a devise to son John, when the testator had two of the same name; and here the word *as* may be a restriction; or, if the following words be as particular instances, it may not restrain the word *whatsoever*; and he thought the words imported to carry all the household goods. And of that opinion was the master of the rolls; and the proof was read accordingly.

*Abr. Eq. 230; Mich. 1706; Pendleton and Grant*, 2 Vern. 517. § Where testator devised land as "all that part of cedar swamp to the eastward of the aforesaid run and branch below the said saw-mill," it was held that extrinsic evidence, tending to show that the testator called a portion of his cedar swamp eastward of the run and branch, and below the mill, his *grist-mill tract*, and thus exempt it from the mill tract, could not be allowed. *Hand v. Hoffman*, 3 Halst. 71. §

[So, where J S, being seised in fee of a real estate as heir on the part of his mother's mother, and being also seised in fee of a small estate as heir to his own father, devised all these lands to trustees and their heirs in trust to pay several annuities and charities; after payment of which he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side forever; and the question was, whether the heir of the mother's father, or the heir of the mother's mother was entitled to the residue of the rents and profits; parol evidence was admitted to show, which heir of the mother's side was intended.

*Harris v. Bishop of Lincoln*, 2 P. Wms. 135.

Again, R H devised to the defendant several closes of the value of 60*l.* *per annum*, paying 100*l.* he owed to J S, and 100*l.* he owed by bond to one Shaw; and devised some small legacies, and gave all the rest of his personal estate to the plaintiffs, his nieces. It happened that the 100*l.* due on bond was not due to Shaw, but was the money of Alice Beck, then the wife of one F. By reason of this mistake, the devisee of the land refused

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to pay the 100*l*. The plaintiff examined Harvey, who drew the will, and deposed that the testator declared, he meant the 100*l*. due to the person who married Mrs. Beck of Lincoln; and another witness deposed, that he meant the bond for which C was bound, as his surety: Decreed for the plaintiff, first at the Rolls, and afterwards brought on upon a bill of review before the lord chancellor, and heard on the merits, and again decreed on the merits; his lordship declaring he saw no hurt in admitting collateral evidence to make certain the person or the thing described. And Lord Thurlow in a late case (*a*) said, it was a clear proposition, that every evidence as to the description of the subject the testator has described, must be admitted. As, in the case of a specific legacy, you must hear evidence concerning the subject to which the will applies, in order to see whether the description applies aptly or not.

*Hodgson v. Hodgson*, 2 Vern. 593; Pr. Ch. 229, S. C. *β* See 1 Johns. 360. *g* (*a*) *Fonnereau v. Poyntz*, 1 Br. Ch. Rep. 477.

{Also where a testator gave a sum, *part of his four per cent. bank annuities*, to his wife for life, and after her decease to several relations; parol evidence was admitted to show that he had no such stock at the date of the will, having previously sold the whole of it and invested the produce in long annuities, and to show the cause of the mistake; this being a latent ambiguity. And the mistake being proved, the legacies were decreed to be paid out of other funds.

3 Ves. J. 306, *Selwood v. Mildmay*; *Ibid.* 308, n., *Dobson v. Waterman*.}

So, parol proof hath been admitted as to the intention of a testator, where the question hath been, whether a legacy should go in satisfaction of a debt due from the testator to the legatee, or whether a sum advanced on the marriage of a child should go in satisfaction of a legacy.

*Cuthbert v. Peacock*, 2 Vern. 593; *Debeze v. Man*, 2 Br. Ch. Rep. 165. {3 Ves. J. 516, *Hinchcliffe v. Hinchcliffe*; 5 Ves. J. 79, *Freemantle v. Bankes*; 6 Ves. J. 391, *Pole v. Lord Somers*; 7 Ves. J. 508, *Trimmer v. Bayne*.} In *Fowler v. Fowler*, 3 P. Wms. 354, Lord Talbot said, his opinion was against the admission of such evidence.

It also had been admitted in equity, to prove a variation between the agreement executed and the agreement intended, upon a suggestion that such variance hath happened through mistake, fraud, &c.

*Henkle v. Royal Exchange Assurance Company*, 1 Ves. 317; *Baker v. Payne*, *Ibid.* 456; *South Sea Company v. D'Olliffe*, 2 Ves. 376; *Pitcairne v. Ogbourne*, *Ibid.*; *Lady Shelburne v. Lord Inchiquin*, 1 Br. Ch. Ca. 338; *Harvey v. Harvey*, 2 Ch. Ca. 180. *Per Reynolds, C. B.*, in *Fitzgerald v. Lord Fauconberg*, Fitzg. 213. *β* 1 Johns. 571; 4 Dall. 340; 1 Wash. 15. *g* But in *Hardwood v. Wallis*, cited in 2 Ves. 195, parol evidence for this purpose was rejected. In that case, an estate was agreed to be settled prior to marriage on the intended husband for life; remainder to wife for life; remainder to the first, &c., son in tail male; remainder to all and every the daughters of that marriage. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitation to the sons in tail male; where he stopped, and wrote, *then go on as in Pippen v. Ekins*; which was a precedent he delivered to his clerk to go on from that limitation, and was a right settlement on the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage. It was executed with this mistake. The plaintiff was the only daughter of that marriage: the husband by a second wife left a son and four daughters, the defendants. It was insisted, that letting in the daughters of the second marriage would make the first wife a purchaser for them, or the children of other successive wives, to the destruction of the interest of her only child: the draught of the attorney was proved, and the settlement in *Pippen v. Ekins*. But the master of the rolls, Sir William Fortescue, would not admit the parol evidence of the attorney to be read; and held, that the other evidence would not do: that nothing appearing in writing under the hands of the parties, the settlement could not be altered.—Evidence of

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this kind, it must be observed, seems to be more readily admitted to rebut an equity, than to obtain a decree upon. *Legal v. Miller*, 2 Ves. 299; *Joynes v. Statham*, 3 Atk. 388; *Eden v. Lord Bute*, 7 Br. P. C. 204, 445. ¶ Although parol evidence is not admissible to vary a written contract, yet it is allowed to prove a vice in it. *Murphey v. Trigg*, 1 Monr. 72; parol evidence is also admissible to show that a deed or conveyance, absolute on its face, was intended by the parties only as a mortgage, or security for the payment of money. *Mark v. Pell*, 1 Johns. Ch. R. 594; *Slee v. Manhattan Co.* 1 Paige, 48; *Whittick v. Kane*, 1 Paige, 202; *Washburn v. Merrill*, 1 Day, 139; *Ross v. Norvell*, 1 Wash. 14; *Blanchard v. Keaton*, 4 Bibb, 451; *Lewis v. Robards*, 3 Monr. 409; *Streator v. Jones*, 3 Hawks, 423; *Thompson v. Cotton*, 5 Litt. 74. ¶ In *Wollam v. Hearn*, 7 Ves. J. 211, Sir Wm. Grant decided that though a defendant resisting a specific performance may give parol evidence that the written agreement is, by fraud, different from the intended agreement, yet a plaintiff cannot give it for the purpose of obtaining a specific performance of the agreement as varied by the parol evidence.—[1] Or surprise. 6 Ves. J. 328, *The Marquis Townshend v. Stangroom*.—There have been many decisions in Pennsylvania in favour of the admission of parol evidence even in contradiction to written instruments; but they have been chiefly in cases of *fraud* and *trust*. See 1 Dall. 424, *Lessee of Thompson and Wife v. White*. The leading case on this subject is *Hurst's Lessee v. Kirkbride*, cited 1 Bin. 616. The plaintiff, Timothy Hurst, claimed the manor of Pennsbury under a deed from R. E. Fell. This deed (dated 10th May, 1770, and made in pursuance of and in exact conformity to articles, dated 10th April, 1770) after describing a large lot of ground in Philadelphia, contained general expressions, comprehending all the grantor's lands in Pennsylvania and elsewhere in America. The counsel for the defendant offered to prove by parol testimony, that it was not the intent of the parties to convey the manor of Pennsbury, and that the sale of the manor was excepted at the time of executing the articles and deed. The court, after argument, permitted evidence to be given by W. Parr, the conveyancer who drew the writings, of conversations which he had with the parties when he received his instructions for drawing the writings, and while he was drawing them; and also that immediately after Fell had signed and sealed the writings, before he rose from his chair, and before the witnesses had signed their names, he mentioned the manor of Pennsbury to Hurst, who answered, "As to the manor, sir, I will treat with you about it another time." The truth was, that Fell had not a good title to the manor, and had afterwards sold it to Kirkbride, not in his own right, but as attorney for the real owners in England. It was a gross fraud in Hurst, after all that had passed, to set up a claim to the manor under the deed from Fell.}

{So, if a deed intended to be a mortgage is by mistake and accident made an absolute deed, Chancery will treat it as a mortgage; and parol evidence is admissible to show the mistake.

1 Day, 139, *Washburn v. Merrill*. Vide 1 Dall. 427, and the cases there cited. 1 Wash. 14, *Ross v. Norvell*.}

So, parol evidence is admissible to show, whether a thing be parcel or not of the estate demised by a deed. So, to show that persons describing themselves in a certificate as officers of the parish at large, were the officers of the hamlet where the pauper was settled. In explanation of mercantile contracts it is every day's practice to resort to it.(a)

*Doe v. Burt*, T. R. 701, *Rex v. Inhabitants of Sambourn*, 3 T. R. 609. *Per* Lord Hardwicke in *Baker v. Paine*, 1 Ves. 459, and *Blunt v. Cumyns*, 2 Ves. 331.] (a) ¶ It has been doubted whether this has not been carried too far. In the case of *Anderson v. Pitcher*, Lord Eldon, C. J., is reported to have expressed himself to this effect: "It is now too late to say, that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge, Lord Holt. It is true indeed, that Lord Mansfield, who may be considered as the establisher, if not as the author, of a great part of this law, expressed himself thus: Wherever you render additional words necessary and multiply them, you also multiply doubts and criticisms. (*Lilly v. Ewer*, Dougl. 74.) Whether, however, it be not true that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned." ¶ "The true and appropriate meaning of a usage is to interpret the otherwise indeterminate inten-

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tions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from presumptions and implications and acts of a doubtful nature. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some qualified and some technical, according to the subject-matter to which they are applied." *Per* Story, J., in the matter of the Schooner *Reeside*, 2 Sumn. 569. See *Yeaton v. The Bank of Alexandria*, 5 Cranch, 492; *Willings v. Consequa*, 1 Pet. C. C. R. 225; *Van Ness v. Packard*, 2 Pet. 148; *Williams v. Gilman*, 3 Greenl. 276; *Heald v. Cooper*, 8 Greenl. 33; *United States v. Arredondo*, 6 Pet. 175; *Barber v. Bruce*, 3 Conn. 9; *Gibson v. Culver*, 17 Wend. 305; *Gordon v. Little*, 8 S. & R. 533; *Harrie v. Nicholas*, 5 Munf. 483; *Sewall v. Gibbs*, 1 Hall, 602; *De Forrest v. Fulton Fire Ins. Co.*, 1 Hall, 84; *Wait v. Fairbanks*, *Brayt*. 7; *Coit v. The Commercial Ins. Co.*, 7 Johns. 385; *Sleight v. Hartshorn*, 2 Johns. 531; *Allegre's adm'r. v. The Maryland Ins. Co.*, 2 Gill & Johns. 136; *Galloway v. Hughes*, 1 Bailey, 553; *Hazard v. The New England Marine Ins. Co.* 1 Sumn. 218. To have any influence in the interpretation of a contract, a usage must be so well settled, so uniformly acted upon, and of such a continuance as to raise a just presumption that it was known to both contracting parties, and that the contract was made in conformity to it. *Snowden v. Warden*, 3 Rawle, 101; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Paul v. Lewis*, 4 Watts, 402; *Kendall v. Russell*, 5 Dana, 503; *Thompson v. Hamilton*, 12 Pick. 425.

It has been held, that if A purchases land in the name of B, A may be admitted to read proofs, that he paid the purchase-money, and so make it a resulting trust, or trust by implication of law for himself.

*Gascoigne v. Thwing*, 1 Vern. 366; *Bird v. Blossett*, 2 Ventr. 361; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Lloyd v. Spillet*, 2 Atk. 150. [Parol evidence offered to raise an equity, that a pension granted by the crown to the defendant absolutely and without any terms, was in trust for the plaintiff, the defendant by his answer, denying it, was rejected by Lord Thurlow, after much argument and long deliberation. *Lady Margaret Fordyce v. Willis*, 3 Br. Ch. Rep. 577.]  $\beta$  See *Jenison v. Graves*, 2 Blackf. 440; *Elliott v. Armstrong*, 2 Blackf. 198.

Parol evidence may be admitted to explain a written instrument, which on the face of it appears equivocal.

*Rex v. Landon*, 8 Term R. 379; and see *Stammers v. Dixon*, 7 East, R. 200.

Devise of "my estate of Ashton," the testator having a maternal estate, comprehending a manor and capital farm and lands in the parish of Ashton, as well as several other estates, some in adjacent parishes, some ten and fifteen miles distant; evidence is not admissible to show that he was accustomed to call all his maternal estate his "Ashton estate," in order to raise the inference that he meant to devise the whole by that name.

*Doe v. Oxenden*, 3 Taunt. 147; and see *Doe v. Greening*, 3 Maule & S. 171; *Doe v. Lyford*, 4 Maule & S. 550.

Devise of "all that my farm called Trogues Farm, now in the occupation of A C," is not necessarily limited to the lands of Trogues Farm in the occupation of A C, but may be shown by evidence to extend to other lands of Trogues Farm, not in his occupation.

*Goodtitle v. Southern*, 1 Maule & S. 299; and see *Beaumont v. Field*, 1 Barn. & A. 247; *Carruthers v. Seddon*, 6 Taunt. 14.

Where a testator devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate, it appeared that the testator had three brothers, each having a son named Simon; but this was held not to raise any latent ambiguity, so as to let in parol evidence, for it was clear the testator meant Simon son of Matthew.

*Doe v. Westlake*, 4 Barn. & A. 57; and see *Doe v. Huthwaite*, 3 Barn. & A. 632.

A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to have been filed on the 28th of November; held,  
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that evidence was admissible to show that it was actually filed on the 24th of December.

Wilton v. Girdlestone, 5 Barn. & A. 847.

The consideration expressed in a deed of conveyance was 28*l.*, but parol evidence was admitted to prove that 30*l.* was the real consideration.

Rex v. Scammonden, 3 Term R. 474; and see Baker v. Dewey, 1 Barn. & C. 704; Halliley v. Nicholson, 1 Price, 404; Russell v. Dunskey, 6 Moo. 233.

To explain an ambiguous award of a road under an enclosure act, evidence of contemporaneous acts of the occupiers of the land may be received.

Wadley v. Bayliss, 5 Taunt. 752; and see Bendyshe v. Pearce, 1 Bro. & B. 460.

On a warranty of prime singed bacon evidence is not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted, as prime singed bacon.

Yates v. Pym, 6 Taunt. 446.

After the handwriting of an attesting witness to a bond had been proved, Heath, J., admitted evidence of a declaration by deceased, when dying, that he had been concerned in forging the bond.

Aveson v. Kinnaird, 6 East, 195.

Where a promissory note purports to be payable on demand, parol evidence is not admissible to show that, at the time of making it, it was agreed that it should not be payable till after the decease of the maker.

Woodbridge v. Spooner, 3 Barn. & A. 233; and see Free v. Hawkins, 8 Taunt. 92; 1 Moo. 535; Hale v. Small, 8 Taunt. 730; 3 Moo. 58; Hogg v. Snaith, 1 Taunt. 347; Moseley v. Hanford, 10 Barn. & C. 729.

Parol evidence of a broker may be admitted to show that a sale was to a third person, for whom the buyer was agent, although the bought note and invoice were in the name of the buyer.

Wilson v. Hart, 1 Moo. 45.

Where an agreement on unstamped paper has been lost or destroyed, no parol evidence can be given of its contents.

Rippiner v. Wright, 3 Barn. & A. 478; Rex v. Castle Morton, 3 Barn. & A. 588.

[So, it is incompetent to a party to aver other considerations than those expressed in a deed. ¶ Thus, where the question was, whether the settlement had been gained by the purchase of an estate within the statute 9 G. 1, c. 7, § 5, parol evidence was admitted to show, that the parties, after having agreed upon twenty-eight pounds as the purchase-money, (which was the consideration expressed in the deed of conveyance,) made a subsequent unwritten agreement before the execution of the deed, that the consideration should be thirty pounds, and that the latter sum was actually paid. And when fraud is imputed, the party, who complains of the fraud, may prove any consideration, however contrary to the averment in the deed, to show the fraudulent nature of the transaction. ¶ As, where the considerations mentioned in the deed were 10,000*l.* and *natural love and affection*, the Lords Commissioners of the Great Seal directed an issue to try, whether natural love and affection formed any part of the consideration, the estates which were conveyed by the deed being worth 30,000*l.* On an appeal this was confirmed; and the jury, on the trial of this issue, finding that *natural love and affection* constituted no part of the consideration, the deed was afterwards set aside by the lord chancellor.

Rex v. Inhabitants of Scammonden, 3 T. R. 474, cited *per Cur.* in 6 Ves. 337, n.;

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*Filmer v. Gott*, 7 Br. P. C. 70; *β Willes*, 677; 5 Ves. Jr. 700. *g* But in *Clarkson v. Hanway*, 2 P. Wms. 203, it was holden, that the grantee could not give parol evidence to prove blood and kindred to have been the consideration of a conveyance, the consideration expressed in the deed being an annuity to be paid to the grantor. And in *Peacock v. Monk*, 1 Ves. 128, Lord Hardwicke said, "Where any consideration is mentioned, as of love and affection only, if it is not said also, *and for other considerations*, you cannot enter into proof of any other; the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. It is otherwise, where there is no consideration at all in the deed." *β Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Howes v. Barker*, 3 Johns. 509, 510; *acc. g* *β* See also 2 Sch. & Lefr. 501. But in some particular cases within the statute of frauds, the consideration must be stated in the written memorandum, and if it is not, the defect cannot be supplied by parol evidence. *Wain v. Wartlers*, 5 East, 10. See as to this case, *Stadt v. Lill*, 9 East, 348. *Ex parte Minet*, 14 Ves. 190. *Ex parte Gardom*, 15 Ves. 287; *Bateman v. Phillips*, 15 East, 272; *Egerton v. Mathews*, 6 East, 307. *β*

*β* So, where the question was, whether a person had gained a settlement under 9 G. 1, c. 7, § 5, evidence was admitted to show, that less than thirty pounds was the consideration, though the deed of conveyance expressed a larger sum; for that act says, that no person shall gain a settlement by virtue of any purchase, unless the consideration for such purchase shall amount to the sum of thirty pounds *bond fide paid*.

*R. v. Mettinglen*, 2 T. R. 212; *R. v. Olney*, 1 M. & S. 387.

So, for the purpose of setting aside a will on the ground of fraud, parol evidence may be given of what passed at the time of the testator's signing, and what he said; as, when it was proved, that the testator at the time of the execution, asked, whether the contents of the will were the same with those of a former will, to which he was answered in the affirmative, when in fact they were different.

*Small v. Allen*, 8 T. R. 147. *β*

[So, parol evidence may be admitted to show that at the time of making a will, the devisor gave instructions to insert the name of A in it, when the attorney inserted that of B by mistake. But parol evidence of declarations made by the testator before the making of the will cannot be received to contradict it.

*Thomas v. Thomas*, 6 T. R. 671; *Beaumont v. Fell*, 2 P. Wms. 141; *β Reeves v. Reeves*, Dev. Eq. R. 386. *g*

An entry in the steward's book, and parol proof by the foreman of a jury, was admitted as good evidence, to show that a feme covert surrendered her whole estate, although the surrender upon the roll, and the admission thereon, was but of a moiety.

*Hill v. Wigget*, 2 Vern. 547. So *Towers v. Moor*, *Ibid.* 98.]

*β* So, if a bishop's register were to be produced in evidence for the purpose of showing a presentation by a patron, under whom the plaintiff claims, and a blank should appear in the place where the patron's name is usually inserted, the presentation might be proved in some other way.

*Bp. of Meath v. Ld. Belmore*, 1 Wils. 215.

Also, to oust an implication, and rebut an equity, parol evidence has been admitted to explain the intention of the testator; as, where a man devises particular legacies to his executors, and makes no disposition of the surplus of his estate; in this case, according to the notions of the courts of equity, the executors shall be only trustees for the next of kin; but to rebut this equity, which arises by implication only, the executors have been allowed to prove by parol evidence, that the testator designed them the surplus.

To this purpose are the cases in Vern. 473. *Foster and Munt*, Chan. Ca. 19 b;

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Crompton and North, 2 Vern. 99; Pring and Pring, 2 Vern. 648; Lady Granville and Duchess of Beaufort, 2 Vern. 736. [Batchelor and Searl, Eq. Ca. Abr. 246, S. C.; Gilb. Eq. Rep. S. C.; Duke of Rutland v. Duchess of Rutland, 2 P. Wms. 210; Petit v. Smith, 1 P. Wms. 7; Brassbridge v. Woodroffe, 2 Atk. 68; Lake v. Lake, 1 Wils. 313; Ambl. 126, S. C. But in Blinkhorne v. Feast, 2 Ves. 28, Oct. 1750, Lord Hardwicke expresses himself to be very tender in admitting parol evidence in cases of this kind; and it should be restricted to what passed at the time of making the will. Nourse v. Finch, 1 Ves. jun. 358. And Lake v. Lake, Nov. 1751, is the last case (in print) which has been decided since that time on parol evidence.] {See also 6 Ves. J. 398. But now it is settled that parol evidence may be given of what passed previous or subsequent to the will, as well as at the time of executing it: the latter is indeed of greater weight; but the whole is admissible. 2 Ves. J. 465, 644, Clennel v. Lewthwaite; 4 Ves. J. 730; 6 Ves. J. 324, Pole v. Lord Somers; 7 Ves. J. 508, 518, Trimmer v. Bayne; 10 Ves. J. 77, Williams v. Jones.}

So, where the Earl of Gainsborough made his will, and thereby devised several legacies, and charged his real estate with the payment of them and his debts, and devised his estate, so charged, to the defendant, his nephew, and made the plaintiff, his wife, executrix; and the bill was brought to have the personal estate discharged from the debts and legacies, suggesting that the creditors threatened to come upon and exhaust the personal estate; and that it was the intent of the testator that she should have the personal estate clear to herself, and that the directions for making the will were so; but that, either by the mistake or contrivance of the person who drew the will, it was not so expressed; and on demurrer, because no such averment could be admitted against a will in writing, the demurrer was overruled; and it was held by Rawlinson and Hutchins, that though such an averment could not be admitted where it was to make the party a title, yet, where it was only to rebut an equity, as in this case, it might.

Countess and Earl of Gainsborough, 2 Vern. 252; Abr. Eq. 230, S. C. and affirmed in the House of Lords.

So, where one not of kin, but a stranger, was made executor, and had considerable legacies given him, although it was decreed by Sir Peter King, in the mayor's court, in favour of the testator's brothers, that the surplus should be distributed; yet, upon appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, it was decreed accordingly.

Abr. Eq. 245; Littlebury and Buckley, affirmed in the House of Lords.

[And as parol evidence is admissible in favour of the executor to show no resulting trust for the next of kin, so it hath also been admitted in favour of the next of kin, to take off the effect of the parol evidence adduced by the executor. And it seems from some cases (a) that it may be read by the next of kin originally and in the first instance.

Bishop of Cloyne v. Young, 2 Ves. 95; Coote v. Bond, 2 Br. Ch. Rep. 526. (a) Fane v. Fane, 1 Vern. 30; Rackfield v. Careless, 2 P. Wms. 158.

Where a testator gave legacies of the same amount in two different instruments, parol evidence was admitted to show that he intended them to be accumulative.

Coote v. Boyd, 2 Br. Ch. Rep. 522. β See Osbourne v. The Duke of Leeds, 5 Ves. 369.γ

Where a fine is levied, if no uses are declared, the resulting uses shall be to the consor, but parol evidence is admissible to rebut the presumption of such resulting uses.

Roe v. Popham, Dougl. 24.]



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But, notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain, that too much caution cannot well be used in this particular, especially when it is considered that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence, and uncertainty, binds the courts of equity as well as the common law courts; as also that little regard ought in many cases to be had to the expressions of the testator, either before or after the making of his will, because, possibly, these expressions might be used by him, on purpose to control or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements which cannot after his death be found out.

Vide 2 Vern. 98, 337, 625, and Salk. 234; 2 Ld. Raym. 831, where, in the case of Cole and Rawlinson, it is laid down by my Lord Chief Justice Holt, that the testator's intent must be collected from the words of the will, and not from his circumstances, or any matters *dehors*, and that to travel into the affairs of the testator, would render property precarious, and introduce uncertainty and confusion in the law itself. *β* Mann v. Ex'rs. of Mann, 1 Johns. Ch. R. 231; Richmalter's Adm'x. v. Myers, 4 Desaus. 215. *g*

Hence, in a late case in the House of Lords, where the testator devised several legacies, and amongst the rest gave considerable legacies to his two executors, to whom also he devised the surplus of his estate; and there being a debt of 3000*l.* due by bond to the testator from one of the executors, he insisted, that, there being sufficient assets to satisfy all the legacies, this 3000*l.* should not be brought into the surplus of the testator's estate, but that the same was extinguished for his benefit, by his being made co-executor; and that though the surplus of the estate was devised to them both, yet that this debt could not be taken to be part of that surplus, being before extinguished; and, by the evidence of the person who drew the will, fully proved, that this was the testator's intention; which evidence, it was urged, ought to be admitted, being only to rebut an equity, and oust an implication of law arising from the notions of the courts of equity, which revives the debt in these cases, and gives equal benefit to both the executors; but the lords refused going into this parol evidence, and decreed that the 3000*l.* should be taken as part of the surplus of the testator's personal estate, which both the executors were equally entitled unto. For though in some books the testator's making a debtor executor is said to be an extinguishment of the debt, because an executor cannot sue himself; yet it was never doubted, but that such a debt remained assets to satisfy other creditors. Also, it has been (a) resolved to be assets to satisfy legacies. And this devise of the surplus and residue of the testator's estate being as much a legacy, and as well recoverable in the spiritual court as any particular legacy, it was but fitting, that since the courts of equity claim now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature, that there should be the same measure of justice in both these courts.

Selwin and Brown, 21st March, 1734, *in domo procerum*. Note: This cause was first heard before his honour the master of the rolls, who admitted the parol evidence, and on the strength thereof decreed, that the 3000*l.* should not be taken as part of the surplus of the testator's personal estate; but that it was extinguished for the benefit of the obligee, and accordingly ordered the bond to be cancelled; but this decree was reversed by my lord chancellor, though he admitted the parol proof to be read, as not thinking the testimony of a single witness, according to the circumstances of this case, sufficient to control what appeared on the face of the will. Ca. temp. Talb. 240, S. C.; 4 Br. P. C. 179, S. C. (a) For this vide Yelv. 160; Plow. 186 a; Co. Litt. 264; 8 Co. 136 a; Cro. Eliz. 373; Hob. 10; Leon. 320.

{Parol evidence may be given of questions asked by the testator, at the

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time of executing his will, whether the contents were the same as those of a former will, to which he was answered in the affirmative; in order to set aside the latter will on the ground of fraud.

8 Term, 147; Doe v. Allen. See 2 Bin. 423, Havard v. Davis.}

A testatrix bequeathed her real and personal estate to E T and J U equally between them for life; and upon the death of E T she gave the whole estate to J U in tail general, and for want of such issue to R U in fee, with a few pecuniary legacies; and charged the real estate with the payment of these legacies, if her personal estate should not be sufficient; and by her will declared, she gave all the rest and residue of her personal estate to her uncle L C's three daughters; and particularly gave to Mrs. S L 10*l.* and made her executrix. For the residuary legatees it was insisted, that *rest* and *residue* of her personal estate must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there is a fee devised, and, consequently, the testatrix has disposed of the whole: that parol evidence of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of L C, might be admitted in this case; that (to be sure) things which are quite contrary to the will shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be a mere blunder of the drawer: that this doth not entrench upon any of the rules with regard to parol evidence, but only clears up who was intended to have the personal estate, where the whole is devised to two different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate. Lord Hardwicke—As to the question, whether I ought to admit parol evidence to explain the intention of the testator, I am of opinion, that this is not a case in which parol evidence can be read, and that it would be of dangerous consequence. It is true, there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only: for I do not know that, upon the construction of a will, courts of law or equity admit parol evidence, except in two cases: first, to ascertain the person, where there are two of the same name, or there has been a mistake in a Christian or surname, and this upon absolute necessity; where, if such evidence were not let in, it would make the will void. The other case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor with a small legacy, and the next of kin claim the residue; in order to rebut the resulting trust for the next of kin, parol proof has been admitted to ascertain the person who was to have the residue. It is very true, cases may be cited, where Lord Cowper has admitted such evidence; for he went upon this ground, that it was by way of assisting his judgment in cases extremely dark and doubtful. I have the greatest deference for his judgment, but must own, I was never satisfied with this rule of Lord Cowper's of admitting parol evidence in doubtful wills. Besides, he went further in the great case of Strode and Russel, in which there was an appeal to the House of Lords. Mr. Justice Tracy, who assisted Lord Cowper in that case, was at first of the same opinion with him; but, on considering it more, he disavowed his former opinion, and was clear that it could not be admitted, and this alteration in his judgment was mentioned in the House of Lords. In the case of Selwin and Brown, I was of opinion that it ought to have been admitted; and even Lord Talbot, when he had heard the cause, had a remorse of judgment at the same time that

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he rejected the parol evidence: but the House of Lords refused it as of most mischievous consequence, and affirmed his decree.

Ulrich v. Litchfield, 2 Atk. 372; Dowset v. Sweet, Ambl. 175; Bradwin v. Harpur, Ibid. 374; *β* Beaumont v. Fell, 2 P. Wms. 141; Powell v. Biddle, 2 Dall. 70; *δ* 2 Vern. 621.

Upon *plene administravit* pleaded, the question was, whether 1000*l.* received by the defendant was due to her in her own right, or as executrix to her husband, and, consequently, assets. It arose upon the following devise:—"I give to my loving brother, John Stoneham, 1000*l.*, and in case of his death, to his wife Susanna," who was the defendant. It appeared that John Stoneham survived the testator: the plaintiff therefore insisted, that this legacy, which the defendant admitted that she had received, vested absolutely in him, and was assets in her hands. On the part of the defendant, it was offered to give in evidence, that the testator *in extremis* declared, he meant to give his brother only the interest of the 1000*l.*, and that the defendant should have the principal in case she survived him. The parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And Lee, chief justice, said, it could not be allowed, and tha. in the case of Selwin and Brown, the House of Lords had refused it, even where it was to support the legal interpretation of the will; and Lord Hardwicke about two years ago held it in the same manner in the case of the Earl of Inchiquin and O'Brien.

Lowfield v. Stoneham, 2 Str. 1261.

Although parol evidence may be received to explain, yet it can never be admitted to annul or substantially to vary a written instrument. An action on the case was brought for the use and occupation of a house, of which, it was agreed in writing, that a lease should be let by Christiana Preston to Abraham Gamage for twenty-one years, at 26*l.* per ann., to commence from Michaelmas then next. Gamage died and made Merceau his executor, who paid 26*l.* into court for one year's rent. On the trial, the plaintiff offered to show by parol evidence, that besides the 26*l.* per ann. the defendant had agreed to pay 2*l.* 12*s.* 6*d.* a year, being the ground-rent of the premises to the ground landlord; but no evidence was offered of the actual payment of such ground-rent during the testator's life; without which De Grey, chief justice, thought such parol evidence inadmissible, and nonsuited the plaintiff. On a motion to set aside this nonsuit, it was alleged, that this was evidence not to alter or vary, but to explain the agreement; that this was not a solemn deed or will, but a mere executory act; and had a bill in Chancery been brought to carry it into execution, parol evidence would have been admitted to prove the agreement to pay the ground-rent. For in Joynes v. Statham, 3 Atk. 388, parol evidence was admitted to show, that the agreement for a lease at 9*l.* a year was to be *clear of taxes*. But by Blackstone, J., I am clearly of opinion that the lord chief justice did right in rejecting this evidence. Courts should be very cautious in admitting any evidence to supply or explain written agreements; else the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement, for that is in fact to vary it. Here is a positive agreement that the tenant shall pay 26*l.* Shall we admit proof that this means 28*l.* 12*s.* 6*d.*? What is it to the tenant to whom the rent is to be paid, so as he is obliged to pay more than his contract expresses? We can neither alter

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the rent nor the term, the two things expressed in this agreement. With respect to collateral matters, it might be otherwise. (a) He might show who is to put the house in repair, or the like, concerning which nothing is said; but he cannot by parol evidence shorten the term to fourteen years, or extend it to twenty-five years, or make the rent other than 26*l.* per ann. The case in *Atkins* is of a mere executory act, in which the master was to settle the proper covenants, and therefore had a right to inquire who was to pay the taxes. Besides, there were strong suggestions of fraud in making the written agreement, as one party could neither read nor write.

*Meres v. Ansell*, 3 Wils. 275; *Preston v. Merceau*, 2 Bl. Rep. 1249. {3 Dall. 415, 424, *Clarke v. Russel*; 1 Cain. 358; 2 Cain. 163; 3 Johns. Rep. 68; 1 Mass. T. Rep. 69, 93; 2 Day. 137; 1 Dall. 133; 2 Cran. 29; 1 Bay. 307. And the rule applies as well where the contract is introduced in a controversy between third persons, as where the litigation is between the parties to it. 1 Johns. Rep. 573. Parol evidence may be given of a fact collateral to the written instrument in order to explain the intention of the parties, the instrument being in some measure equivocal. 8 Term, 379, *The King v. Inhabitants of Laindon*; 3 Johns. Rep. 319, *McKinstry v. Pearsall*; 2 Dall. 196, *Pleasants v. Pemberton*.} || (a) *Qu.* and vide *Meres v. Ansell*, *ubi sup.*; *Rich v. Jackson*, 4 Br. Ch. Rep. 515; *Powell v. Edmunds*, 12 East, 6. But parol evidence has been admitted to ascertain a fact collateral to the written instrument, in order to explain the intention of the parties. *R. v. Laindon*, 8 T. R. 379. See *Hope v. Atkins*, 1 Price, 143. || § See *Brooks v. White*, 2 Metc. 283. §

In a debt upon a bond payable at a certain day, the defendant pleaded, that by agreement between the defendant and the plaintiff's testator, the bond only stood as an indemnity. To this plea the plaintiff demurred, and the question was, whether the agreement pleaded could be given in evidence, contrary to the express tenor of the bond, purporting to be absolute, for payment on the day. The plaintiff contended, that the office of parol evidence extended no farther than to explain a deed consistently with its general purport, and by no means to change the nature of the special obligation; and that even on a will, the uncertainty to be removed by evidence must arise from something extrinsic to the instrument. The court agreed the plea to be bad, and the objection decisive against admitting collateral evidence to change the nature of the deed.

*Mease v. Mease*, Cowp. 47. § Where a note absolute on its face was given, it may be proved by parol evidence that it was not to be paid on the happening of a certain contingency. *Dale v. Pope*, 4 Litt. 167. § {See 2 Dall. 171, *Field v. Biddle*; *Ibid.* 173, *Merrick v. Owen*; 1 Bin. 610, *Wallace v. Baker*.}

In no case can parol evidence of a parol communication between the parties be received, to add a term not inserted in the specific agreement which they have executed; for what has passed between them may have been altered and shifted in a variety of ways, but what they have signed and sealed was fully settled. And my Lord Thurlow laid it down as a rule of law, which it was impossible to break in upon, that nothing could be added to the written agreement, unless in cases where there is a clear, subsequent, independent agreement varying the former, not where it is of matter passing at the same time with the written agreement.

*Haynes v. Hare*, 1 H. Bl. 664; *Lord Portmore v. Morris*, 2 Br. Ch. Rep. 249; *Rich v. Jackson*, 4 Br. Ch. Rep. 519; 6 Ves. 334, (n.) S. C. {Parol evidence may be given of an agreement to enlarge the time for performance of a previous written contract. 1 Johns. Ca. 22; 3 Johns. Rep. 528. But when an agreement is reduced to writing, all previous agreements are resolved into that: 2 Cain. 161; 1 Johns. Rep. 140, 418, 461; 2 Johns. Rep. 560; 3 Johns. Rep. 509; *Addis*. 361, 373, unless they are collateral to it, relating to a distinct subject. 4 East, 29; 2 Cain. Er. 102.}

An agreement in writing between a landlord and a person who was then

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his tenant under a lease which had some time to run, was signed by the landlord for a new lease to be granted at any time after the completion of repairs which were to be made by the tenant with all convenient speed; but blanks were left for the time of the commencement of such new lease. Upon the completion of the repairs the landlord tendered a lease to commence from that time; and upon the tenant's refusal to accept it, filed a bill for a specific performance. The tenant admitted, by his answer, that he accepted the agreement, but insisted, that the new lease was not to commence before the old one was expired. The landlord offered evidence to show, that it was the true meaning of the agreement that the new lease should commence from the completion of the repairs; but the master of the rolls rejected it.

*Pym v. Blackburn*, 3 Ves. 34.

The verbal declarations of an auctioneer cannot be admitted to contradict the printed conditions.

*Gunnis v. Erhart*, 1 H. Bl. 289.] || *Jenkinson v. Pepyns*, cited 6 Ves. 330; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & Beam. 524; *Powell v. Edmunds*, 12 East, 6.]

{Cotemporary and continuing usage may be given in evidence to explain doubtful words in old instruments.

4 East, 333, 336, *The King v. Asbourne*; 7 East, 195, *Weld v. Hornby*; *Ibid*. 200, *Stammers v. Dixon*; 10 Ves. J. 346. See 2 Johns. Rep. 357, *Cortelyou v. Van Brundt*.

A deed may be shown to have been in fact delivered at a day subsequent to that on which it bears date.

3 Lev. 348, *Stone v. Bale*; 1 East, 540, *Schuman v. Weatherhead*; 4 East, 477, *Hall v. Cazenove*. And that may be proved by the subscribing witness. 2 Dall. 214, *Fox's Lessee v. Palmer*.}

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[A PRESUMPTION, as defined by the *civilians*, is *conjectura ex certo signo proveniens quæ alio adducto pro veritate habetur*. β *Poth. Tr. des Oblig. part. 4, c. 3, s. 2*; *Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 4, s. 3.*§ For when the fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances that necessarily or usually attend such a fact. And these are called presumptions, and not proofs,(a) for they stand instead of the proofs of the fact till the contrary be proved.(b)

*Gillb. L. E. 303.*] (a) || So *Mascardus, Probatio per præsumptiones et conjecturas dici non potest vera et propria probatio*. (b) Presumptive proof is sufficient for this purpose; presumptions may be repelled by contrary presumptions. 1 Marshall, 68. || β The nature of a case and its circumstances may raise such a natural presumption of a fact, that it may be submitted to the jury without positive proof. *Snevely v. Jones*, 9 Watts, 433. §

My Lord Coke distinguishes presumptive proof, by which he says juries are often induced into, 1, Violent presumption, which amounts to *plena probatio*; as, if one be stabbed in a house, and a man be seen running out of it with a knife bloody, and none else in the house. 2, *Præsumptio probabilis*, which moves a little. 3, *Præsumptio levis*, which moves not at all.

Co. Litt. 6. β Presumptions are more properly divided into legal or artificial, and natural.—1. Legal or artificial presumptions are such as derive from the law a technical or artificial operation and effect, beyond their mere natural tendency to produce belief, and operate uniformly, without applying the process of reasoning on which they are founded to the circumstances of the particular case. For instance, at the expiration of twenty years, without payment of interest on a bond, or other acknowledgment of its existence, satisfaction is to be presumed; but if a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time, does not

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arise; this is evidently an artificial and arbitrary distinction. 4 Greenl. 270; 10 Johns. R. 338; 9 Cowen, R. 653; 2 McCord, R. 439; 4 Burr. 1963; Lofft, 320; 1 T. R. 271; 6 East, R. 215; 1 Camp. R. 29.—Legal presumptions are of two kinds: first, such as are made by the law itself, or presumptions of *mere law*; secondly, such as are to be made by a jury, or presumptions of *law and fact*. 1. Presumptions of *mere law* are either absolute and conclusive, as, for instance, the presumption of law that a bond or other specialty was executed upon a good consideration, cannot be rebutted by evidence, so long as the instrument is not impeached for fraud; 4 Burr. 2225; or they are not absolute, and may be rebutted by evidence; for example, the law presumes that a bill of exchange was accepted on a good consideration, but that presumption may be rebutted by proof to the contrary. 2. Presumptions of *law and fact* are such artificial presumptions as are recognised and warranted by the law as the proper inferences to be made by juries under particular circumstances; for instance, an unqualified refusal to deliver up the goods on demand made by the owner, does not fall within any definition of a conversion, but inasmuch as the detention is attended with all the evils of a conversion to the owner, the law makes it, in its effects and consequences, equivalent to a conversion, by directing or advising the jury to infer a conversion from the facts of demand and refusal.—2. *Natural* presumptions depend upon their own form and efficacy in generating belief or conviction on the mind, as derived from those connections which are pointed out by experience; they are wholly independent of any artificial connections and relations, and differ from mere presumptions of law in this essential respect, that those depend, or rather are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, from the course of nature and the ordinary habits of society. Bouv. Law Dict. tit. *Presumption*.

[If a man gives a receipt for the last rent, the former is presumed to be paid, because he is supposed first to receive and take in the debts of the longest standing; especially, if the receipt be in full of all demands, then it is plain there were no debts standing out. And if this be under hand and seal, the presumption is so violent, that the law admits of no proof to the contrary.]

Gilb. Ev. 142; Co. Litt. 373 (a).]

Where a lease is proved, and it is also shown, that the claimant hath received rent within twenty years, this infers a seisin in fee, and throws it upon the adverse party to show that the lease is subsisting. And Eyre, Baron, held, that where rent is received without any proof of a lease, this also *primâ facie* is evidence for the plaintiff, and obliges the defendant to show, that it is either a quit-rent or that the term is unexpired.

*Per Cur.* in Harpur v. Brock; *Seac.* Tr. 14 G. 3; 3 Wooddes. 333.

Possession, and rent received, for twenty years, were holden to be admissible evidence of a fee, to be left to a jury; though the title, so far as it was developed, appeared to be a long term of years; for it might be a term attendant on the inheritance, and the lease one of the muniments of the estate.

Denn. v. Barnard, Cowp. 595. {See 5 Ves. J. 565, Archerly v. Roe.}

[An original lease for a long term being produced and proof given of possession for seventy years, it will be left to the jury to presume the mesne assignments.]

2 W. Black. 1228, Earl v. Baxter.

An uninterrupted enjoyment of a way, or of any other incorporeal hereditament, for twenty years, where the origin of it does not appear, affords a presumption of a grant to the party enjoying it. And the extent of the right must be measured by the manner in which it has been actually enjoyed.

3 East, 294, Campbell v. Wilson; Ibid. 544, *per* Lawrence J. in Curwen v. Salkeld; 6 East, 214, Bealy v. Shaw; 3 Cain. 316, S. C. cited and approved; 7 East, 195, Weld v. Hornby. The length of time, from which the presumption of a grant is drawn

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in these cases and those referred to below, does not conclusively establish the right claimed, but is only matter of evidence, which must be left to the consideration of a jury to be credited or not, and to draw their inference one way or the other, according to the circumstances. The only case in which it appears to have been considered as conclusive with regard to the right is *Holcroft v. Heel*, as reported in 1 Bos. & Pul. 400; but that case, as explained in *Campbell v. Wilson*, 3 East, 298, 301, is consistent with the principle above stated, and so far only assented to by the Court of King's Bench. See 2 Saun. 175, note (2) by Serj. Williams.

And even a grant or charter from the crown, though it can only be by *matter of record*, may be presumed in favour of rights of which parties have long been in the quiet and peaceable possession; notwithstanding the maxim *nullum tempus occurrit regi*.

12 Rep. 4, *Crimes v. Smith*; *Ibid.* 5, *Bedle v. Beard*; Cowp. 102, *Mayor of Kingston upon Hull v. Horner*; *Ibid.* 214; *Eldridge v. Knott*; 3 Term, 159. The principle of these cases has been recognised in several of the United States. In Virginia a grant of land from the commonwealth has been presumed from a quiet and uninterrupted possession for upwards of sixty years, together with the payment of quit-rents before, and taxes after, the revolution; 2 Hen. & Mun. 370, *Archer v. Saddler*, and in North and South Carolina, from a long possession with some corroborating circumstances. *Taylor*, 157, *Denn v. Tucker*; 1 Bay. 26, *Lessee of Alston v. Saunders*.

Where trustees are directed to convey to a devisee on his attaining the age of twenty-one, the jury may be directed to presume a conveyance {<sup>1</sup>} from the trustees to him in much less time than twenty years. It was what they were bound to do, and what they would have been compelled by a court of equity to do, if they refused. But it is to be presumed that they did their duty. On the same principle—that what ought to have been done shall be presumed to have been done—a reconveyance of the legal {<sup>2</sup>} estate may be presumed after a length of time, and when the purpose for which it was conveyed has been answered. But a reconveyance will not be presumed, where {<sup>3</sup>} it would have been a breach of duty in the trustees to have made it.

{<sup>1</sup>} 4 Term, 682, *England v. Slade*; in which the presumption was drawn in four years after the devisee was twenty-one. 1 Cain. 84, *Vandyck v. Van Beuren* and *Vosburgh*. {<sup>2</sup>} 12 Ves. J. 239, *Hillary v. Waller*. {<sup>3</sup>} 8 East, 248, *Keene v. Deardon*.

After a lessee has quitted the premises demised, and does not appear to have subsequently paid any rent, and after a possession for fourteen years by persons to whom the landlord (who had a right of re-entry for non-payment) then sold them, a regular demand and re-entry will be presumed.

2 Cain. 382, *Jackson v. Demarest*. But nine years is insufficient. 3 Johns. Rep. 226, *Jackson v. Walsh*. When the heirs of an intestate acquiesced for twenty years in the possession (by a purchaser) of the real estate of their ancestor, under a sale made by the administrator, it was presumed that the administrator took the oath and posted the notifications required by law previous to the sale; evidence being given of the order authorizing him to sell and of the actual sale. 3 Mass. T. Rep. 399, *Gray v. Gardner*. See farther 1 Cain. Er. 18, *Bergen v. Bennett*; 7 East, 45, *The King v. Inh. of Long Buckley*.—As to presuming that common recoveries were regularly suffered, vide ante, p. 613.}

In case of a feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for any (a) length of time will make a strong or violent presumption, which stands for proof. And here the rule is, that *ex diuturnitate temporis omnia præsumuntur solemniter esse acta*.

Co. Litt. 6; 1 Ro. Rep. 132. (a) Where from their antiquity things receive a credit. Mod. 117; Lev. 25; and vide Palm. 427.

|| Possession is *prima facie* evidence of property; *id enim est cujusque propriam quo quisque, fruatur atque utitur*. Possession of land for twenty years (a)

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is evidence of a fee; if evidence of a fee, it must be evidence of all that is necessary to support and perfect the title to an estate in fee. Long enjoyment (b) then under a title, which could only be by record, is strong evidence from which a jury may presume the record to have existed, whether it be a grant from the crown within time of legal memory, or even (c) an act of parliament. But presumption must have grounds on which to stand; (d) and to warrant a presumption from length of time, the possession must have been adverse, and under the eye or with the knowledge (e) of those who were immediately interested in resisting it, and capable of granting the right to it. For though the inference is drawn for the purpose and from a principle of quieting the possession, (g) not from a belief or supposition that the instrument inferred actually existed; yet there must be something from which the inference is to arise; there must be a potential existence on which to raise the presumption of an actual existence.

Cic. Ep. (a) *Denn v. Barnard*, Cowp. 595. Where a lease is proved, and it is also shown, that the claimant hath received rent within twenty years, this infers a seisin in fee, and throws it upon the opposite party to show that the lease is subsisting. And Eyre, B., held, that where rent is received without any proof of a lease, this also is *prima facie* evidence for the plaintiff, and obliges the defendant to show, that it is either a quit-rent, or that the term is unexpired. *Per curiam* in *Harpur v. Brock*, Scac. Tr. 14 G. 3; 3 Wooddes. 333. (b) *Mayor of Hull v. Horner*, *Ibid.* 102; *Crimes v. Smith*, 12 Co. 4; *Bedle v. Beard*, *Ibid.* 5; 3 T. R. 157, 158; 7 T. R. 492; *Roe v. Ireland*, 11 East, 280. (c) *Farcar's case*, cited in *Skinns*. 78. (d) *Goodtitle v. Duke of Chandos*, 2 Burr. 1072. (e) *Bradbury v. Grinsell*, 2 Saund. 175 d, in notes; *Daniel v. North*, 11 East, 372. (g) *Eldridge v. Knott*, Cowp. 314.

Length of time may be used as evidence against the demand in a writ of right as well as in any inferior action; and an undisturbed adverse possession for forty years is sufficient to rebut the presumptive evidence of a seisin in fee in the person under whom the demandant claims, or, at least, from which to presume a conveyance of the estate to the tenant.

*Jayne v. Price*, 1 Marshall, 68.

Length of time affords the same ground of presumption in the case of incorporeal, as of corporeal hereditaments: an uninterrupted enjoyment of an easement for twenty years or upwards is considered as evidence of a right of enjoyment; that is, as evidence from which a jury may presume a conveyance or agreement; as in an action on the case for obstructing light; (h) or in the case of a market regularly kept above twenty years; (i) or in the case of adverse enjoyment of a way for upwards of twenty years, without any thing to qualify or explain it. (k) So, a faculty from the ordinary may be presumed from long uninterrupted usage of a pew in a church, claimed as appurtenant to a messuage. (l)

(h) *Lewis v. Price*, 2 Saund. by Williams, 175 a; *Dougal v. Wilson*, *Id.* *ibid.*; *Darwin v. Upton*, *ibid.*, and 3 T. R. 159. (i) *Holcroft v. Heel*, 1 Bos. & Pull. 401, and 3 East, 301. (k) *Campbell v. Wilson*, 3 East, 294; *Keymer v. Summers*, Bull. N. P. 74; *Carr v. Heaton*, 3 Gwill. 1262. (l) *Rogers v. Brooks*, 1 T. R. 431 a; *Griffith v. Matthews*, 5 T. R. 296.

Adverse possession for a shorter period than twenty years, though it be not of itself, without other evidence to support the right, a sufficient ground on which to presume a grant, may yet be used as presumptive evidence of a license. Indeed, for the furtherance of justice, presumptions will be made in favour of a rightful possession, without regard to time. Where trustees ought to convey to the beneficial owner, it shall be presumed that they have conveyed accordingly; (m) or, where the beneficial occupation of an estate by



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the possessor (under an equitable title) induces a probability that there has been a conveyance of the legal estate to the person who is equitably entitled to it, a conveyance of the legal estate may be presumed.<sup>(n)</sup> But such a presumption cannot be raised on a supposed breach of trust, or on a doubtful equity.<sup>(o)</sup>

6 East, 215; 4 Burr. 1963; Doe v. Wilson, 11 East, 56. <sup>(m)</sup> Per Lord Kenyon, 7 T. R. 3, 49; 8 T. R. 122. <sup>(n)</sup> England v. Slade, 4 T. R. 682. <sup>(o)</sup> Keene v. Dear-  
don, 8 East, 248.

The existence of a grant being inferred from usage, it follows as a corollary, that the same usage must determine the extent of it. We know the right only as we collect it from the enjoyment, and therefore the enjoyment must be the measure of it. Hence if a right to water is presumed from an enjoyment of twenty years, it can only be to so much as has been appropriated during that period.<sup>(a)</sup> So, where a building having been used for twenty years as a malt-house, was afterwards converted into a dwelling-house, it was holden to be entitled only to the same degree of light in its new state, which it had in its former state,<sup>(b)</sup> so that the owner of the adjoining ground might lawfully erect a wall which prevented the admission of sufficient light for domestic purposes, if what was still admitted were enough for the making of malt.

<sup>(a)</sup> Bealey v. Shaw, 6 East, 208. <sup>(b)</sup> Martin v. Goble, 1 Campb. N. P. 320; Chandler v. Thompson, 3 Campb. N. P. 80.

The circumstance of twenty years having elapsed without any demand made, is of itself a presumption that a bond has been paid. And satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption; as, an account settled between the parties in the intermediate time, without any notice being taken of such a demand. || But the presumption from the lapse of twenty years may be repelled by proof of the obligor's recent admission of the debt; or of the payment of interest within that time, which is an acknowledgment that the principal sum was not then discharged.

Oswald v. Legh, 1 T. R. 270. Vide tit. *Obligations*, (P). <sup>β</sup> See O'Brien v. Coulter, 2 Blackf. 421; Tinsley v. Anderson, 3 Call, 329; Hunt v. Forman, 2 Dana, 471; Burwell's Exrs. v. Anderson's Admr. 3 Leigh, 348; Butler v. Tripplett, 1 Dana, 154; Winstansley v. Savage, 2 McCord's Ch. R. 15; Barnett v. Emerson, 6 Monr. 608; Arden v. Arden, 1 Johns. Ch. R. 313; Kane v. Bloodgood, 7 Johns. Ch. R. 90. <sup>γ</sup> {12 Ves. J. 266; 4 Cran. 417, Higginson v. Mein. So it is a presumption that a judgment has been satisfied. Curteis v. Fitzpatrick, cited Peake Ev. 17, note (g). But this presumption may be rebutted by any facts which destroy the reason of the rule. It cannot arise during a state of war, in which the plaintiff was an alien enemy; but twenty years must elapse exclusive of the period of his disability. 2 Cran. 180, Dunlop v. Ball. And between citizens, the confusion in the situation of the country produced by a revolutionary war is proper for the consideration of the jury. 1 Bay. 482, Exr. of Brewton v. Exr. of Cannon. It may be repelled also by showing the inability of the obligor to pay; or that he was a near relation; or has recently acknowledged that the debt was not paid, but added that it was forgiven; or that the party entitled to the money was absent; Cowp. 109; 12 Ves. J. 266; 6 Ves. J. 516, Reeves v. Brymer; 3 Cain. 48, Smedes v. Hooghtaling; or that a writ was taken out, but not served, because the party could not be found; Moyle v. Lord Roberts, cited 1 Term, 271; see Taylor, 155, Quince's Admr. v. Ross's Admr. In the case of a small demand, which the party might think not worth the trouble of collecting, the rule does not apply; and therefore it has been held that mere length of time short of the statute of limitations, unaccompanied by other circumstances, is not sufficient to found a presumption of a release of a quit-rent. Cowp. 214, Eldridge v. Knott; 10 Ves. J. 467, 468.}

Twenty years' possession by a mortgagee is a presumptive bar to a right of redemption; but its effect may be taken off by showing the receipt of

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interest, that accounts have been kept, that it has been treated as a mortgage in a deed or will, and the like.

Jenner v. Tracy, 3 P. Wms. 288. Vide tit. *Mortgage*, (E), 6; Reeks v. Postlethwaite, Coop. 161; Barrow v. Martin, Ibid. 189.

The fact of the birth of a child during a lawful marriage is *prima facie* evidence of its legitimacy. But, if there has been a divorce *a mensâ et thoro*, a child born afterwards (as a year after the sentence, &c.) is presumed to be illegitimate.

Parishes of St. George and St. Margaret, 1 Salk. 123. Vide tit. *Bastard*, (A).  $\beta$  See Commonwealth v. Striker, 1 Browne's R. App. xlvii.

In the case of a quit-rent claimed by the lord of the manor, proof by the tenant, that no demand had been made upon him for near forty years, was not admitted to be a sufficient ground for presuming a release or extinguishment; and such presumption, it was said, could not be raised within less than fifty years, which is the period fixed by the statutes of limitations. And by Aston, J., "a presumption from mere length of time, which is to support a right, is very different from a presumption to defeat a right. Here, the presumption is to defeat the right of the lord to a small payment within the fifty years limited by the statute, and therefore upon mere length of time, unaccompanied by other circumstances, such a limitation ought not to be altered, and another set up."

Eldridge v. Knott, Cowp. 214. ||

[If a person claiming a toll for passing over a highway, can show that the liberty of passing over the soil, and the taking of a toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls.

Lord Pelham v. Pickersgill, 1 T. R. 660.

If a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she is lost.

Green v. Brown, 2 Str. 1199; Newby v. Read, *Sittings after Mich.* 3 G. 3;  $\beta$  Browne v. Neilson, 1 Caines, 525; Gordon v. Browne, 2 Johns. 150.  $\gamma$

Persons once in being shall be intended still living, if the contrary is not proved.

Throgmorton v. Walton, 2 Ro. Rep. 461; Wilson v. Hodges, 2 East, 312;  $\beta$  Innis v. Campbell, 1 Rawle, 375; Wilson v. Hodges, 2 East, 312. But after an absence of seven years without being heard from, death will in general be presumed. Ibid., Newman v. Jenkins, 10 Pick. 515; Wambough v. Shank, 1 Penning. 229; Woods v. Woods's Adm'r., 2 Bay, 476; Spurr v. Trimble, 1 Marsh. Ky. R. 278; Hull v. Commonwealth, Hardin, 479. See M'Comb v. Waight, 5 Johns. Ch. 263; Crouch v. Eveleth, 15 Mass. 305; University of N. C. v. Johnston, 1 Hayw. 373; Loring v. Steineman, 1 Metc. 204; Northrop v. Wright, 24 Wend. 221.  $\gamma$

The fact of a tenant for life not having been seen or heard of for fourteen years, by a person residing near his estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life.

Doe v. Deakin, 4 Barn. & A. 433.

In a public navigable river twenty years' possession of the water at a given level, is not conclusive as to the right.

Vooght v. Winch, 2 Barn. & A. 662; and see Miles v. Rose, 5 Taunt. 705.

A deed whereby a party conveys one full moiety is *prima facie* evidence that the grantor is the owner of the other moiety.

Reed v. Williams, 5 Taunt. 257.

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A regular usage for twenty years unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom.

*Rex v. Joliffe*, 2 Barn. & C. 54; and see *Cross v. Lewis*, 2 Barn. & C. 686; 2 Bro. & B. 403, 667.

On an agreement to pay 100*l.* if the plaintiff would not send herrings for a twelvemonth to the London market, and particularly to the house of J S, and the plaintiff proved that he had sent no herrings during the twelvemonth to that house, it was held sufficient to entitle him to recover, the defendant not proving that the plaintiff had sent herrings to the London market.

*Calder v. Rutherford*, 3 Bro. & B. 302.

The law always presumes against the commission of crime; and, therefore, where a woman, twelve months after her first husband was last heard of, married again, the sessions were held right in presuming that the first husband was then dead, and it was for the other party to prove him alive. In this case the presumption of law that a party is living till a certain number of years after he was heard of, must yield to the higher presumption that he has not committed a crime.

*Rex v. Twynning*, 2 Barn. & A. 386; and see 3 East, 192; 10 East, 211; 2 Camp. 113.

*Prima facie* the presumption is, that the strip of land between the highway and the adjoining enclosure is, as well as the soil of the highway *ad medium filum viæ*, the property of the owner of the enclosure, whether freeholder, leaseholder, or copyholder. But this presumption may be rebutted by evidence showing the right to be in the lord of the manor or other person; and if the strip of land communicates with open commons, the evidence of ownership applying to the larger portions applies to this.

*Steel v. Prickett*, 2 Stark. Ca. 463; *Grose v. West*, 7 Taunt. 39; and see *Doe v. Pearsey*, 7 Barn. & C. 304.

After a lapse of thirty years from the date, and after full service by the apprentice, the court will presume that lost indentures of apprenticeship were duly stamped, and this notwithstanding it is proved by an officer from the stamp office that, on due search, it did not appear that such an indenture had been stamped or enrolled.

*Rex v. Long Buckby*, 7 East, 45.

But the court will not, even after a long and undisturbed enjoyment, presume a bargain and sale, and enrolment thereof in Chancery.

*Doe v. Waterton*, 3 Barn. & A. 149.

Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment against the then owner of the land, and defendant's family had been in possession ever since, it was held (nothing appearing as to whether the debt was satisfied or not) that the original possession being accounted for, the length of possession was only *prima facie* evidence of a subsequent conveyance to defendant's family, and that the jury ought not to presume such conveyance unless they were satisfied that one was executed.

*Doe dem. Fenwick v. Reed*, 5 Barn. & A. 232.

||But, where no account can be given of them, this presumption of the duration of life ceases at the expiration of seven years from the time they were last known to be living; a period which has been fixed by analogy to the statute of bigamy, 1 Ja. 1, c. 10, and also to the statute next following.

*Doe v. Jesson*, 6 East, 80, 85; *Hopewell v. De Pinna*, 2 Campb. N. P. 113.

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By 19 C. 2, c. 6, reciting, "that divers lords of manors and others have used to grant estates by copy of court roll for one, two, or more life or lives, according to the custom of their several manors; and have also granted estates by lease for one or more life or lives; or else for years determinable on one or more life or lives; and it hath often happened, that such person or persons for whose life or lives such estates have been granted, have gone beyond the seas, or so absented themselves for many years, that the lessors and reversioners cannot find out whether such person or persons be alive or dead, by reason whereof such lessors and reversioners have been held out of possession of their tenements for many years, after all the lives on which such estates depended are dead, in regard that the lessors and reversioners, when they have brought actions for the recovery of their tenements, have been put upon it to prove the death of their tenants, when it is almost impossible for them to discover the same: For remedy of which mischief so frequently happening to such lessors or reversioners, it is enacted, That if such person or persons, for whose life or lives such estates have been or shall be granted as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the life or lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners; in every such case the person or persons upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead."

[In ejectment the case was as follows: John Gifford was seised in fee of the lands in question, and made a lease in reversion to Lewis Davells for 99 years, to commence after the deaths, or other sooner determination of the estates of John Davells, the father, and John Davells, the son, who had then a lease in possession for 99 years, if they or either of them so long lived. The plaintiff positively proved the death of John Davells, the son; but as to the father, the proof was, that he had been reputed dead, and nobody had heard of him for 15 years last past. Upon an objection, that this last proof was insufficient, it was holden clearly by Holt, C. J., upon the perusal of the above statute, that this case was within it, because Lewis Davells, the lessor of the plaintiff, had a term in reversion of the lands, and so was a reversioner within the very letter of the statute; and he held, that a remainderman was within the equity of that law. *Holman v. Exton*, Carth. 246.]

[By the 6 Ann. c. 18, reciting that divers persons, as guardians and trustees for infants, husbands in right of their wives, and other persons having estates or interests determinable upon a life or lives, have continued to receive the rents and profits of such lands after the determination of their said particular estates or interests, it is enacted, "That any person claiming any estate in remainder, reversion, or expectancy after the death of any person within age, married woman, or any other person whomsoever, may, upon affidavit that he hath cause to believe that such person within age, &c., is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person, once a year have an order from the great seal for the production of such person within age, &c., and upon the guardian, trustee, &c., refusing or neglecting to produce such infant, &c., agreeably to such order, the said infant, &c., shall be taken to be dead, and the remainderman or reversioner shall enter upon the estate in like manner as if such infant, &c., were actually dead."

## (I) Where the Law requires the highest Proof.

§ Innocence is always presumed even against another presumption of law : for example, when a woman marries within twelve months after her husband has left the country, the presumption of innocence preponderates over the presumption of the continuance of life.

2 B. & A. 386; Bouv. L. D. tit. *Innocence*.

The presumption of innocence in favour of a public officer, for official acts, will prevail over circumstances of suspicion, when a public officer is charged with conspiracy or fraud in the discharge of his duty, but it may be overcome by proof of delinquencies of a similar nature.

Bottomley v. United States, 1 Story, 135.g

## (I) Where the Law requires the highest Proof the Nature of the Thing is capable of.

It seems in regard to evidence to be an incontestable rule, that the party, who is to prove any fact, must do it by the highest evidence of which the nature of the thing is capable.

Show. Rep. 397; Carth. 220; Holt, 284; Salk. 281; § Bullock v. Koon, 9 Cowen, 30; Boone v. Dykes, 3 Monr. 531; Ingraham v. White, 2 L. R. 294; United States v. Porter, 3 Day, 284; St. Clair v. Jones, Addis. 243; M'Kinney v. Leacock, 1 S. & R. 27; Vanhorn v. Frick, 3 S. & R. 278; Campbell v. Wallace, 3 Yeates, 271; Conduct v. Stevens, 1 Monr. 74; James' Lessee v. Gordon, 1 Wash. C. C. R. 333; Little v. Delancey's Lessee, 5 Binn. 266; Pollard v. Dwight, 4 Cranch, 421.g {That is, if such evidence is in his possession or power. Buller, 293, 294; 2 Wils. Works, 378, 379. Where an instrument is in the hands of a party against whom it is intended to be produced, a copy or parol evidence of its contents will be admitted, if notice has been given to him to produce it, but not otherwise. Peake, Ev. 67; Peake, N. P. 165, Shaw v. Markham; 1 Esp. Rep. 127, Rex v. Doran. And there is no distinction in this respect between criminal and civil cases. A man cannot, indeed, be compelled in a criminal case to produce evidence against himself: but that is not the object of the notice. He is liable to no punishment if he does not produce it, and is left at liberty to do so or not; the only consequence is, that inferior evidence will be admitted. If that evidence is not correct, he may show its incorrectness by producing the original; which the notice enables him to be prepared to do. 2 Term, 201, n., Attorney-General v. Le Merchant; 1 Leach, C. L. 330, (3d ed.) The King v. Aickles; 1 Bin. 273, Commonwealth v. Messenger. In both cases the notice may be given either to the party or his attorney. 3 Term, 306, Gates v. Winter; 2 Term, 263, n. But in trover for a "certificate in writing of the registry of a certain ship or vessel called S.," the certificate may be proved by the production of the registry, though no notice be given to produce the certificate itself. 3 Bos. & Pul. 143, Bucher v. Jarrett. See 1 Esp. Rep. 50, Cowan v. Abrahams. And on an indictment for stealing a bill obligatory, evidence may (without notice) be given of the contents of the instrument which has been stolen. 1 Bin. 273; 3 Bos. & Pul. 145; 1 Leach's C. L. (3d ed.) 330. So on an indictment for forgery, the instrument being in the defendant's hands, or secreted in order to protect him. 3 Mass. T. Rep. 82, Commonwealth v. Snell; 1 Day, 100, Ross v. Bruce. The counterpart of a deed is sufficient evidence thereof against the party executing it, or those claiming under him, without notice to produce the original. 5 Term, 465, Burleigh v. Stubbs; 7 East, 363, Roe v. Davis. See Salk. 287, Anonymous; Addis, 243, St. Clair v. Jones.—See farther 2 Bos. & Pul. 39, Jory v. Orchard; Ibid. 237, Anderson v. May; 3 Cain. 174, Tower v. Wilson; Peake, Ev. 75; 1 Esp. Rep. 411, Doxon v. Haigh; Ibid. 455, Godlieb v. Danvers; 4 Esp. Rep. 13, Bayne v. Stone; Ibid. 256, Leeds v. Cook; 6 East, 421, n., The King v. Moors; 1 Cain. 363, Peyton v. Hallet; 4 Dall. 132, Edgar's Lessee v. Robinson.—*Quære* whether the party giving notice to produce a writing has a right to demand an inspection of it, in order to decide whether or not he will read it in evidence. 1 Esp. Rep. 210, Sayer v. Kitchen; 5 Esp. Rep. 235, Wharam v. Routledge; 1 Cain. 276, Lawrence and Whitney v. Vanhorne and Clarkson; 1 Johns. Rep. 385, Kenny v. Same.—When evidence sufficient to induce the presumption of the loss of the instrument is produced, parol proof of its contents or a copy will be received. 8 East, 273, Kensington v. Inglis; 1 Cain. Er. XXVII. Livingston v. Rogers; 2 Cain. 367, Jackson v. Lucett; 3 Johns. Rep. 300, Jackson v. Todd.}

As, where the question was, whether the abbey de Sentibus was an infe-

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rior abbey, or not, Dugdale's Monasticon Anglicanum being produced for evidence, was refused, because the original records might be had in the augmentation office.

So, if a witness be to testify what another swore on a former trial, the record (a) of such trial must be produced, or his evidence is not to be admitted, &c.

2 Show. Rep. 163. (a) || The production of the *nisi prius* record and *postea* endorsed on it is sufficient for this purpose. Pitton v. Walter, 1 Str. 162. But the person called upon to prove what a deceased witness has said upon a former trial, must repeat his very words, and not merely swear to their effect. Lord Palmerston's case, cited by Lord Kenyon in 4 T. R. 290. ||

|| So, where a license to trade granted by the crown was lost, parol evidence of its contents was not admitted; because there must be a register of it in the secretary of state's office, and that register would be the best evidence.

Rhind v. Wilkinson, 2 Taunt. 237. || A law required a written declaration to be signed and filed by a party in the office of the secretary of state, as evidence of such party's consent to avail himself of certain statutory provisions; it was held that to prove such consent, as against the party, the written evidence must be resorted to, and that his declaration on the subject could not be received in evidence. Rinaldi v. Rives, 1 Stew. 174.g

So, where the question was, whether the defendant had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature; and it appeared in evidence, that the goods were delivered by the officer of the defendants with a written order to the plaintiff to receive them, in which nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died, and that no other person was present at the delivery; and it was further proved by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person aboard; the plaintiff was nonsuited, on the ground that he had not given the best evidence of the want of notice which it was in his power to produce, by calling the Company's officer, who delivered the articles on board; which nonsuit was afterwards affirmed by the Court of K. B. "The best evidence," said Lord Ellenborough, "should have been given of which the nature of the thing was capable. The best evidence was to have been had by calling in the first instance upon the persons immediately and officially employed in the delivery and receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor on the other. And though the one of these persons, the mate, was dead, it did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, viz., the presumption and inference arising from a non-communication to other persons on board, as long as the military conductor, the other living witness immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to: and no impossibility of resorting to this evidence is suggested to exist in this case."

Williams v. E. I. Company, 3 East, 192; M'Kee v. Myers, Addis. 31.g

But, this rule will be dispensed with where a strict adherence to it would be productive of serious public inconvenience.

Supr. 261, 262; R. v. Lord George Gordon, Dougl. 593, n. 3; Lynche v. Clarke, 3 Salk. 154; Jones v. Randall, Cowp. 17.

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So a *prima facie* evidence will be sufficient, where it is aided by the general presumptions of law.

Berryman v. Wise, 4 T. R. 366; Case of the Gordons, Leech's Cr. Ca. 585; R. v. Jones, 2 Campb. N. P. 131; R. v. Verelst, 3 Campb. N. P. 432; Williams v. E. I. Company, 3 East, 192; Monke v. Butler, 1 Ro. Rep. 83; R. v. Haslingfield, 2 M. & S. 558. *β* See 6 Pet. R. 632; 14 Pet. Rep. 334.*γ*

So, a lower degree of evidence may be sufficient in proof of a fact, from the very nature of the case, or from the manner in which the fact itself is stated on the record, or from the relative situation of the parties, or from the conduct of the adverse party.

1 N. R. 210; Bevan v. Williams, 3 T. R. 635, n. a.; Peacock v. Harris, 10 East, 104; R. v. McIntosh, 3 T. R. 634; Cross v. Kaye, 6 T. R. 663; *β* Beals v. Guernsey, 8 Johns. 451; White v. Kibling, 11 Johns. 128.*γ*

If in trover there be a demand in words, and a demand in writing, and both be perfect, either may be proved as evidence of the conversion. If indeed the verbal demand have any reference to that in writing, the writing must be produced; but, if they are concurrent and independent, the latter will not supersede the former.

Smith v. Young, 1 Campb. N. P. 439.

So, verbal admissions by a party of his having been supplied with goods may be given in evidence, though it should appear that he has signed his name at another time, to an account acknowledging the receipt of them.

Jacob v. Lindsay, 1 East, 460.

So, in proof or disproof of handwriting, the supposed writer of the instrument need not be called, but the evidence of persons well acquainted with his style of writing will be sufficient.

Hughes's case, 2 East, P. C. 1002; McGuire's case, Ibid.; Newland's case, Ibid. 1001; *contr.*, Smith's case, Ibid. 1000.||

{Foreign laws are facts which, like other facts, must be proved before they can be noticed in a court of justice. The principle, that the best evidence of which the nature of the thing admits shall be required, applies to them as well as to other facts. The unwritten law may be proved by the testimony of intelligent witnesses; but statutes must be proved by documents from that country properly authenticated. The certificate of our consul there, that the statutes are truly copied from the originals, is not sufficient; for consuls are not officially authorized to authenticate foreign laws. And the sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. A copy certified under the great seal, or one proved upon oath under a commission to be a true copy, will be received.

1 Cran. 1, Talbot v. Seeman; 2 Cran. 187, 236, Church v. Hubbard; 1 John. Rep. 385, 394, Kenny v. Clarkson; 3 Johns. Rep. 105, Smith v. Elder; 3 Esp. Rep. 58, Boehdlinck v. Schneider, and the cases referred to by Mr. Day in n. (2), 4 Esp. Rep. 79, Huile v. Heightman. In Talbot v. Seeman, the Supreme Court of the United States permitted *marine ordinances* of France, which had been promulgated by the executive by order of the legislature of the United States, to be read without farther proof.—A printed copy of an act of assembly of Virginia, purporting to be printed by the printers to that state, and stitched up with other acts in a blue paper cover, admitted in evidence in Pennsylvania. 1 Dall. 463, Thompson v. Musser.

In the case of public officers, as a sheriff, deputy-sheriff, justice of the peace, constable, &c., it is sufficient to prove that they acted in those cha-

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racters, without producing their appointments ; and that even in the case of murder.

4 Term, 366, *Berryman v. Wise* ; 4 Bos. & Pul. 905, S. C. cited ; 3 Johns. Rep. 431, *Potter v. Luther*. A magistrate who is found acting as such, must be presumed to have taken the requisite oaths. 4 Cran. 75, 130, *Ex parte Bollman and Swartwout*.

The existence of a written agreement of partnership between the defendants, does not preclude the plaintiff from proving a partnership by their actions or declarations.

2 Bin. 245, *Widdifield v. Widdifield* .}

¶ Parol evidence of the contents of a written paper cannot be given, without first giving positive proof of its destruction, or of a diligent search by which its loss has been ascertained.

*Parks v. Dunkle*, 3 Watts & Serg. 291. g

If two parts of an instrument are prepared, but only one is stamped, the party having the unstamped part may give secondary evidence, if the other party refuse on notice to produce the stamped part.

*Garnons v. Swift*, 1 Taunt. 507.

In *indebitatus assumpsit* for work and labour, if the plaintiff prove his case by other evidence, he is not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement, fixing the price, and which defendant gave no notice to produce.

*Stevens v. Pinney*, 8 Taunt. 327 ; 2 Moo. 349 ; and see *Gorton v. Dyson*, 1 Bing. 219.

In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the Court of Quarter Sessions to the clerk of the peace or his deputy ; the clerk of the peace stated, that an indictment for the assault was preferred, and that the grand jury returned *ignoramus*, and that it was usual, in such cases, to throw away or destroy the depositions, and that he had searched and could not find them. Held, that parol evidence of their contents was admissible, and that it was not necessary to call the deputy-clerk of the peace to show that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to deliver them to his principal, and not being in his custody, it was to be presumed that they were lost or destroyed.

*Freeman v. Arkell*, 2 Barn. & C. 494 ; and see *Brewster v. Sewell*, 3 Barn. & A. 296.

In an action by the assignee of a bankrupt, where the defendant had exhibited an account between him and the bankrupt, and made a part payment to the plaintiff on account, this was held *prima facie* evidence of the plaintiff being assignee, without producing the proceedings, there being no notice to dispute them.

*Dickinson v. Coward*, 1 Barn. & A. 677 ; and see *Peacock v. Harris*, 10 East, 104.

There are three descriptions of cases where notice to produce an instrument is unnecessary ; 1, where the instrument produced and that to be proved are duplicate originals ; 2, where the instrument to be proved is a notice, as a notice to quit, or a notice of dishonour of a bill of exchange. In *Kine v. Beaumont*, 3 Bro. & B. 288, the Common Pleas, after consulting the judges of the other courts, held that the copy of an original letter, giving notice of dishonour of a bill, was admissible, without notice to produce the original letter. The 3d case is where, from the nature of the suit, the



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opposite party must know that he is charged with possession of the instrument, as in trover for a bond or note.

6 Barn. & C. 398. *Sed vide* 1 Moo. & M. 31.

A copy of an attorney's bill delivered under the statute is within the second class above, as it is a notice of the amount of plaintiff's demand, and that he will enforce it by action, unless defendant tax the bill.

Colling v. Terewick, 6 Barn. & C. 394.

A surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls; held, that such surrender and presentment might be proved by a draft of entry from the memorials of the manor, and the parol testimony of the foreman of the homage jury.

Doe v. Calloway, 6 Barn. & C. 484.

The declarations of a master of a pauper apprentice as to what was done with the indentures, were held inadmissible, since the master being living should be called.

Rex v. Inh. of Denis, 7 Barn. & C. 620. See Rex v. Morton, 4 Maule & S. 48.

In an action for rent of land verbally let on the same terms as the former tenant's lease, such lease must be produced properly stamped.

Turner v. Power, 1 Moo. & M. 131.

Evidence that an advertisement was inserted in a country newspaper circulated at the residence of the party, is not admissible as proof of notice of the facts in the advertisement, unless it be shown that he took in the paper.

Norwich Company v. Theobald, 1 Moo. & M. 153.

In an action for work and labour, where it is shown that the work was commenced under a written agreement, such agreement ought to be produced; and the plaintiff cannot recover without it for extras, although a particular item was proceeded in, after an admission by the defendant that it was an extra.

Vincent v. Cole, 1 Moo. & M. 257. *Sed vide* Ibid. 413.

Where a court prints and circulates copies of its rules for the guidance of its officers, the production of one of these printed rules is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court, and the copy is not shown to be examined.

Dance v. Robson, 1 Moo. & M. 294.

Where the plaintiff has proved by witnesses a case of implied or oral contract, he cannot be nonsuited by the defendant's producing an unstamped written instrument, purporting to contain the terms of the contract.

Fielder v. Ray, 6 Bing. 332.

Where the plaintiff's witness proved an acknowledgment by defendant that he held under T, and stated that he (the witness) had drawn an agreement touching the premises, between plaintiff and T, it was held that the plaintiff was bound to produce the writing.

Fenn v. Griffith, 6 Bing. 533.

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It seems agreed, that what another has been heard to say is no evidence, because he was not on oath; also, because the party who is affected thereby, had not an opportunity of cross-examining. But such speeches or discourses

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may be made use of by way of inducement or illustration of what is properly evidence.

Mod. 183; Skin. 402. *§*To the general rule that hearsay is not evidence there are many exceptions: among them the following, extracted from Bouv. L. D. tit. *Hearsay*, are the principal: 1. Hearsay is admissible when it is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, when it is a part of the *res gestæ*. 1 Phil. Ev. 218; 4 Wash. C. C. R. 729; 14 Serg. & Rawle, 275; 21 How. St. Tr. 535; 6 East, 193.—2. What a witness swore on a former trial, between the same parties, and where the same point was in issue as in the second action, and he is since dead, what he swore to is, in general, evidence. 2 Show. 47; 11 Johns. R. 446; 2 Hen. & Munf. 193; 17 Johns. R. 176. But see 14 Mass. 234; 2 Russ. on Cr. 683, and the notes.—3. The dying declarations of a person who has received a mortal injury, as to the fact itself, and the party by whom it was committed, are good evidence under certain circumstances. Vide *Declarations*, and 15 Johns. R. 286; 1 Phil. Ev. 215; 2 Russ. on Cr. 683.—4. In questions concerning public rights, common reputation is admitted to be evidence.—5. The declarations of deceased persons in cases where they appear to have been made against their interest, have been admitted.—6. Declarations in cases of birth and pedigree are also to be received in evidence.—7. Boundaries may be proved by hearsay evidence, but, it seems, it must amount to common tradition or repute. 6 Litt. 7; 6 Pet. 341; Cooke, R. 142; 4 Dev. 342; 1 Hawks, 45; 4 Hawks, 116; 4 Day, 265. See 3 Ham. 283. There are perhaps a few more exceptions which will be found in the books referred to below. 2 Russ. on Cr., B. 6, c. 3; Phil. Ev. ch. 7, s. 7; 1 Stark. Ev. 40; Rosc. Cr. Ev. 20; Rosc. Civ. Ev. 19 to 24; Dane's Ab. Index, h. t. Vide also, Dig. 39, 3, 2, 6; Ibid. 22, 3, 28. See Gresl. Eq. Ev. pt. 2, c. 3, s. 3, p. 218, for the rules in courts of equity as to receiving hearsay evidence. 20 Am. Jur. 68.*§*

Also, what a witness hath been heard to say at another time, may be given in evidence, in order to invalidate or confirm the testimony he gives in court.

2 Hawk. P. C. c. 46, § 14. {And where a subscribing witness to an instrument which is forged dies, and his handwriting is proved for the purpose of establishing the execution of the instrument, evidence may be admitted of the acknowledgment of the witness in his dying moments that he had forged it. 3 Burr. 1255, Wright v. Littler; 6 East, 195, 196, Aveson v. Lord Kinnaird.}

So, what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, either for (a) him or against him.

2 Hawk. P. C. c. 46, § 14. (a) [The declarations of a prisoner cannot be given in evidence for him; therefore a witness for this purpose cannot be called in his defence; but he may cross-examine any of the witnesses on the part of the prosecution as to any thing they may have heard him say relating to the fact he is charged with. Id. Ibid.]

||So, in inquiries into events, which happened a long time ago, and beyond the memory of living witnesses, hearsay is admitted; as, in questions of pedigree, the declarations of deceased members of the family, entries in family Bibles, or other books, recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in family mansions, and the will of an ancestor, though found cancelled, and not known to have been proved or acted upon, if it appear to have been treated as a paper relating to the family.

Higham v. Ridgway, 10 East, 120; Bull. N. P. 233; Cowp. 594; Vowles v. Young, 13 Ves. 143; 2 Dall. 117; Douglass's Lessee v. Sanderson, 1 Yeates, 15; Winder v. Little, 1 Yeates, 152; Lessee of Lilly v. Kintzmilller, 1 Yeates, 28.*§* "The tradition," said Lord Eldon in the case of Whitelocke v. Baker, "must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. Declarations in the family, descriptions in wills, descriptions on monuments, in Bibles and registry books, are all admitted upon this principle, that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." 13 Ves. 514. *§* See Raborg's adm'x. v. Hammond's

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Adm'r., 2 Har. & Gill, 42.g Declarations therefore made after the commencement of a suit, or preparatory to one, would seem to be inadmissible. Vin. Abr. tit. *Evidence*, (T. b. 91.) The answer of the judges to the question proposed to them in the case of the Berkeley peerage, and what was said by Lawrence, J., upon that occasion. Ph. Ev. 178. But *contr.* Haywood v. Firmion, *cor.* Lord Camden, Sittings after Trinity Term, 1766, and Goodright v. Moss, Cowp. 594. Declarations made by persons not members of the family, if known to have been intimately acquainted with the family, may be received, Gilb. Ev. 112; 3 T. R. 723; though Lord Erskine rests the admissibility of such evidence upon the principle of *interest* in the relative in knowing the connections of the family, and upon that principle, considering the husband as part of the wife's family, allowed his declarations of her illegitimacy to be evidence. Vowles v. Young, *ubi supr.*

So, proof by one of the family, that a younger brother of the person last seized had many years before gone abroad, and that the repute of the family was, that he had died there, and that the witness had never heard in the family of his having been married, has been admitted as good *prima facie* evidence of such person's death without lawful issue.

Doe v. Griffin, 15 East, 293.  $\beta$  Evidence of hearsay may be given to prove a pedigree. Strickland v. Poole, 1 Dall. 14; Stein v. Bowman, 13 Pet. 209.g

So, the declarations of persons having the best means of knowing a fact, and no interest to falsify it, have been admitted as evidence of it after their death. Such are the declarations of a deceased parent as to the birth or the time of the birth of his child, or to the fact of his being born before marriage. Such are the entries of the receipt of ecclesiastical dues in the books of a deceased rector, which are evidence for succeeding rectors; as also are such entries in the books of a lessee of the rectory after the expiration of his lease. Similar entries made by improper rectors have been received as evidence for succeeding rectors, though certainly in violation of principle: the ground of their admission being that they could not benefit the party making them or his representatives.

Herbert v. Tuckell, Sir T. Raym. 84, cited in Doe v. Rawlins, 7 East, 290; R. v. Bramley, 6 T. R. 330; May v. May, Bull. N. P. 112; 7 East, 290; 2 Ves. 43; Anon., Bunb. 46; Vin. Abr. tit. *Evidence*, [T. b. 73.] & [T. b. 117.]; Illingworth v. Leigh, 4 Gwill. 1619; Woodnoth v. Lord Cobham, Bunb. 180. But see Degross v. Leve-moor, 2 Gwill. 529; Outram v. Morewood, 5 T. R. 123; Perigal v. Nicholson, 1 Wightw. 63.  $\beta$  The declarations of a deceased member of a family, that the parents of a family were never married, are admissible in evidence, whether his connection with that family was by blood or marriage. Jewell's Lessee v. Jewell, 1 How. U. S. R. 219.g

[Where positive proof cannot be had, the declarations of persons uninterested, and who are then dead, are admissible, as in questions concerning legitimacy, or in questions of pedigree.

Bull. Ni. Pri. 294. {See 1 Dall. 9, 14; 2 Dall. 116; 1 Wash. 123; 2 Wash. 147.}

Hearsay is good evidence to prove the death of any person beyond sea.

Bull. Ni. Pri. 294.

Hearsay is evidence in cases of settlement of paupers.

Rex v. Nutley, 3 Term Rep. 715; Rex v. Greenwich, *Ibid.* 716; Rex v. Holy Trinity in Wareham, Cald. 141. {*Contr.*, 1 East, 373, The King v. Inh. of Nuneham Courtney; 2 East, 27, The King v. Inh. of Chadderton; *Ibid.* 54, The King v. Inh. of Ferry Frystone; *Ibid.* 63, The King v. Inh. of Abergwilly; 8 East, 539, The King v. Inh. of Erith. See 3 Term, 707, Rex v. Eriwell; 2 Cain. 106, Germantown v. Livingston.}

It is evidence also, whether parcel or not parcel.

Davis v. Pearce, 2 Term Rep. 53. See Garnons v. Barnard, Anstr. 299.

In questions of prescription, hearsay is good evidence in order to prove a general reputation.

Bull. Ni. Pri. 295; {1 East, 357, Reed v. Jackson; 1 Esp. Rep. 324, Wethnell v. Gartham.}

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In a *quare impedit*, the plaintiff derived his title from Lord R, in whom he laid a presentation of one Knight; the bishop set up a title in himself, and traversed the seisin of Lord R; the plaintiff gave in evidence an entry in the registry of the diocese of the institution of Knight, in which there was a blank in the place where the patron's name is usually inserted, and then offered parol evidence of the general reputation of the country, that Knight was in by the presentation of Lord R; upon a bill of exceptions, this came on in K. B. when the better opinion was, that the evidence was admissible, the register, which was the proper evidence, being silent: for a presentation may be by parol, and what so commences may be transmitted to posterity by parol, and that creates a general reputation.

Bishop of Meath v. Lord Belfield, Bull. Ni. Pri. 295; 1 Wils. 215, S. C.

It seems to be no objection to the admission of hearsay evidence, that the party whose declarations are brought as such would not himself now be an admissible witness, provided at the time of making those declarations he stood indifferent.

Espin. Ni. Pri. 787.]

{In every *civil* case, except an action for criminal conversation, general reputation, the acknowledgment of the parties, and reception by their friends as man and wife, is sufficient evidence of a marriage. And it is generally incumbent on those who would impeach such a reputed marriage to show wherein the illegality consists.

4 Burr. 2059, Morris v. Miller; 1 W. Black. 632, S. C.; 2 W. Black. 877, Harvey v. Harvey; 1 Esp. Rep. 213, Read v. Passer; Peake, N. P. 231, S. C.; 1 Esp. Rep. 353, Leader v. Barry; Taylor, 121, Teltz v. Foster; 1 Wooddes. 433, 434.} *β* Milford v. Worcester, 7 Mass. 48; Trenton v. Reed, 4 Johns. 52; Kibby v. Rucker, 1 Marsh. (Ken.) Rep. 331.*g*

||And further, in questions of boundaries or customs, it is no objection to the declarations of a deceased person, that he claimed himself under the same custom, provided there do not appear to have been a *lis mota* at the time; as, on a question of parochial modus, that he was a parishioner, and liable to pay tithe; or on a question of parochial or manorial boundary, that he claimed a right of common on the wastes which his declarations went to enlarge.

Harwood v. Sims, Wightw. 112; Nicholls v. Parker, 14 East, 331.

On an indictment for murder, the declarations of the deceased after he had received the mortal wound may be given in evidence against the prisoner.

Leach, C. L. 437, Woodcock's case; Ibid. 399, Henrietta Radbourne's case; Addis, 281, Pennsylvania v. Lewis and others; Ibid. 381, Pennsylvania v. Stoops. See 1 Johns. Rep. 163; 2 Johns. Rep. 34, 35. But the declarations of a convict at the time of execution cannot be admitted; for his testimony on oath could not have been received, had he been living; and dying declarations are considered only as equivalent to the evidence of the living witness on oath. Leach, C. L. 308, Drummond's case. *β* Rex v. Pike, 3 Carr. & Payne. 598; State v. Monaquas, Charl. 16; King v. The Commonwealth, 2 Virg. Cas. 78; The State v. Moody, 2 Hayw. 31; 2 Wheel. Cr. Cas. 390. At the time of making his dying declarations, the deceased must have been conscious that he could not recover. Gibson v. The Commonwealth, 2 Virg. Cas. 111; State v. Poll and Lavinia, 1 Hawks, 442, 518, 519; Vass v. The Commonwealth, 3 Leigh, 786. See also Rex v. Van Butchell, 3 Carr. & Payne, 629; Rex v. Crockett, 4 Carr. & Payne, 544; Rex v. Gallagher, Macnally's Ev. 385; Rex v. Moseley, Ry. & Moo. 97; Maryland v. Ridgeley, 2 Harr. & M'H. 120. Dying declarations are not evidence in civil actions. Wilson v. Berem, 15 Johns. 286; Jackson, ex dem. Coe, v. Kniffen, 2 Johns. 35; Gray v. Goodrich, 7 Johns. 95; Rex v. Mead, B. & Cr. 605.*g*

What a party has himself been heard to say does not fall within the objec-

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tion as to hearsay evidence, but may be given in evidence against him. And it has been determined that what has been said by the party on record, though only a trustee for another, comes within this rule.

2 Esp. Rep. 653, *Baerman v. Radenius*; 7 Term, 663, S. C.; *Ibid.* 670, n. *Craig and Wife v. D'Aeth*; *Peake*, Ev. 11, 12.

So the declarations of persons under whom the parties claim are, in general, evidence against them; unless those persons are now competent witnesses, and may be procured.

2 Day, 121, *Nichols v. Hotchkiss*; 3 Johns. Rep. 499, *Jackson v. Scissam*; 2 Dall. 93, *Andrews's Lessee v. Fleming*;}.

If the declarations of deceased persons, competent from their situation and connections to speak to a fact, and under no temptation to misrepresent, are evidence; *à fortiori* are the declarations of such persons when they contradict an interested motive of action. Hence entries in their books, by which they charge themselves with the receipt of money on the account of a third person, or acknowledge the payment of money due to themselves, are strong evidence of the fact, in consideration of which the money is stated to have been received or paid.

*Barry v. Bebbington*, 4 T. R. 515; *Stead v. Heaton*, *Ibid.* 669; *Harper v. Brooke*, 3 Wooddes. 332, and *supr.*, 288; *Warner v. Greenville*, 2 Str. 1129, and *supr.*, 253; *Doe v. Robson*, 15 East, 33; *Haddon v. Parry*, 5 Taunt. 305; *Higham v. Ridgway*, 10 East, 109; *Roe v. Rawlings*, 7 East, 279; *Bagalley v. Jones*, 1 Campb. 367; *Ivatt v. Finch*, 1 Taunt. 141; *Chapman v. Cowlan*, 13 East, 10; *Peaceable v. Watson*, 4 Taunt. 16.

In questions concerning public rights, reputation is admissible; for in such cases all mankind are considered as interested in preserving evidence. And this has been extended to rights not strictly public, such as of manors, parishes, and commons, and a modus; and where a private right, claimed by prescription, goes in abridgment of a general right of common, reputation is admissible, for it is not so properly evidence of the private right, as evidence of the manner in which the public right is to be enjoyed. But this sort of evidence cannot be introduced till a foundation has been laid for it, by showing an exercise of the right, or acts of enjoyment within the memory of living witnesses.

*Nicholls v. Parker*, 14 East, 331, n.; *Denn v. Spray*, 1 T. R. 466; *Beebec v. Parker*, 5 T. R. 26; *Doe v. Sisson*, 12 East, 62; *Morewood v. Wood*, 14 East, 327, n.; *Weeks v. Sparke*, 1 M. & S. 679; *Howard v. Sims*, 1 Wightw. 112. #See *Dillingham v. Snow*, 5 Mass. 547. Reputation has been held sufficient to prove the defendant to be a deputy sheriff, *Porter v. Luther*, 3 Johns. 431; that he was an overseer of a certain road, *Dean v. Greedly*, 10 Wend. 254; to show that persons claiming to be trustees or collectors of school districts, were such, *Ring v. Groot*, 7 Wend. 341; *McCoy v. Curtice*, 9 Wend. 17; to show that a man was a constable, *Adams v. Jackson*, 2 Aik. 145; *Barrett v. Reed*, 2 Hamm. 411; *Johnson v. Stedman*, 3 Hamm. 94; or a justice of the peace, *Wilcox v. Smith*, 5 Wend. 231; *Snow v. Peacock*, 2 Carr. & Payne, 215; or a collector, *Eldred v. Sexton*, 5 Hamm. 215; or that a person acting as president of a court martial was really such. *The State v. Gregory*, 2 Murph. 69. It must be recollected that such evidence of reputation will not be sufficient when the officer himself is a party. *Keyser v. McKissan*, 2 Rawle, 139.g

By the better opinion, reputation would seem not to be admissible as evidence of prescriptive rights merely private. But this has been *vexata questio*.

*Morewood v. Wood*, *ubi supr.*; *R. v. Eriswell*, 3 T. R. 709; *Webb v. Potts*, Noy, 44; *Reed v. Jackson*, 1 East, 357; *Clothier v. Chapman*, 14 East, 331, n.; *Didsbury v. Thomas*, *Ibid.* 323; *Barnes v. Mawson*, 1 M. & S. 81; *Weeks v. Sparke*, *Ibid.* 679; *Bull. N. P.* 295; *Bp. of Meath v. Lord Belfield*, *Ibid.*; 1 Wils. 215, S. C.; but see *Lord Kenyon's* observations on this case, 3 T. R. 723.

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Tradition is admissible merely from necessity, and only where no other proof can be had. It is not evidence of a particular fact. Hence in questions of settlement, the declarations of a deceased parent are not admissible as to the *place* of his child's birth; nor are the declarations of a deceased person, as to his having been hired for a year, or having been relieved by a parish.

R. v. Erith, 8 East, 542; R. v. Nuneham Courtney, 1 East, 373; R. v. Chadderton, 2 East, 99; R. v. Ferry Frystone, Ibid. 54; R. v. Abergwilly, Ibid. 63. *¶* *Mima Queen and Child v. Hepburn*, 7 Cranch, 290; *John Davis v. Wood*, 1 Wheat. 6; *Ward v. The People*, 3 Hill, 395.*g*

But to prove seisin in a devisor, the declarations of a deceased occupier of the land, that he held as his tenant, were received as evidence of that fact, for it would otherwise be almost impossible to prove the holding of this particular tenant. Besides, the declarations were in some degree against the interest of the occupier, as destroying that evidence of title which arises from possession, and making him liable to a demand for rent.

*Holloway v. Roke*, cited by Buller, J., in *Davies v. Pierce*, 2 T. R. 55; *Peaceable v. Watson*, 4 Taunt. 16.

So, where the point was, whether certain lands were parcel of A's or B's estate, the declarations of a deceased occupier, who held under both A and B, were admitted in evidence.

*Roll v. Fellow*, Vin. Abr. tit. *Evidence*, [A. B. 38.] pl. 10; *Bridgman v. Jennings*, 1 Ld. Raym. 734; *Davies v. Pierce*, 2 T. R. 53.*l*

*¶* General reputation is not admissible as evidence to prove that one prosecuting as endorsee of a bill of exchange, is in fact, the general agent of the drawer.

*Winants v. Sherman*, 3 Hill, 74.

Evidence by confession, especially where it goes to the merits of the case, is open to much objection.

*Thomas v. Hatch*, 3 Sumn. 170.*g*

On a *parol* demise, rent to take place from the following *Lady-day*, evidence of the custom of the country is admissible to show that by *Lady-day* is meant old *Lady-day*: *aliter* if the demise is by deed.

*Doe dem. Hall v. Benson*, 4 Barn. & A. 588; *Doe v. Lea*, 11 East, 312.

What a dead witness has sworn to on a former trial between the same parties, is evidence in the cause, and may either be read from the judge's notes, or proved by the recollection or notes of any person who heard it.

*Mayor of Doncaster v. Day*, 3 Taunt. 262.

It is no objection to evidence of reputation of a modus that the deceased person from whom the hearsay came was liable to pay tithes.

*Harwood v. Sims*, Wightw. 112; and see *Moseley v. Davies*, 11 Price, 162.

Evidence of reputation is not admissible in support of a farm modus.

*Pritchett v. Honeyborne*, 1 Young & J. 135.

(As to the admissibility of hearsay evidence on questions as to private prescriptive rights, see *Barnes v. Mawson*, 1 Maule & S. 81; *Blacket v. Lowes*, 2 Maule & S. 494; *Doe dem. Didsbury v. Thomas*, 14 East, 323; *Weeks v. Sparke*, 1 Maule & S. 679.)

A declaration by the owner or occupier of adjoining land that his neighbour's land extends to such a spot, accompanying an act of forbearance to go beyond the spot for that reason, (or without such act, if he speaks against his interest,) is evidence that the land extends so far.

*Sir Thomas Stanley v. White*, 14 East, 332.

## (L) Of the Party's Confession.

On an issue in trespass whether certain trees were the freehold of the plaintiff or not, it appeared that the trees grew in a woody belt, of considerable extent, entire and undivided, which encircled plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant; evidence was held admissible of acts of ownership in different parts of the belt (not merely those adjoining defendant's land) of those under whom plaintiff claimed, which had been acquiesced in by owners of the adjoining land; for this was evidence of a general right through the whole extent of such enclosure, which might be presumed to have belonged formerly to one owner.

Sir Thomas Stanley v. White, 14 East, 332; and see Tyrwhitt v. Wynne, 2 Barn. & A. 554; Hollis v. Goldfinch, 1 Barn. & C. 218; Doe v. Sisson, 12 East, 62.

Ancient entries made by the monks of an abbey relating to an endowment by them of the vicarage, are good evidence (*quantum valeant*) of their subject-matter, although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*.

Bullen v. Michel, 2 Price, R. 399; and see Doe v. Thynne, 10 East, 206; Mather v. Jackson, 1 Young & J. 65; Rowe v. Brenton, 8 Barn. & C. 737; Plaxton v. Dare, 10 Barn. & C. 17. An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls. Brett v. Beales, 1 Moo. & M. 416; and see Ibid. 398; Madison v. Nuttall, 6 Bing. 226.

Entries of charges made by an attorney in his books, showing the time of the making an instrument, are admissible evidence after the attorney's death, the entries being shown to be paid.

2 Stra. 1129; 10 East, 118; 7 Bing. 433.

An entry made by a deceased collector of taxes in a private book kept by him for his convenience, charging himself with moneys, is evidence against the collector's sureties after his death, although the parties who paid the money to him are alive; for the entry is to the collector's prejudice.

Middleton v. Malton, 10 Barn. & C. 317; and see 8 Barn. & C. 556; 3 Brod. & B. 132.

An entry in the registry book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not evidence, nor is the private memorandum of the fact made by the clerk present at the baptism.

Doe v. Bray, 8 Barn. & C. 813.

The examination of a soldier taken under the mutiny act, as to his place of settlement, is to be received as evidence, even though he be dead, or absent from the kingdom, at the time when the appeal is tried.

Rex v. Inhab. of Warminster, 3 Barn. & A. 121.

Dying declarations are only admissible where the death of the party is the subject of charge, and the circumstances of the death the subject of the declaration.

Rex v. Mead, 2 Barn. & C. 605; and see 4 Barn. & C. 230; Doe v. Ridgway, 4 Barn. & A. 53.

Declarations of servants and intimate acquaintances are not admissible in questions of pedigree, but only those of kindred.

Johnson v. Lawson, 2 Bing. R. 86

## (L) Of the Party's Confession.

THE confession of the defendant himself, whether taken on an examination before justices of the peace, in pursuance of 1 & 2 P. & M. c. 13, or

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of 2 & 3 P. & M. c. 10; upon a bailment or commitment for felony, or taken by the common law on an examination before a magistrate for treason or other crime, or spoken in private discourse, has always been allowed to be given in evidence against the party, but not against others.

But for this vide 2 Hawk. P. C. c. 46, § 6. *§* The following rules respecting confessions are extracted from Bouv. L. D. h. t.—A confession must be made voluntarily, by the party himself, to another person. 1. *It must be voluntary.* A confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it. 1 Leach, 263. This is the principle, but what amounts to a promise or a threat, is not so easily defined; vide 2 East, P. C. 659; 2 Russ. on Cr. 644; 4 Carr. & Payne, 387; S. C., 19 Eng. Com. L. Rep. 434; 1 Southard, R. 231; 1 Wend. R. 625; 6 Wend. R. 268; 5 Halst. R. 163; Mina's Trial, 10; 5 Rogers's Rec. 177; 2 Overton, R. 86; 1 Hayw. (N. C.) R. 482. But it must be observed that a confession will be considered as voluntarily made, although it was made after a promise of favour or threat of punishment, by a person *not in authority* over the prisoner. If, however, a person having such authority over him be present at the time, and he express no dissent, evidence of such confession cannot be given. 8 Carr. & Payne, 733. 2. *The confession must be made by the party to be affected by it.* It is evidence only against him; in case of a conspiracy, the acts of one conspirator are the acts of all, while active in the progress of the conspiracy, but after it is over, the confession of one as to the part he and others took in the crime, is not evidence against any but himself. Phil. Ev. 76, 77; 2 Russ. on Cr. 653. 3. *The confession must be to another person.* It may be made to a private individual, or under examination before a magistrate. The whole of the confession must be taken, together with whatever conversation took place at the time of the confession. Roscoe's Ev. N. P. 36; 1 Dall. R. 240; Ib. 392; 3 Halst. 275; 2 Penna. R. 27; 1 Rogers's Rec. 66; 3 Wheeler's C. C. 533; 2 Bailey's R. 569; 5 Rand. R. 701. *Confession*, in another sense, is where a prisoner being arraigned for an offence, confesses or admits the crime with which he is charged, whereupon the plea of guilty is entered. Com. Dig. *Indictment*, (K); *Ibid. Justices*, (W 3); Arch. Cr. Pl. 121; Harr. Dig. h. t.; 20 Am. Jur. 68.*g*

But wherever a man's confession is made use of against him, it must be taken altogether, and not by parcels.

{In civil as well as criminal cases. But the jury are not bound to take the whole as true. 1 Dall. 240, 392; 1 Johns. Rep. 395; 3 Johns. Rep. 427. So the books of account of a party should be taken altogether; they are not to be admitted as evidence to charge him, without receiving them also as to the items for which he has credit in them. 2 Hen. & Mun. 603.} *§* See *Rex v. Clewes*, 4 Carr. & Payne, 221; *Tipton v. The State*, Peck's R. 308; *Rex v. Steptoe*, 4 Carr. & Payne, 397; *Rex v. Higgins*, 3 Carr. & Payne, 603; *Smith v. Blandy, Ry. & Mo.* 257; *Farral v. McClea*, 1 Dall. 392; *Morris v. Vauderen*, 1 Dall. 65; *Blight v. Ashley*, 1 Pet. C. C. 15; *Bassler v. Neisly*, 2 S. & R. 354; *Marshall v. Sheridan*, 10 S. & R. 268; *Commonwealth v. Eberle*, 3 S. & R. 9; *Respublica v. Roberts*, 1 Dall. 39; *Respublica v. McCarty*, 2 Dall. 86; *United States v. Tardy*, 1 Pet. C. C. 458.*g*

[It must not be drawn from him either by threat or promise, but must be quite voluntary.

2 H. H. P. c. 284; *Leach's Cases*, 286, 287; *Burn's Just. tit. Examination.*] *§* *State v. Guild*, 5 Halst. 163; *State v. Roberts*, 1 Dev. 259; *State v. Feilds*, Peck. 140; *Commonwealth v. Knapp*, 9 Pick. 496; *State v. Aaron*, 1 South. 231; *Thorn's case*, C. H. Rec. 81; *State v. Thompson, Kirby*, 345; *State v. Phelps, Kirby*, 282; *Commonwealth v. Chabbock*, 1 Mass. 144; *Rex v. Parratt*, 4 Carr. & Payne, 570; *Rex v. Kingston*, 4 Carr. & Payne, 387; *Rex v. Thompson*, 1 Leach, 291; *Rex v. Gibbons*, 1 Carr. & Payne, 97. See *Patton v. Freeman*, Coxe, 113, where it was ruled that the objection, that a confession was not voluntary, does not apply to a civil case.*g*

*§* When a confession is obtained by a promise to put an end to a prosecution, such confession is inadmissible as evidence.

*Boyd v. The State*, 2 Humph. 37.

A servant was charged with attempting to set fire to her master's house; two rooms were on fire, and a spoon and other articles were found in the



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sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things in the pump, he would send for a constable to take her; held, that this was such an inducement to confess as would render any statement made by the prisoner respecting the fire inadmissible, the whole being one transaction.

Reg. v. Hearn, 1 Carr. & M. 109.*g*

|| It is evidence, whether made before or after his apprehension; whether on a judicial examination, or after commitment; whether reduced into writing or not; and if reduced into writing, whether signed by him or not.

Lambe's case, 2 Leach's Cr. Ca. 629; 1 East's P. C. 133; Keb. 19; see Fort. Disc. 243.||

[His examination ought not to be upon oath.

1 H. H. 585.

Where the confession is regularly taken, it is of itself, uncorroborated by any other evidence, sufficient to convict him.

Leach's Cases, 287.]

§ No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession *in open court*.

Const. U. S. art. 3, § 3.

Evidence of confessions, in a civil suit, cannot be withdrawn without the consent of both parties.

Vibbard v. Staats, 3 Hill, 144.*g*

The whole of an admission or account must be taken together, as well the statements favourable as those unfavourable to the party.

Randle v. Blackburn, 5 Taunt. 245.

The defendant may give in evidence the admission of the plaintiff on record, though he be only a trustee.

Bauerman v. Radenius, 7 Term R. 663.

Or of a party really interested, though not on the record.

1 Wils. 257; 4 Camp. 38; and see Spargo v. Brown, 9 Barn. & C. 936.

But the party making the admission or declaration must be identified with the party on the record, or the evidence is not admissible.

Beauchamp v. Parry, 1 Barn. & Adol. 89.

An acknowledgment by a trader made after an act of bankruptcy, though before the issuing the commission, is inadmissible in evidence, in an action by the assignees, to prove the petitioning creditor's debt; but in an action by the bankrupt against his assignees, such admissions are evidence.

Smallcombe v. Bruges, 13 Price, 136; Jarret v. Leonard, 2 Maul. & S. 265; and see 1 Camp. 376.

But declarations before the act of bankruptcy are admissible for the defendant in an action by the assignees, to prove the petitioning creditor's debt fraudulent.

Thompson v. Bridges, 8 Taunt. 336; 2 Moo. 376.

Declarations of a party who has been holder of a bill of exchange cannot be received in evidence, unless made while he had the bill in his possession.

Pocock v. Billing, 2 Bing. 269.

An admission, in order to be evidence, should be of a mere fact within the party's knowledge, not of a conclusion mixed up of law and fact; thus an admission by a party suing for goods in trover, that he had been dis-

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charged under the insolvent act since the sale of the goods, is not evidence that he had no title to sue ; for such discharge, unless all the legal requisites under the act have been complied with, does not divest him of his right.

*Summersett v. Adamson*, 1 Bing. 73 ; 7 Moo. 374.

Declarations of a widow in possession of premises, that she had them for her life, and that after her death they would go to the heirs of the husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession.

*Doe dem. Human v. Pettett*, 5 Barn. & A. 223.

The general rule is, that declarations of the wife are not evidence for or against the husband.

2 Phill. Evid. 76.

In trespass against husband and wife, the wife's confession of trespass committed by her is not evidence against the husband ; nor are her declarations evidence in his favour.

*Denn v. White*, 7 Term R. 112 ; *Hodgkinson v. Fletcher*, 4 Camp. 70 ; *Scholey v. Goodman*, 1 Bing. 349.

Where the wife has acted for the husband in his business, and by his authority and consent, he adopts her acts, and will be bound by any admission or acknowledgment made by her respecting that business.

*Anderson v. Saunderson*, Holt's N. P. C. 591 ; *Clifford v. Burton*, 1 Bing. 199 ; Phill. on Evid. v. i. 79 ;

Where one of several partners made a contract in his individual capacity, and at the time declared that the property was his alone ; this declaration was held evidence against all the partners in a joint action on the contract.

*Lucas v. De la Cour*, 1 Maul. & S. 249 ; and see *Booth v. Quin*, 7 Price, 193.

An acknowledgment of a debt made by a debtor after arrest, but before an escape, is evidence against the marshal in an action for an escape.

*Per Bayley, J.*, *Rogers v. Jones*, 7 Barn. & C. 86.

Where a party examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy ; this was held not evidence of an account stated with the assignees ; and it seems that an admission obtained on such a compulsory examination is not evidence at all against the party in a civil suit.

*Tucker v. Barrow*, 7 Barn. & C. 623.

A lessee who executes a counterpart of a lease, cannot dispute its admissibility in evidence, or impeach its validity on the ground of its not being properly stamped.

*Paul v. Meek*, 2 Young & J. 116 ; and see 3 Young & J. 80.

A demurrer or plea to a bill in equity, does not so far admit the facts charged in it, as to be evidence against the defendant of those facts in a future *action between the same parties*.

*Tomkins v. Ashby*, 1 Moo. & M. 32.

On a plea in abatement of non-joinder of A B, as defendant, his declarations made before action brought are evidence in support of the plea.

*Clay v. Langslow*, 1 Moo. & M. 45.

The declarations of a party suing as assignee of a bankrupt, made before he became such, are not evidence against him.

*Fenwick v. Thornton*, Ibid. 51.

An acknowledgment of a debt, without specifying any amount, is not

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sufficient to entitle the creditor to nominal damages on a count upon an account stated.

*Bernasconi v. Anderson*, 1 Mo. & M. 183.

In case for a false representation of the solvency of A B, whereby the plaintiffs trusted him with goods, their declarations at the time they trusted him are admissible in evidence for them.

*Fellowes v. Williamson*, 1 Moo. & M. 306.

The deposition of a witness taken in a judicial proceeding, in the presence of the party there charged, is not admissible in another proceeding against that party, although he was present, and had the opportunity of cross-examining.

*Melen v. Andrews*, 1 Moo. & M. 336.

If the examination of a prisoner taken in writing is inadmissible by reason of irregularity, parol evidence of what he said at the examination may be received.

*Rex v. Reed*, 1 Moo. & M. 403.

An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied by a caution that the offer is confidential.

*Wallace v. Small*, 1 Moo. & M. 446.

In case for negligence, the declarations of one defendant who had suffered judgment by default are not admissible in evidence against the others to show the circumstances of the injury, although such others are, independently, shown to be concerned in it.

*Daniels v. Potter*, 1 Moo. & M. 501.

Declarations of a testator in subversion of a will are not admissible in evidence, though both parties claim under him, and though they are offered with a view to show the manner in which the will was executed.

*Provis v. Reed*, 5 Bing. 435.

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It is observable (a) that this, with other circumstances, (b) in *Algernon Sidney's* case, was ruled to be good evidence of his having written a paper charged against him as an overt act of high treason: yet in the trial of the (c) seven bishops, the court was divided in opinion, whether similitude of hands was evidence of the defendant's having signed the paper charged against them as a libel; and the parliament having declared an opinion in the (d) reversal of *Algernon Sidney's* attainder, that comparison of hands is no evidence of a man's handwriting in criminal cases; it seems to have been generally holden since that time, that it is not evidence in any criminal case, whether capital or not capital. (e)

(a) 2 Hawk. P. C. c. 46, § 15. (b) 3 Stat. Tri. 809. ¶ As it appears from the report of *Algernon Sidney's* case, in the book referred to, three witnesses were called to prove a paper to be his handwriting: the first said, he had seen the prisoner write the endorsement upon several bills of exchange, and that he believed the paper to have been written by him: this evidence was objected to as a comparison of handwriting, but admitted: the second witness said, he had not seen the prisoner write more than once, but that he had seen his endorsement on bills, and that the paper was very like it: the third witness said, he had seen several notes, which had come to him with the endorsement of the prisoner's name, and that he had paid them, and had never been called to account for mispayment: the whole of the evidence was received. The prisoner, in his defence, insisted, that nothing but the comparison of handwriting had been offered as proof against him; and the act of parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. It recites,

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among other particulars, that "there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet supposed to be his handwriting, which was not proved by any one witness to have been written by him; but the jury was directed to believe it by comparing it with other writings of his." However, if this report of the trial be correct, something more than the mere comparison of handwriting was laid before the jury: for, according to the report, the first witness had seen the prisoner write his name several times. And though it may be objected to the two last witnesses, that the endorsements, mentioned by them, were not sufficiently proved to have been written by the prisoner, yet that objection will not apply to the other witness, whose evidence was certainly admissible. The same sort of evidence was admitted in Lord Preston's case within a year after the reversal of Sidney's attainder, and has been since received in many cases of great authority. Phil. Ev. 365, and see De la Motte's case, 1781, in vol. 21 of Howell's New Coll. of St. Tr. 810. (c) 4 Stat. Tri. 338. (d) And if it be not evidence in a criminal case, it cannot be evidence in a civil case, for the same rules must apply to both. But see R. v. Cator, 4 Espin. N. P. Ca. 117; Eagleton v. Kingston, 8 Ves. 475; Wade v. Broughton, 3 Ves. & Beam. 172. (e) 1 W. & M. c. 7, of private acts. {This subject of the admissibility of the evidence of comparison of hands has undergone much discussion in many later cases in England, and the result from the whole appears to be this:—that comparison of hands is properly that evidence which a witness is enabled to give, or a jury to collect, merely by comparing the writing produced with another proved or admitted to be that of the party; and differs therefore from the proof of handwriting by witnesses who know the party's hand from having seen him write, or received letters from him in a course of correspondence, and who swear that they believe the writing in question to be his:—that the former is not evidence in any criminal case; nor in any civil case, except with regard to old transactions of which, from the distance of time, no better evidence can be expected:—and that the latter is evidence in criminal as well as civil cases, especially if the paper is found in the possession of the prisoner. See 1 Burr. 644, The King v. Hensey; 1 W. Black. 384, Gould v. Jones; Buller, 236, S. C.; Peake, N. P. 20, n., Brookbark v. Woodley; Ibid. 20, Macferson v. Thoytes; 1 Esp. Rep. 14, Stranger v. Searle; Peake, Ev. (Walpole Ed. 1804.) 73, Allesbrook v. Roach; 1 Esp. Rep. 351, S. C.; Peake, Ev. 71, App. 186, Cary v. Pitt; Ibid. 187, Da Casta v. Pym, 4 Term, 497; Goodtitle *ex dem.* Revet v. Braham; 2 Esp. Rep. 714, Batchelor v. Sir John Honeywood; 4 Esp. Rep. 37, Garrells v. Alexander; Ibid. 117, The King v. Cator, and Mr. Day's note; 8 Ves. J. 457, 473, Eagleton and Coventry v. Kingston; 7 East, 65, The King v. Johnson; Ibid. 282, n., Roe v. Rawlings; Buller, 236, 237; Addis, 35, Pennsylvania v. M'Kee.} β Strother v. Lucas, 7 Pet. 763, 767; Titford v. Knott, 2 Johns. 211; Jackson, *ex dem.* Van Duzen, v. Van Duzen, 5 Johns. 155; Jackson, *ex dem.* Parker, v. Phillips, 9 Cowen, 94; Rowt's adm'r. v. Kile's adm'r., 1 Leigh, 216; Sharp v. Sharp, 2 Leigh, 249; Gardner's adm'r. v. Vidal, 6 Rand. 106; Goldsmith v. Bane, 3 Halst. 87; Woodward v. Spiller, 1 Dana, 179; Murati v. Luciani, 1 Baldw. 49; United States v. Craig, 4 Wash. C. C. Rep. 729; Farmers' Bank v. Whitehall, 10 S. & R. 110; Bank of Pennsylvania v. Haldeman, 1 Pennsylv. 161; Commonwealth v. Smith, 6 S. & R. 571; Callan v. Gaylord, 3 Watts, 321; Lodge v. Phipper, 11 S. & R. 333; Vickroy v. Skelly, 14 S. & R. 372; Myers v. Toscan, 3 N. H. Rep. 47; Lyon v. Lyman, 9 Conn. 55.β

β When the handwriting of A B is in evidence, a paper purporting to be written by A B, but not relating to the issue in the cause, cannot be put in the hands of a witness in order to test his veracity, by asking him whether it is in his handwriting.

5 Ad. & Ell. 514; Griffiths v. Ivory, 3 P. & D. 179.

In an action against acceptor of a bill of exchange, a banker's clerk proved that two years ago he saw a person, calling himself by defendant's name, sign a book; that he had never seen him since, but he thought the handwriting was the same, and that he had since seen checks similarly signed go through the bank; held, that this was proper evidence to go to the jury.

Warren v. Anderson, 8 Scott, 384.

The mere unaided comparison of hands is not in general admissible; but after evidence has been given of the handwriting, it may be corroborated

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by comparing the writing in question with a writing concerning which there is no doubt.

*Baker v. Haines*, 6 Wharton, 284; *Moody v. Rowell*, 17 Pick. 490. See *Faunce v. Gray*, 21 Pick. 315.

Proof of the seal of a medical institution, and of its officers, to a diploma produced on the trial of a cause, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, is competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names.

*Finch v. Gridley's Exrs.*, 25 Wend. 469.

An instrument signed by a mark may be proved by inspection by a person who has seen the party so sign the instruments.

*Daniels v. Patter*, 1 Mo. & Malk. 501.

A person who knows the signatures of the president and cashier of a bank, by having seen bills in circulation, may prove that a bill is counterfeit.

*The State v. Carr*, 5 N. H. Rep. 367.*g*

(N) Whether the Depositions of Witnesses in another Cause may be given in Evidence.

DEPOSITIONS cannot be given in evidence against any person who was not party to the suit; (a) and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party.(b)

*Hardr.* 22, 472; *Bunb.* 91, 321; *Gilb. Evid.* 62; *Prec. Ch.* 212; *Vin. Abr. tit. Evidence*, (A. b. 31,) pl. 45, 47; *Vern.* 413; *Eq. Cas. Abr.* 227, pl. 3. (a) But, if a witness is examined in Chancery, you may read, without an order, any other depositions of the same person, in the spiritual court, or elsewhere, in any other cause, so as you make use of them only to confront the evidence he then gives. *Anon.*, *Mosely*, 118, 188. (b) || It is said, *supr.* 562, in note, that in cases of customs and tolls, and, in general, in all cases where hearsay and reputation are evidence, depositions may be admitted, though the parties in the two suits are not the same. But after the opinions delivered by the judges in the House of Lords in the *Banbury* and *Berkeley* peerage cases, respecting depositions in question of pedigree, this position would seem not to be maintainable. 2 *Selw. N. P.* 684; *Phil. Ev.* 178. || β That the parties must be the same, see *Lightner v. Wike*, 4 S. & R. 205; *Jackson, ex dem. Potter, v. Bailey*, 2 *Johns.* 17; *Powell v. Waters*, 17 *Johns.* 176; *Bowie v. O'Neale*, 5 *Harr. & Johns.* 226; *Arderry v. Commonwealth*, 3 *J. J. Marsh.* 183; *Walker v. Walker*, 16 S. & R. 377; *Boardman v. Reed's Lessee*, 6 *Pet.* 328; *McCully v. Barr*, 17 S. & R. 445; *Pegram v. Isabell*, 2 *Hen. & Munf.* 193.*g*

β (O) Of the *Res Gestæ*.

A difference arising between a bank and an individual as to whether a certain note had been paid, the president of the bank and the individual proceeded to examine the bank books, and during the examination the president declared himself satisfied that the defendant's statement that he had paid the note was correct; held, in an action by the bank to recover on the note, that the declaration of the president was proper evidence for the defendant, as having been made while acting within the scope of his ordinary powers, and being therefore a part of the *res gestæ*.

*Bank of Monroe v. Field*, 2 *Hill*, 245.

When the state of mind, sentiment, or disposition of a person, at a given period, become permanent topics of inquiry, his declarations and conversations being part of the *res gestæ*, may be given in evidence.

*Barthelemy v. The People*, 2 *Hill*, 248, 257, note (b).

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When a party is charged with fraud in a particular transaction, evidence may be given of previous fraudulent transactions between him and third persons; and whenever the intent or guilty knowledge of the party is material to the issue of the case, collateral facts, tending to establish such intent or knowledge, are proper evidence.

*Bottomley v. United States*, 1 Story, R. 135.

As a general rule, the declarations and conversations of the plaintiff are not admissible evidence in favour of his own rights. This is, however, but a general rule, and admits and requires various exceptions. There are many cases in which the party may show his declarations comport with acts in his own favour, as a part of the *res gestæ*.

*The Philadelphia and Trenton Rail Road Company v. Stimpson*, 14 Pet. R. 448.

In an action for enticing away the plaintiff's servant, evidence of the declarations of the servant, at the time of leaving, was admitted to show that he left of his own accord, and for reasons of his own; the declarations made by him at the time of leaving being part of the *res gestæ*.

*Hadley v. Carter*, 8 N. H. Rep. 80.

When several persons are associated together for an illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others.

*American Fur Company v. The United States*, 2 Pet. 258.

When a fraudulent combination has been established, the acts and declarations of one of the parties to it may be proved against the others; but only such acts and declarations as constitute a part of the *res gestæ* ought to be received.

*Apthorp v. Comstock*, 2 Paige, 492.

In an action of trespass for taking horses claimed by the plaintiff, under a sale alleged by the defendant to be fraudulent as against creditors of the vendor, the plaintiff offered evidence to show, that after the sale he directed the seller to take the horses to an inn and get them kept at the plaintiff's expense, and that on the next day he himself told the innkeeper that he owned the horses by virtue of a bill of sale, and would pay for their keeping. Held, that these declarations of the plaintiff were admissible as part of the *res gestæ*.

*Boyden v. Moore*, 11 Pick. 362.

Proof of a distinct indictable offence is admissible in evidence, whenever it forms part of the *res gestæ* of the offence for which the defendant is on his trial.

*State v. Chitty*, 1 Bailey, 379.

Upon a question of boundary, the declaration of a deceased person, who pointed out a line of marked trees, saying it was a known division line, was held to be admissible in evidence as part of the *res gestæ*.

*Van Dusen v. Turner*, 12 Pick. 532.

The declarations of the wife are not evidence against the husband, unless they constitute the injury complained of, or form a part of the *res gestæ*.

*Park v. Hopkins*, 2 Bailey, 408.

## EXCOMMUNICATION.

EXCOMMUNICATION is the highest ecclesiastical censure which can be pronounced by a spiritual judge against a Christian, for thereby he is (a) excluded from the body of the church, and disabled to bring any action, or sue any person in the common law courts.

Co. Litt. 133; Godolph. Repert. 624. (a) By the 33d of the Articles of the Church of England, that person, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken by the whole multitude of the faithful as a heathen and publican, until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto.—It was used by way of punishment only for great and heinous crimes, according to the rule in the *Reformatio Legum*, fol. 80. *Non debet excommunicatio minutis in delictis versari, sed ad horribilium criminum atrocitatem admovenda est, in quibus ecclesia gravissimam infamiam sustinet, vel quod illis evertatur religio, vel quod boni mores pervertantur.* But now the frequent use of excommunication is in cases of contumacy, for not appearing or disobeying sentences, though in the smallest matters, and those oftentimes of a civil nature, which is one of the principal means of bringing a contempt upon it, and yet is the only way which the spiritual court hath to enforce obedience. Gibs. Cod. 1095. || The use of it in cases of mere contumacy is abolished by the statute of 53 G. 3, c. 127, *infra*, and its severities, where it is still allowed, are also mitigated by that statute.—The Druids in Gaul had recourse to the process of excommunication to enforce their jurisdiction, as appears from the account left us by Cæsar. The features of their excommunication have so strong a resemblance to those of the excommunication of later days, that I shall take leave to extract the passage. *Illi [Druides] rebus divinis intersunt, sacrificia publica et privata procurant, religiones interpretantur.—Fere de omnibus controversiis, publicis privatisque, constituunt; et si quod est admissum facinus, si cædes facta, si de hereditate, si de finibus controversia est, iidem decernunt, præmia penasque constituunt. Si quis aut privatus, aut publicus, eorum decreto non steterit, sacrificiis interdicunt. Hæc pœna apud eos est gravissima. Quibus ita est interdictum, si numero impiorum ac sceleratorum habentur; iis omnes decedunt; aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant; neque iis potentibus jus redditur, neque honos ullus communicatur.* COMM. Lib. 4. ||

Excommunication is divided into the greater and less: the greater (a) excludes a man from the communion of the faithful, as well as of the sacraments; the less excludes him from the communion of the sacraments only; but they both equally disable him from bringing any action, &c.

Co. Litt. 134. (a) || The greater excommunication seems to have been formerly the same with the *anathema*; though in later times there was a material difference between them.—See an admirable dissertation upon *Excommunications* and *Interdicts* in the first volume of M. Du Boulay's *Histoire du Droit Public Ecclesiastique François*. ||

Under this head we shall consider,

- (A) In what Cases the Spiritual Court may properly excommunicate.
- (B) In what Cases a Person shall be said to be *ipso facto* excommunicated.
- (C) By whom Excommunication is to be pronounced and certified.
- (D) What Inconveniencies and Disabilities it lays the Party excommunicated under: And herein of his Disability to bring any Action.
- (E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law, and by virtue of the Statute 5 Eliz. c. 23.
- (F) Of Absolving and Assailing a Person excommunicate.

(A) In what Cases the Spiritual Court may properly excommunicate.

It seems agreed, that wherever the spiritual court hath jurisdiction in any (a) cause, and the party refuses to appear to their citation, or after sentence, being admonished, refuses to obey their decree, that he may be excommunicated.

Roll. Abr. 883; 12 Co. 76. (a) That anciently the King's tenants who held *in capite*, and whose attendance was necessary on the person of the king, could not be excommunicated. 2 Inst. 631; Gibs. Cod. 1102.—That a bishop or other peer of parliament may be excommunicated. 7 Mod. 56, &c., The Bishop of St. David's case.

Also it seems, that at common law the *significavit* of an excommunication might be upon a general clause, as *propter contumaciam*, or *de non parendis mandatis ecclesie*; but now, by the 5 Eliz. c. 23, the cause must be set forth in the writ *de excommunicato capiendo* itself, because by that statute the writ is made returnable in B. R., which would be to no purpose if the cause were not set forth in the writ, so as to enable the court to judge thereof.

Salk. 393, 350; Ld. Raym. 586, 618; Gibs. Cod. 1097.

But it was always holden, that the bishop's certificate signifying the excommunication into Chancery, on which the writ of *excommunicato capiendo* issued, ought to comprise the particular cause of the excommunication; so that the court might judge (b) whether it were a matter within their jurisdiction, or not.

14 H. 4, 14 b; Roll. Abr. 883. (b) And therefore the Court of Chancery, for any defect in the certificate, used to grant a *superedeas*; but before the 5 Eliz. c. 23, there were no discharges in B. R. on *excommunicato capiendo*, but where a man was excommunicated pending a prohibition. Salk. 293.

If the excommunication appears to have been by an archdeacon of a peculiar or limited jurisdiction, it ought to appear by the certificate, either expressly, or by implication, that the matter thereof arose (c) within his (d) jurisdiction; otherwise is void.

Roll. Abr. 884, Sterling's case; Roll. Rep. 174, S. C. (c) The defendant was taken upon a *capias excommunicatum*, and because it was not mentioned in the *significavit* that he lived in that diocese at the time of the excommunication, it was therefore adjudged to be uncertain, and the party was discharged. Moor, 467, Beaumont's case; Show. Rep. 17, S. C. cited; Godb. 191, S. P. (d) The defendant was taken upon a *capias excommunicatum*, and the *significavit* was, that he was excommunicated for not answering articles; but it not being shown what these articles were, it was adjudged ill. Roll. Rep. 136, Fox's case.—If a man is excommunicated for an offence, which is pardoned by a general pardon, and this being shown to the bishop, he notwithstanding refuses to absolve him, an action on the case lieth against him. 12 Co. 76.

If the excommunication in a writ of *excommunicato capiendo* is recited to be *pro quibusdam causis subtractionis decimarum sive* (e) *aliorum jurium ecclesiasticorum*, this is too uncertain: for the *alia jura* might be such matters as were out of their jurisdiction, and they ought to show the matter was within their jurisdiction; for of that the king's courts are to be judges, and not they themselves.

Salk. 293, The King and Fowler, adjudged upon such a return to a *habeas corpus*; 1 Ld. Raym. 619, S. C. [(e) *Secus*, if it had been the conjunctive *et*. 2 Atk. 499; Rex v. Turfoot, Ca. temp. Hardw. 314.]

So where in a writ of *excommunicato capiendo*, the recital of the *significavit* was, that he was excommunicated for not paying the costs *in quodam negotio puerorum educationis sive instructionis sine aliquâ licentiâ in eâ parte prius obtentâ*; the writ was quashed for uncertainty, because it might be a teaching to fence or dance, and not letters.

Salk. 294; The Queen v. Hill, 2 Ld. Raym. 818, 1415.

There was a presentment in the spiritual court of the Bishop of Ely against



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the defendant for teaching school\* in Cambridge without a license, by the churchwardens of the parish; whereupon, as the way was there, a citation was fixed up at the church door, for the defendant to come in and answer the charge of the presentment; but he, being a dissenter, and not coming to church, had no notice of the citation; and for his contempt in not coming, he was excommunicated; whereupon he applied to the bishop to get himself assailed, for that it was a writing-school he taught, and so not within the bishop's jurisdiction; but the court refused to assail him, unless he would put in caution to answer such articles, and abide by such sentence, as they should make thereupon: which he was advised not to do, because that would be owning their jurisdiction, and concluding himself to abide by their sentence, and thereupon he moved for a prohibition, and had it, with a special clause to assail him. Mr. Page moved for the prohibition, and insisted, that they could not excommunicate any one for contempt, without showing that the matter itself was within their jurisdiction; and as they could not excommunicate for the original matter, if it were not within their jurisdiction, so neither could they for a contempt to a citation upon that matter; and cited 8 Co. 68, Trollop's case; Doctor and Student; 12 Co. 77; 14 H. 4, 14; 5 Co. 23. And he said, by these books it appears, that, if the bishop refused to assail him, an action on the case would lie against him; but now-a-days, a prohibition was thought the better way; and he said, this presentment being only for teaching school, they could not come after with articles, and charge him with any other matter, as a writing-school, latin-school, or other particular school;† which the court agreed, and said it was like a presentment by a grand jury here, which cannot be altered or changed by articles after; and as the grand jury are upon their oath, so are the churchwardens there; and said, that when articles are given in against any one, the citation ought to be founded upon them; but when it was by presentment, that was a charge and a citation itself, and cannot be after altered by articles; though Serjeant Parker said, he thought this presentment to be only in the nature of a summons, and that it was necessary articles should be drawn up against him after, to charge upon the particulars; but the prohibition with the said clause was granted.

Pasch. 6 Ann., The Queen and Bentley. \* None shall keep a schoolmaster, or teach school, without the bishop's license, 23 El. c. 1, § 6 & 7; 1 Jac. 1, c. 4, § 9, 13, & 14; Car. 2, c. 4, § 11. † For the causes in which an *excommunicato capiendi* may be awarded on the statute, vide stat. 5 Eliz. c. 23, § 13.

[If the writ is in a suit *pro correctione morum*, it is too general. So, for not appearing to answer *certis articulis animæ suæ salutem, morumque correctionem concernentibus*.

Rex v. Thead, 1 Str. 43; Rex v. Munnery, Ibid. 76.

If it is for *slander* or *defamation*, it is certain enough.

Rex v. Keat, 2 Str. 950.]

||So, that the defendant was excommunicated in a cause "of defamation and scandal *merely spiritual*," holden to be sufficient.

Rex v. Payton, 7 T. R. 153.¶

[Two *significavit* were quashed, being only said to be in a cause which came by appeal in a matter merely spiritual. For by Lord Talbot, we are not to lend our assistance, but where it appears clearly they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual. In Fowler's case, it was in causes of ecclesiastical rights, and held not sufficient.

Rex v. Eyre, 2 Str. 1067.]

(B) In what Cases a Person said to be excommunicated.

¶ If the greater, instead of the less, excommunication be pronounced, it is only a ground of appeal, not on which to move to quash the writ.

Rex v. Payton, 7 T. R. 153.¶

(B) In what Cases a Person shall be said to be *ipso facto* excommunicated.

By several (a) acts of parliament, offenders of several kinds are made to incur the punishment of excommunication *ipso facto*.

(a) For the causes of excommunication *ipso facto*, according to the constitutions and canons ecclesiastical of the church of England, vide Godolph. Repert. 629.

And to this purpose it is enacted by 6 E. 6, c. 4, "That if any person whatsoever shall, by words only, quarrel, chide, or brawl in any church or churchyard, that then it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending, that is to say, if he be a layman *ab ingressu ecclesiæ*; and if he be a clerk, from the ministration of his office for so long a time as the same ordinary shall by his discretion think meet and convenient, according to the fault."

[By 27 G. 3, c. 44, no suit shall be commenced in any ecclesiastical court for striking or brawling in any church or churchyard after the expiration of eight calendar months from the commission of the offence.]

And it is further enacted by the said statute, "That if any person shall smite or lay any violent hands upon any other, either in any church or churchyard, that then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon, in any church or churchyard, or shall draw any weapon in any church or churchyard, to the intent to strike another with the same weapon, that then every person so offending, and thereof being convicted by verdict of twelve men, or by his own confession, or by two lawful witnesses before justices of assize, justices of *oyer* and *terminer*, or justices of peace in their sessions, by force of this act, shall be adjudged by the same justices, before whom such person shall be convicted, to have one of his ears cut off, &c., and besides that, every such person to be and stand *ipso facto* excommunicated, as aforesaid."

In the construction hereof the following opinions have been holden :

1. That the statute extends as well to cathedral as parochial churches and churchyards.

Cro. Eliz. 324.

That notwithstanding the words of the statute be expressed, That he who smites another in the church, (a) &c., shall *ipso facto* be deemed excommunicate; yet there ought either to be a precedent conviction of law, which must be transmitted to the ordinary, or the excommunication must be declared in the spiritual court, upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof till he be found guilty upon a lawful trial; also, it must be intended, in the construction of this statute, that the excommunication ought to appear judicially; for otherwise there could be no absolution.

Dyer, 275; Lit. Rep. 149; Hotl. 86, 919; Cro. Eliz.; Vent. 146. (a) [For this second offence in the act, *smiting in a churchyard*, a precedent conviction at law is not necessary, though if there is one, the ordinary may use it as a proof of the fact. For with respect to this, and the first offence in the act, the statute, though it provides a penalty, does not change the jurisdiction. As to the last offence, *malicious striking*

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*with any weapon, &c.*, there must be a previous conviction, and a transmission of the sentence, and a declaration. *Wilson v. Greaves*, 1 Burr. 240; *Wenmouth v. Collins*, 2 Ld. Raym. 850.]

That when the proceedings for the offences against this statute are in the spiritual court, costs may be given *pro expensis litis*, but not *pro damnis*.

Cro. Ja. 462; Hedl. 86, S. P.; 1 Burr. 244.

That he who strikes another in a church, &c., can no way excuse himself, by showing that the other assaulted him.

Cro. Ja. 367.

That (a) churchwardens who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.

Saund. 13; *Hawe v. Planner*, 2 Keb. 124; Lev. 196; Sid. 301; Mod. 168, S. C. (a) Or perhaps private persons. 1 Hawk. P. C. c. 63, § 29.

That if the proceeding be in the temporal courts, by way of indictment, for drawing a weapon in the church, &c.; and it conclude *contra formam statuti*, it must be laid to be, with an intent to strike such a person; for being laid to be *contra formam statuti*, the jury cannot inquire of any other offence than that which comes within the description of the act.

Cro. Eliz. 231, *Penhallo's case*; 4 Leon. 49; Noy, 171, S. C.

That in an indictment upon this statute, for striking in the church, in order to bring the offender within the latter clause of the statute, which subjects him to the loss of an ear, &c., it must be shown that the striking was with a weapon.

Cro. Eliz. 464.

So it hath been holden, that if a man take up a stone in the churchyard, and offer to throw it at another, or having a hatchet or axe in his hand, offer to strike another therewith, that this is not an offence within this part of the statute; for these are not such weapons as may properly be said to be drawn, as a sword, dagger, &c.

Dalton's Justice, c. 23, f. 49, said to have been so holden by two justices. Comp. Incumb. 347, cited.

Also, two persons committed to prison by certain justices of the peace for disturbing a minister in his office, were discharged upon a *habeas corpus*, by the Court of King's Bench, for that their commitment was too general, not showing wherein they disturbed, but only that they *per apertum factum* disturbed, &c., not showing the particular fact whereby they did disturb, viz., by brawling, fighting, or otherwise, there being several punishments to each; but the court bound them to their good behaviour for a year.

3 Keb. 803; *Rex v. Nicols and Robins*; Comp. Incumb. 347, S. C., cited.

By the 3 Ja. 1, c. 5, § 11 and 12, it is enacted, "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, and as if such person had been so denounced and excommunicated according to the laws of this realm, until he or she shall conform, &c., and that every person sued by such person so disabled, may plead the same in disabling of such plaintiff, as if he or she were excommunicated by sentence in the ecclesiastical court, except the action of such recusant do concern some hereditament or lease, which is not to be seized into the king's hands, by force of some law concerning recusancy."

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In the exposition hereof it hath been holden,

1. That a plea in disability, pursuant to this statute, ought to show before what justices the conviction was, that the court may know where to send for a certificate thereof, if it be denied; and that the record itself, or at least a certificate thereof, ought immediately to be produced.

Noy, 89; Latch, 176; 3 Lev. 333.

2. That if after such a plea it be certified, that the plaintiff have conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapse and be convict again, the defendant cannot plead the same disability a second time.\*

Hedl. 176. \* Why not in the nature of a plea, after the last continuance, if the plaintiff hath by his own act rendered himself incapable?

That it must appear, either from the conviction itself or by proper averments, that the plaintiff is convicted of popish recusancy, because no recusants, except popish ones, are within the said clause; but this is sufficiently set forth, by alleging, that the plaintiff being *popalis recusans* was indicted and convicted *secundum formam statuti, &c.*

5 Lev. 333.

Also it is holden by (a) some, that all popish recusants convict may be taken up by the writ *de excommunicato capiendo*, and that they are not to be admitted as competent witnesses in any cause. But by (b) Hawkins, this seems to be a construction over-severe; for inasmuch as this, like all other penal statutes, ought to be construed strictly, and the words thereof are no more than that such persons shall stand disabled, &c., as persons lawfully excommunicate, &c., and the purport thereof may be fully satisfied by the disability to bring any action; it seems to be too rigorous to carry them farther.

(a) 2 Bulst. 155. (b) Hawk. P. C. c. 12, § 6.

By the 25 E. 1, c. 4, it is enacted, "That all archbishops and bishops shall pronounce the sentence of excommunication against all those that by word, deed, or counsel, do contrary to the charters, or that in any point break or undo them; and that the said curses be twice a year denounced and published by the prelates aforesaid."

[The sentences pronounced at this time, and Ann. 37, H. 3, are inserted at large in Gibs. Cod. tit. 1, c. 1, p. 2, 4.] ¶ But these sentences of excommunication denounced in parliament in the times of H. 3, E. 1, &c., against the infringers of *Magna Charta*, and other liberties of the church and people, were not properly excommunications, but only threatenings of the sentence, and declarations that the persons offending deserved to be accused and excommunicated by the bishop. For an excommunication, saith Fitzherbert, [N. B. 64 F.] must grow upon a special suit against a man, either *ex officio* or by a party, whereupon a *significavit* may be granted.¶

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THE sentence of excommunication can only be pronounced by the bishop, or other person in holy orders, being a master of arts at least: also, the priest's name pronouncing such sentence is to be expressed in the instrument issuing under seal out of the court.

Gibs. Cod. 1095.

Excommunication must be certified by the bishop of the diocese, whose proper subject the party is, and cannot be certified by his commissary (c) or official; the reason whereof, according to the (d) civilians, is, because no person inferior to a bishop can call in the secular arm, by the laws of the church; but my Lord Coke (e) assigns the reason of it to be, because no

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certificate of excommunication by any shall disable one, but the certificate of him to whom the court may write to absolve the party excommunicated.

Co. Litt. 133; Ro. Abr. 884. (c) [By the ancient common law, as was said by Hankford, 11 H. 4, 64 a, a commissary might certify excommunication; and that he was restrained by parliament.] (d) *Lindw. de Sent. excomm. c. Præterea. ver. Prælatorum.* (e) 8 Co. 68.

But the vicar-general, *episcopo in remotis agente*, or the guardian of the spiritualities, *vacante sede*, may do it, (a) either by direct certificate, that the person is excommunicate, or by letters testimonial, reciting the entry thereof in the register, and attesting that such entry is there found.

Co. Litt. 133; F. N. B. 62 N. (a) Vern. 222; 3 Keb. 60, 69.

[And although the bishop be in his diocese, yet the certificate of the vicar-general, by his letters unto the Chancery, reciting that the bishop is *in remotis agend.*, is good, and shall not be traversed.

F. N. B. 62, N.]

So, a parson excommunicated by a commissary, official or archdeacon, who derive their jurisdiction from the bishop, may be certified excommunicated by the bishop himself. (b)

8 Co. 63; Ro. Ab. 434; Reg. 65. (b) [But in this case the rule in the register is, that the excommunication must be said in the writ to be by the authority of the bishop himself.]

Also, the bishop, after election, though before consecration, may certify excommunication.

F. N. B. 62, N.

[The chancellor of the university of Oxford may certify excommunication of persons within his jurisdiction.

F. N. B. 64, C. But *quæ*.

Whether the court of delegates have power to excommunicate, (though admitted in modern practice,) was formerly questioned. Where they do, a certificate of it under their seal must be produced.

2 Bulstr. 4; 2 Ro. Abr. 233; Lutw. 17.]

|| An excommunication may be certified by letters testimonial, as well as by direct certificate. But in both cases the certificate must be pleaded *sub sigillo*, as well in equity as at law.

1 Vent. 222; Mitf. Eq. P. 186.]

In times of popery, excommungement certified by the pope, or delegates commissioned by him, did not disable the plaintiff to sue, &c., because the court had no person to whom they could write to have him assoiled.

16 E. 3, 31; 14 H. 4, 14; Ro. Abr. 883.

The court will not receive the certificate of excommunication of one bishop from another, because they must have the certificate from the bishop whose proper subject the party was; and he might have been assoiled by his own ordinary, after the first certificate to the bishop.

8 Co. 63; F. N. B. 65, A.

Nor will they receive a certificate of a bishop deceased, because the party may stand assoiled by the present ordinary, after the decease of the bishop who has certified; and the court will not (c) receive any certificate but from such person to whom they can write to assoil.

Bro. Excom. 21; Co. Litt. 134. (c) Ro. Abr. 883.

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(C) By whom Excommunication is to be pronounced.

[But, when the bishop hath certified the excommunication under seal, his death will not vacate the certificate.

Co. Litt. 134.]

The certificate ought to be directed, either to the court, or at least *universis S. Matris ecclesiae filiis*, and (a) ought to contain the day of the excommunication, [that is, the day on which the excommunication was published in the church, for the writ *de excommunicato capiendo* cannot be awarded till the party hath lain under the sentence forty days, (b) which are to be reckoned from that day.

8 Co. 63. (a) Ro. Abr. 883; Lindw. 150; Swinb. 309. (b) [For within forty days it was competent for him to appeal to the Court of Rome; and the appeal would operate as a *supersedeas* to the process, and liberate the party. 20 H. 6, 25 a, b.]

The certificate must signify, that the person was excommunicated by special name, and in a special suit against him *ex officio*, or by the party; for otherwise he doth not incur the sentence of the greater excommunication.

F. N. B. 64, F.

The defendant was excommunicated for not paying his proportion of a rate made for repairing the church of D in Suffolk. It was moved to supersede the writ, 1st, For that it was not shown that the defendant was commorant within the diocese at the time of the excommunication pronounced, Moor, 467; Sir T. Jones, 89. 2dly, Because there was no addition of the defendant in the writ. On the other side it was answered, (as to the first objection,) that the defendant in the libel was said to be of D in Suffolk, which was the same parish where the church was, and it should not be intended that, after the libel, he removed from thence: but, if he did remove, his flying from the process of the court should not mend his case, for then the party by his own act, and by turning his back upon justice, might avoid such proceedings. As to the want of addition, this was said to be only necessary in the causes of excommunication mentioned in the statute of 5 Eliz. c. 23, for which reason it was true, that for want of addition, there could be no proceeding against him by way of proclamation with pains and penalties for not appearing; but still as the matter was plainly of ecclesiastical, cognisance, (viz.,) the repairing of the church, the excommunication was good, and so was Cro. Car. 196; Hughes's case, T. Jones, 89; The Inhabitants of Bermondsey, 1 Show. 16; Johnson's case, 1 Salk. 293; The King v. Fowler.—The chancellor disallowed both the exceptions.

Rex v. Burrard, 1 P. Wms. 435.

[Mr. Keith, minister of Mayfair chapel, which was a chapel of ease to St. George's parish, Hanover square, of which the plaintiff was rector, being cited into the Bishop of London's court for officiating as a clergyman of the church of England without being licensed by the bishop, and having been denounced excommunicate forty days, for contumacy and contempt of the ecclesiastical laws, upon the bishop's certificate into Chancery, the writ of *significavit* issued, which it was moved to quash.—Lord Hardwicke, Chancellor.—This is a case of as great consequence to the good government and discipline of the church as can possibly happen. I can take notice of nothing but what appears on the *significavit*; (c) and the question before me is, whether there is sufficient to warrant the court to issue the writ of *excommunicato capiendo*? Now, if this gentleman is out of the jurisdiction, he is not without remedy, for he may go to a court of common law after sentence, as well as before. The first and material exception is, that

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the particular cause of the excommunication ought to be set forth. It is not necessary for the ecclesiastical court to show they have rightly proceeded ; for if they have not, you have a remedy by appealing to higher ecclesiastical jurisdiction. Here is certainly a description of the principal cause, and if some of the matters mentioned are within the jurisdiction, it is sufficient. It is not like the case of *The King and Fowler*, which was held uncertain, as it was in the disjunctive, *tithes or other ecclesiastical dues*, so that it might be ecclesiastical dues only : if it had been *tithes AND other ecclesiastical dues*, it would have been well enough. As to preaching, there is no pretence for his doing it without license from the bishop : the same as to the administration of the sacrament, and celebration of marriage ; for the canons of 1603, confirmed by act of parliament, are express as to that matter. Here, the ground of the contumacy is described specially, which is more than necessary ; for where the cause is sufficient, it may be set forth generally. The second exception is, that it is not mentioned in what manner Keith officiated, or performed divine service, and therefore it might be in his own house, or a private chapel. But the word *officiating* ought not to be so construed ; for reading prayers or a sermon in a private family, is not performing divine service. *Divine service* is the expression made use of in several acts of parliament, particularly in the act of uniformity, 13 and 14 Car. 2, c. 4, § 27, relating to the service in Welsh : in several other acts of parliament that direct the reading of proclamations, the order is, that it be read after *divine service*. The word *officiate* relates to his office as a presbyter, which must mean his doing it in a public manner. It is not indeed necessary for a minister to have a license from the bishop of the diocese for every particular case, but yet the bishop may suspend him wholly where he is irregular, till he submits to perform his duty properly : and it is not here a description of the case, but of the contempt only, for which he has excommunicated him. The fourth exception is, That it is not said at the time of the excommunication he officiated within the diocese of London, and therefore he has been cited out of the diocese contrary to the statute of 23 H. 8, c. 9. It is not averred, indeed, that he was resident in the diocese at the time of the excommunication pronounced, but being said in the libel to be in the diocese, I will not presume he was not commorant when the monition issued ; and to this purpose the case of *The King v. Burrard*, 1 P. Wms. 435, was properly cited. (d) There is another answer to this objection ; that a man may be resident in one diocese, and come into another and commit the offence charged upon him in the *significavit*, and this, for the purpose of being cited, is a residence sufficient, and he may be presented in the diocese where he committed the offence ; and unless he was so considered, there would be no remedy. See *Dr. Blackmore's case*, in *Hardr.* 421. The fifth exception is, That he, who pronounced the sentence of excommunication, is not said to be a person in holy orders. The averment in the *significavit* is sufficient, for the words are, *a person lawfully authorized*, which take in the capacity of the person doing it. The sixth exception is, That it doth not appear when the excommunication was pronounced. Now, the *significavit* only avers, that he continued contumacious, but the *terminus a quo*, and the *terminus ad quem*, are never set forth. The last exception was, That Mr. Keith is within the toleration act, the 1st W. & M. c. 18. The act of toleration was made to protect persons of tender consciences, and to exempt them from penalties ; but to extend it to clergymen of the church of England, who act contrary to the rules and discipline of the

(D) What Inconveniencies, &c., it lays the Party under.

church, would introduce the utmost confusion. All the exceptions therefore must be overruled.

Dr. Trebec v Keith, 2 Atk. 498. (c) The word *significavit* is here used to denote the bishop's certificate. It is sometimes used to denote the writ *de excommunicato capiendo* itself. In this latter sense it seemeth to be more properly applied; the writ having received its name from this same word in the beginning of it. *Significavit nobis venerabilis pater N, &c.* The third exception was, that it is not said he has performed divine service since the monition. But to this his lordship is not reported to have spoken. (d) Rex v. Payton, 153, S. P.]

If an ecclesiastical judge excommunicate without malice, (a) for disobedience of the order of his court, made in a matter in which the court has jurisdiction, he is not liable to an action on the case, although the proceedings may be irregular, and set aside on appeal.

Ackerley v. Parkinson, 3 Maule & S. 411. (a) Since 53 G. 3, c. 127, excommunication could not issue for such a cause. See letter (E).

(D) What Inconveniencies and Disabilities it lays the Party excommunicated under: And herein of his Disability to bring any Action.

A PERSON excommunicated is thereby disabled to (b) be a witness in any cause, cannot be attorney or procurator for another, is to be turned out of church by the churchwardens, and not to be allowed Christian burial.

Giba. Cod. 435, 1096, 1097. (b) But such a person is entitled to the benefit of clergy. Bro. Clergy, 20.—And may contract marriage. Godolph. Repert. 626.

The votes of persons excommunicated have been frequently objected to at elections, but the decisions of the House of Commons do not appear. 8 Journals, 118; 13 Journ. 42. According to *Bracton*, *Excommunicato interdictur omnis actus legitimus ita quod agere non potest, &c.*, and the testimony of such persons was formerly rejected in courts of law, and has been considered inadmissible by authors, on the ground of a *dictum* of Lord Coke, (2 Bulstrode's Rep. 155.) But all doubt appears now to be removed as to their capacity to vote by the 53 G. 3, c. 127, § 2, 3, which enacts, that no sentence of excommunication shall be pronounced by ecclesiastical courts in cases of contempt or disobedience to their order, and that persons excommunicated shall in no case incur any civil penalty or disability whatever.

Dodd's Doubtful Questions in the Law of Elections, p. 39.

An excommunicate person is disabled to sue or commence any action; but such disability cannot be pleaded (c) after a general imparlance, for thereby the defendant admits him a good plaintiff.

9 E. 4, 36; Co. Litt. 133; 8 Co. 63; Roll. Abr. 883. (c) Placita, Gen. 10; Latch, 179; Lutw. 19. See tit. *Abatement*, vol. i. p. 4, 5.

|| If the bishop himself be sued, and he plead an excommunication by himself, or his commissary, although it be for another cause than is then in question, it shall not disable the plaintiff, because the bishop himself is party.

8 Co. 68.||

When excommunication is pleaded, the bishop's letter under his seal, witnessing the excommunication, must be shown; and though the plaintiff cannot deny the plea, yet the writ shall not abate, but the defendant *eat inde sine die*, because the plaintiff, upon producing his letters of absolution, shall have a resummons or reattachment. (d)

Litt. § 207; 8 Co. 69, 626; Co. Litt. 134; 3 Lev. 208, 240. (d) || So, in equity, he may, in such case, sue out fresh process, and compel the defendant to answer the bill. Mitf. Eq. Pl. 187.||



(D) What Inconveniencies, &c., it lays the Party under.

If in an appeal of murder, &c., the defendant pleads excommunication in the plaintiff in disability, the appellee shall be bailed until the plaintiff purchases letters of absolution, and then he must plead in chief; for if the defendant should be kept in prison till the plaintiff were absolved, he might be a prisoner for life.

3 Assize, pl. 12; 2 Hawk. P. C. 114.

Excommunication is a good plea to an executor or administrator, though he sue *in autre droit*, for an excommunicate person is excluded from the body of the church, and incapable to lay out the goods of the deceased to pious uses: besides, it is one of the effects of excommunication, that he cannot be a procurator or attorney for any other person, and therefore cannot represent the deceased. (a)

43 E. 3, 13; Co. Litt. 134; Theol. 11. ¶ Vide *contr.* 14 & 21 H. 6, cited by Cosens in his Apology from a little treatise printed by Berthelet in the time of H. 8. ¶ (a) [But an excommunicated person may be appointed executor, and is capable of a legacy: for the sentence will not annul the executorship, or quite destroy the action, but only suspend it till absolution. God. O. L. 37, 38; Swinb. 367. ¶ Excommunication is no plea to the next friend of an infant. Pr. Reg. Ch. 278.]

Excommunication is no plea on a *qui tam*, because it is for example; and the statute having given the informer an ability to sue, and not excepted excommunicated persons from the liberty of informing, he is enabled to sue by the statute, notwithstanding the censures of the church.

2 Co. 61.

When a prohibition is brought against the bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause of such excommunication shown; this is no good plea; for, in such case, it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. And the plea of excommunication in this case is *exceptio ejusdem rei cujus petitur dissolutio*.

28 E. 3, 97.

If an action be brought by the bailiffs and commonalty of a corporation, the defendant shall not plead excommunication in the bailiffs, because they sue as a corporation, and a corporation cannot be excluded from the communion of the visible church.

30 E. 3, 15; Co. Litt. 134.

When excommunication is pleaded in the plaintiff, he shall not reply, that he has appealed from the sentence, for the sentence is in force until it is repealed; and whilst it is in force, he cannot appear in any of the courts of justice; but he may reply, he is absolved, for then his disability is taken away.

Bro. *Excommunication*, 3; 3 Bulst. 72; 20 H. 6, 25; Placita Gen. 10, 72.

¶ But the absolution must be by the bishop, who excommunicated, or by the archbishop upon appeal.

Moor, 775.

The plea of excommunication must state the precise time when the party was excommunicated.

Baker v. Gough, Cro. Ja. 82.]

[A party in custody on an *excommunicato capiendo* is entitled to the benefit of the rules.

Rex v. Buckland, 1 Str. 413.]

(E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law and by virtue of the Statute 5 Eliz. c. 23.

It is said that the writ *de excommunicato capiendo* is a liberty or privilege peculiar to the church of England, above all the realms in Christendom; for though the assistance of the secular arm hath ever been afforded to the church in most other Christian countries as well as this, yet in no instance is it perhaps so surely and so effectually reached out as by the execution of this writ, which is (a) *debitum justitie*, and not made to depend upon the pleasure of the prince.

Gibs. Cod. 1102, cited from Dr. Cosen's Apol. fol. 8. (a) But in 2 Inst. 623, 631, it is expressly said, that *breve regis de excommunicato capiendo de gratia regis procedit*.

The writ of *excommunicato capiendo* issues out of Chancery, and is founded on the bishop's certificate, signifying the excommunication, and at common law was only returnable into that court; so that for any uncertainty or defect in the writ, the party could only be discharged in Chancery.

Fitz. N. B. 149; Salk. 290.

A warrant issued in pursuance of a writ *de contumace capiendo* stated that the defendant was attached for non-payment of costs, in a cause of appeal and complaint of nullity, lately depending in the Arches Court of Canterbury; held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to show that it was one apparently within the jurisdiction of the ecclesiastical court.

Rex v. Dugger, 5 Barn. & Ald. 791.

But now by the 5 Eliz. c. 23, entitled, *An act for the due execution of the writ de excommunicato capiendo*, reciting, "Forasmuch as divers persons offending in many great crimes and offences, appertaining merely to the jurisdiction and determination of the ecclesiastical courts and judges of this realm, are many times unpunished for lack and want of the good and due execution of the writ *de excommunicato capiendo*, directed to the sheriff of any county, for the taking and apprehending of any such offenders, the great abuse whereof, as it should seem, hath grown, for that the said writ is not returnable in any court that might have the judgment of the well executing and serving the said writ, according to the contents thereof; but hitherto hath been left only to the discretion of the sheriffs and their deputies, by whose negligence and defaults for the most part the said writ is not executed upon the offenders as it ought to be, by reason whereof such offenders be greatly encouraged to continue their sinful and criminous life, much to the displeasure of Almighty God, and to the great contempt of the ecclesiastical laws of this realm.

"§ 2. Wherefore, it is enacted, That every writ of *excommunicato capiendo* that shall be granted and awarded out of the High Court of Chancery against any person or persons within the realm of England, shall be made in the time of term, and returnable before the queen's highness, her heirs and successors, in the court commonly called the King's Bench, in the term next after the *teste* of the same writ, and the same writ shall be made to contain, at the least, twenty days between the *teste* and the return thereof; and after the same writ shall be so made and sealed, that then the said writ shall be forthwith brought into the said Court of King's Bench, and there, in the presence of the justices, shall be opened and (b) delivered of (c) record to the sheriff or other officer, (d) to whom the serving and execution thereof shall appertain, or to his or their deputy or deputies; and if afterwards it shall or may appear to the justices of the same court for the time

(E) Of the Proceedings of *Excommunicato capiendo*.

being, that the same writ so delivered of record be not duly returned before them at the day of the return thereof, or that any other default or negligence hath been used or had in the not well serving and executing of the said writ, that then the justices of the said court shall and may, by authority of this act, assess such amercement upon the said sheriff or other officer, in whom such default shall appear, as to the discretion of the said justices shall be thought meet and convenient; which amercement so assessed shall be estreated into the Court of Exchequer as other amercements have been used.

(b) That the precise form of the statute must herein be observed, and that the writ must be brought and openly delivered in court. Cro. Ja. 567. (c) That the writ must be enrolled and delivered to the sheriff in convenient time, Cro. Car. 583, Packer's case; Vent. 338, S. P., and the prisoner may be discharged on motion, as well as by pleading this matter, at the return of the *habeas corpus*, and vide Sid. 285.—But, where for such a fault the court refused to discharge the prisoners, or to bail them, because they were dangerous persons, and refused to take the oath of allegiance, vide Sid. 165. Also, upon the construction of this clause of the statute, it hath been holden, 1. That one taken on a writ of *excommunicato capiendo* cannot come into B. R. but by *habeas corpus*; and if he be brought in before the writ is returnable, he shall not be allowed to plead, or move to quash the writ. 2. The writ of *excommunicato capiendo* recites the *significavit* which is in Chancery, but the writ is brought into B. R. and is enrolled there before it goes to the sheriff, which enrolment is to inform the court, that at the return of the *excommunicato capiendo* they may award farther process, as the case requires. 3. If by the recital of the *significavit* it appears that there was no cause for the writ, the Court of King's Bench may quash it, and the Court of Chancery cannot, though the *significavit* be there. Salk. 294. [It was formerly doubted, whether after the writ had been issued out of Chancery, and brought into the Court of B. R. and there delivered to the sheriff, but not actually returned into B. R., the Court of Chancery, on a plain error appearing, could supersede it. Rex v. Burrard, 1 P. Wms. 435. But it was determined by Lord Hardwicke, that after the return of the writ is out, the Court of Chancery cannot, on a petition to quash the writ, do any thing in it, as they have no authority; for the Court of B. R. have the cognisance of it, and they can compel the sheriff to return it, and the application to quash it must be to them. If indeed the writ issue in the vacation, and be not yet returnable, (for it must be returned on one of the return-days in the term,) the Court of Chancery will give relief and discharge the party out of custody. *Ex parte* Little, 3 Atk. 479. But, if the writ issued from the Court of Chancery be opened and enrolled in B. R., and on exceptions taken, a rule be made for the prosecutor to show cause why the delivery of the writ to the sheriff should not be stayed; and before that can be done, the return be out, another writ may be sued out from Chancery, but not from B. R. Rex v. Eyre, 2 Str. 1189. After a writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it superseded; for the Court said, they could judge of it by the entry; and since it appeared the defendant could not be legally detained upon it, if he was taken, it was proper to supersede it, to prevent him from being restrained of his liberty contrary to law: that the intent of this statute in directing the writ to be delivered in open court, was to apprise the court of the nature of the cause; that this was now to be considered as a writ that *improvidè emanavit*, and they were not to wait till the return, till all the inconveniencies, which they should have prevented by not issuing the writ, had happened. Rex v. Theed, 1 Str. 43; 10 Mod. 350, S. C. (d) The words "*other officers*" in the statute mean bailiffs of liberties, or the coroner, who is the proper officer to execute process, where the sheriff is incapacitated: therefore, if one who is a prisoner in the Fleet be excommunicated, the Court of Chancery cannot order the cursitor to direct the writ of *excommunicato capiendo* to the warden of the Fleet, the same being a *viscountiel* writ; but the writ must be directed to the sheriff, who may return a *non est inventus* into the King's Bench, upon which return the court will grant a *habeas corpus* to bring up the prisoner, and there charge him with an *excommunicato capiendo*. Strudwicke's case, 3 P. Wms. 53.]

"§ 3. It is further enacted, That the sheriff, or other officer, to whom such writ of *excommunicato capiendo*, or other process by virtue of this act shall be directed, shall not in any wise be compelled to bring the body of such person or persons as shall be named in the said writ or process into the

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said court of King's Bench, at the day of the return thereof, but shall only return the same writ and process thither, with declaration briefly, how and in what manner he hath served and executed the same, to the intent that thereupon the said justices may then further proceed, according to the tenor and effect of this present act.

“§ 4. And if the sheriff or other officer, to whom the execution of the said writ shall so appertain, do or shall return, that the party or parties named in the said writ cannot be found within his bailiwick, that then the said justices of the King's Bench for the time being, upon every such return, shall award one writ of *capias* against the said person or persons named in the said writ of *excommunicato capiendo*, returnable in the same court in the term time, two months at least next after the *teste* thereof, with a proclamation to be contained within the said writ of *capias*, that the sheriff, or other officers, to whom the said writ shall be directed in the full county court, or else at the general assizes or jail-delivery to be holden within the said county, or at a quarter sessions to be holden before the justices of the peace within the said county, shall make open proclamation, ten days at least before the return, that the party or parties named in the said writ shall, within six days next after such proclamation, yield his or their body or bodies to the prison of the said sheriff, or other such officer, there to remain as a prisoner, according to the tenor or effect of the first writ of *excommunicato capiendo*, upon pain of forfeiture of ten pounds; and thereupon after such proclamation had, and the said six days past and expired, then the said sheriff or other officer, to whom the said *capias* shall be directed, shall make return of the same writ of *capias* into the said Court of the King's Bench of all that he hath done in the execution thereof, and whether the party named in the said writ have yielded his body to prison, or not.

“§ 5. And if upon the return of the said sheriff it shall appear, that the party or parties named in the said writ of *capias*, or any of them, have not yielded their bodies to the jail and prison of the said sheriff, or other officer, according to the effect of the same proclamation, that then every such person, that so shall make default, shall, for every such default, (a) forfeit to the queen's highness, her heirs and successors, ten pounds, which shall likewise be estreated by the said justices, into the said Court of Exchequer, in such manner and form as fines and amercements there taxed and assessed are used to be.

(a) This statute doth not take away or affect the *excommunicato capiendo* at common law, but in the particular cases therein mentioned gives a greater penalty to enforce it; and therefore the writ doth not only issue upon excommunication in any other cases, but (as hath been often adjudged) though a *capias* with proclamations and penalties go forth in a matter not within this statute, and the person be thereupon imprisoned, and pray to be discharged, because the matter for which he was excommunicated (though of a spiritual nature) is not within this statute, yet nothing shall be discharged but the penalties, and (without any new writ obtained) the excommunication and imprisonment may remain as at common law, and not be discharged but by absolution in due form. Gibbs. Cod. 1106; but for this vide Cro. Car. 197, 199; Ro. Abr. 175; Jon. 226; Latch, 174, 204; 2 Jon. 89; Show. 17; 3 Mod. 42, 43; Skin. 167; Vern. 24; Salk. 294; 7 Mod. 56, 117.

“§ 6. And thereupon the said justices of the King's Bench shall also award forth one other writ of *capias* against the said person or persons that so shall be returned to have made default, with such like proclamation as was contained in the first *capias*, and a pain of 20*l.* to be mentioned in the second writ and proclamation; and the sheriff or other officer, to whom the said second writ of *capias* shall be so directed, shall serve and execute the

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said writ in such like manner and form as before is expressed for the serving and executing of the said first writ of *capias*; and if the sheriff or other officer shall return upon the said second *capias*, that he hath made the proclamation according to the tenor and effect of the same writ, and that the party hath not yielded his body to prison, according to the tenor of the said proclamation, that then the said party, that so shall make default, shall for such his contempt and default, forfeit to the queen's highness, her heirs and successors, the sum of twenty pounds, which said sum of twenty pounds the said justices of the King's Bench for the time being shall likewise cause to be estreated into the said Court of Exchequer, in manner and form aforesaid.

"§ 7. And then the said justices shall likewise award one other writ of *capias* against the said party, with such like proclamation and pain of forfeiture as was contained in the said second writ of *capias*, and the sheriff or other officer, to whom the said third writ of *capias* shall be so directed, shall serve and execute the said third writ of *capias*, in such like manner and form as before in this act is expressed and declared, for the serving and executing of the said first and second writs of *capias*; and if the sheriff or other officer, to whom the execution of the said third writ shall appertain, do make return of the said third writ of *capias*, that the party upon such proclamation hath not yielded his body to prison, according to the tenor thereof, that then every such party for every such contempt and default shall likewise forfeit to the queen's majesty, her heirs and successors, other 20*l.*, which sum of 20*l.* shall likewise be estreated into the said Court of Exchequer, in manner and form aforesaid; and thereupon the said justices of the King's Bench shall likewise award forth one other writ of *capias* against the said party, with like proclamation and like pain of forfeiture of 20*l.*, and that also the said justices shall have authority by this act infinitely to award such process, with such like proclamation and pain of forfeiture of 20*l.* as is before limited against the said party that so shall make default in yielding his body to the prison of the sheriff, until such time as by the return of some of the said writs before the said justices it shall and may appear, that the said party hath yielded himself to the custody of the sheriff or other officer, according to the tenor of the said proclamation, and that the party, upon every default and contempt by him made against the proclamation of any of the said writs so infinitely to be awarded against him, shall incur like pain and forfeiture of 20*l.*, which shall likewise be estreated in manner and form aforesaid.

"§ 8. And be it further enacted by the authority aforesaid, That when any person or persons shall yield his or their body or bodies to the hands of the sheriff or other officer, upon any of the said writs of *capias*, that then the same party or parties, that shall so yield themselves, shall remain in the prison and custody of the said sheriff or other officer, without (a) bail, baston, or mainprize, in such like manner and form, to all intents and purposes, as he or they should or ought to have done, if he or they had been apprehended and taken upon the said writ of *excommunicato capiendo*.

(a) By the 1 E. 3, c. 8, persons excommunicate, taken at the request of the bishop, are expressly held to be irreplevisable; but it hath been held, that the Court of King's Bench may, as well before as since this statute, bail a person taken upon *excommunicato capiendo*. Bulst. 122.—But where the court refused in such a case to bail the bishop of St. David's, vide 7 Mod. 61. [It is a commitment in execution, and therefore it seems the court can have no power to bail. 1 Show. 16.]

"§ 9. And that if any sheriff or other officer, by whom the said writs of

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*capias*, or any of them, shall be returned, as is aforesaid, do make an untrue return upon any of the said writs, that the party named in the said writs hath not yielded his body upon the said proclamations, or any of them, where indeed the party did yield himself, according to the effect of the same, and that then every such sheriff or other officer, for every such false and untrue return, shall forfeit to the party grieved and damnified by such false return, the sum of 40*l.*; for the which sum of 40*l.*, the said party grieved shall have his recovery and due remedy by action of debt, bill, plaint, or information, in any of the queen's courts of record; in which action, bill, plaint, or information, no essoign, protection, or wager of law, shall be admitted or allowed for the party defendant.

"§ 10. Saving and reserving to all archbishops and bishops, and all others, having authority to certify any person excommunicated, and like authority to accept and receive the submission and satisfaction of the said person so excommunicated in manner and form heretofore used, and him to absolve and release, and the same to signify, as heretofore it hath been accustomed, to the queen's majesty, her heirs and successors, into the High Court of Chancery, and thereupon to have such writs for the deliverance of the said person so absolved and released from the sheriff's custody or prison, as heretofore they or any of them had, or of right ought to or might have had; any thing in this present statute specified or contained to the contrary hereof in anywise notwithstanding.

"§ 11. Provided always, That in Wales, the counties palatine of Lancaster, Chester, Durham, and Ely, and in the Cinque Ports, being jurisdictions and places exempt, where the queen's majesty's writ doth not run, and process of *capias* from thence not returnable into the said Court of the King's Bench, after any *significavit*, being of record in the said Court of Chancery, the tenor of such *significavit* by *mittimus* shall be sent to such of the said head officers of the said country of Wales, counties palatine and places exempt, within whose offices, charge, or jurisdiction, the offenders shall be resiant, that is to say, to the chancellor or chamberlain for the said counties palatine of Lancaster and Chester, and for the Cinque Ports to the lord warden of the same, and for Wales and Ely, and the counties palatine of Durham, to the chief justice or justices there; and thereupon every of the said justices and officers, to whom such tenor of *significavit* with *mittimus* shall be directed and delivered, shall, by virtue of this estatute, have power and authority to make like process to the inferior officer and officers, to whom the execution of process there doth appertain, returnable before the justices there, at their next sessions or court, two months at least after the *teste* of every such process; so always as in every degree they shall proceed in their sessions and courts against the offenders, as the justices of the said Court of King's Bench are limited, by the tenor of this act, in term-times to do and execute.

"§ 12. Provided also, and be it enacted, That any person, at the time of any process of *capias* aforementioned awarded, being in prison, or out of this realm, in the parts beyond the sea, or within age, or of *non sane memorie*, or woman covert, shall not incur any of the pains or forfeitures aforementioned, which shall grow by any return or default happening during such time of nonage, imprisonment, being beyond the sea, or *non sane memorie*; and that by virtue of this statute, the party grieved may plead every such cause or matter in bar of and upon the distress or other process, that shall be made for levying of any of the said pains or forfeitures.

(E) Of the Proceedings of *Excommunicato capiendo*.

"§ 13. And that if the offender, against whom such writ of *excommunicato capiendo* shall be awarded, shall not in the same writ of *excommunicato capiendo* have a sufficient and lawful (a) addition, according to the form of the estatute of (b) *primo* of Henry the Fifth, in cases of certain suits, whereupon process of *exigent* is to be awarded, or if in the *significavit* (c) it be not contained, that the excommunication doth proceed upon some cause or contempt of some original matter of heresy, or refusing to have his child baptized, or to receive the holy communion, as it is now commonly used to be received in the church of England, or to come to divine service now commonly used in the said church of England, or errors in matters of religion or doctrine now received and allowed in the said church of England, incontinency, usury, simony, perjury in the ecclesiastical court, or idolatry, that then all and every pains and forfeitures limited against such person excommunicate by this statute, by reason of such writ of *excommunicato capiendo*, wanting sufficient addition, or of such *significavit*, wanting all the causes aforementioned, shall be utterly void in law, and by way of plea to be allowed to the party grieved.

(a) That if the party excommunicated has no addition in the writ, he may be discharged on motion. Salk. 294; Show. Rep. 16. But where the parties were named A B, merchant, C D, gent., E F, yeoman de paroch. de D, this was held well, though it was objected, that the addition of the parish should refer to him only who was last mentioned. The King and Barnes, 3 Mod. 42; Skin. 176, S. C. adjudged. (b) This statute (1 H. 5, c. 5) enacts, That in every original writ of actions personal, appeals, and indictments in which the *exigent* shall be awarded in the names of the defendants in such original writs, appeals, and indictments, additions shall be made of their estate or degree or mystery, and the towns, hamlets, or places, and the counties where they were or be conversant, &c. (c) [Before this statute, it was not necessary to show the cause in the writ, only in the bishop's certificate, but it was sufficient to say the party was excommunicated for manifest contumacy. Per Holt, C. J., 1 Ld. Raym. 619.]

"§ 14. And if the addition shall be with a *nuper* of the place, then in every such case, at the awarding of the first *capias* with proclamation, according to the form mentioned, one writ of proclamation (without any pain expressed) shall be awarded into the county where the offender shall be most commonly resiant at the time of the awarding the said first *capias*, with pain, in the same writ of proclamation, to be returnable the day of the return of the said first *capias*, with pain and proclamation thereupon, at some one such time and court as is prescribed for the proclamation, upon the said first *capias*, with pain, and if such proclamation be not made in the county where the offender shall be most commonly resiant, in such cases of additions of *nuper*, that then such offender shall sustain no pain or forfeiture, by virtue of this statute, for not yielding his or her body according to the tenor aforementioned; any thing before specified and to the contrary hereof in any wise notwithstanding."

|| By the 53 G. 3, c. 127, it is enacted, "That excommunication, together with all proceedings following thereupon, shall in all cases, save those hereafter to be specified, be discontinued, throughout that part of the United Kingdom of Great Britain and Ireland called England; and that in all causes which according to the laws of this realm are cognisable in the ecclesiastical courts, when any person or persons having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any persons or persons shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced ;

(E) Of the Proceedings of *Excommunicato capiendo*.

saving in the particular cases hereafter to be specified ; but instead thereof, it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same in the form to this act annexed, to his majesty in Chancery, as hath heretofore been done in signifying excommunications ; and thereupon a writ *de contumace capiendo*, in the form to this act annexed, shall issue from the Court of Chancery, directed to the same persons to whom the writs *de excommunicato capiendo* have heretofore been directed ; and the same shall be returnable in like manner as the writ *de excommunicato capiendo* hath been by law returnable heretofore, and shall have the same force and effect as the said writ ; and all rules and regulations not hereby altered, now by law applying to the said writ and the proceedings following thereupon, and particularly the several provisions contained in a certain act passed in the fifth year of Queen Elizabeth, intituled *An Act for the due execution of the writ de excommunicato capiendo*, shall extend and be applied to the said writ *de contumace capiendo*, and the proceedings following thereupon, as if the same were herein particularly repeated and enacted ; and officers of the said Court of Chancery are hereby authorized and required to issue such writ *de contumace capiendo* accordingly ; and all sheriffs, jailers, and other officers are hereby authorized and required to execute the same, by taking and detaining the body of the person against whom the said writ shall be directed to be executed ; and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the court, the judges or judge of such ecclesiastical court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, jailer, or other officer in whose custody he shall be, in the form to this act annexed, for discharging such party out of custody, and such sheriff, jailer, or other officer shall, on the said order being shown to him, so soon as such party shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him.

“ § 2. Provided always, That nothing in this act contained shall prevent any ecclesiastical court from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced as spiritual censures for offences of ecclesiastical cognisance, in the same manner as such court might lawfully have pronounced or declared the same, had this act not been passed.

“ § 3. And it is further enacted, That no person who shall be so pronounced or declared excommunicate, shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court pronouncing or declaring such person excommunicate shall direct, and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his majesty in Chancery, in the same manner as excommunications have been heretofore signified, and thereupon the writ *de excommunicato capiendo* shall issue, and the usual proceedings shall be had, and the party



(F) Of absolving and assoiling a Person excommunicate.

being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such ecclesiastical court."||

(F) Of absolving and assoiling a Person excommunicate.

If a person be unjustly excommunicated, that is, if he be excommunicated for matter of which the spiritual court hath no conusance, and he be taken on a writ of *excommunicato capiendo*, the party grieved shall have (a) a writ out of Chancery to the sheriff, to deliver him out of prison.

2 Inst. 623; 12 Co. 76, and vide the 9 E. 2, c. 7. (a) For this vide F. N. B. 141.

So, if the spiritual court proceed *inverso ordine*, as, if they refuse a copy of the libel, &c., a prohibition shall go, with a clause to absolve, and deliver the party injured.

Sid. 232.

Also, if a man be excommunicated, and offer to obey and perform the sentence, and the bishop refuse to accept and to assoil him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to assoil him, &c., and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate. And so the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical conusance. Also, the bishop, in those cases, may be indicted at the suit of the king.

2 Inst. 623.

But, if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him; which caution, in the civil law, is of three sorts. 1. *Fidejussoria*, (a) as when a man bindeth himself with sureties to perform somewhat. 2. *Pignoratium* or *realis cautio*, as when a man engageth goods, or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing taketh a corporal oath to do it; which last is now the most frequent method.

Giba. Codex, 1110. (a) This method of taking caution was once held to be against law, Bulst. 122: but was afterwards on great debate allowed to be good, and that the bishop having a discretionary power herein, it was as much in his option to take caution by obligation, as by either of the other two methods. 2 Lev. 36; Raym. 225.

If, after a person is excommunicated, there comes a general act of pardon, which pardons all contempts, &c., it seems that this offence is taken away without any formal absolution.

But for this vide Cro. Car. 199; Cro. Ja. 159, 212; 8 Co. 68; Jon. 227; 2 Lev. 36.

## EXECUTION.

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- (A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.
- (B) Of the Judgment on which Execution is to be taken out; and herein of Recognisances and Statutes which are in the Nature of Judgments: And herein,
  - 1. *Of the Nature of Recognisances at Common Law, and on the 23 H. 8, c. 6, &c., and of the Statute Merchant and Staple.*
  - 2. *Of the several Processes on these Securities when forfeited, in order to a full Execution: And therein,*
    - 1. *Of the Manner of Execution on the Recognisance at Common Law, and wherein it differs from the Statutes, &c., and they from each other.*
    - 2. *At what Time Execution may be granted on each of them.*
    - 3. *Who shall have Execution on them, as the Person alters.*
    - 4. *Against whom Execution may be granted.*
  - 3. *What Things are bound by them, and are liable to be extended for the Satisfaction of them.*
  - 4. *What Provision the Law has made for Tenant by Statute Merchant, &c., in case of Eviction.*
  - 5. *The several Ways of vacating and discharging those Statutes, and this, either before or after Execution.*
- (C) Of the several Kinds of judicial Writs which lie after Judgment: And herein,
  - 1. *Of the Form, Teste, and Return of such Writs.*
  - 2. *Of the Elegit.*
  - 3. *Of the Capias ad Satisfaciendum.*
  - 4. *Of the Fieri facias and Levavi facias.*
  - 5. *Of the Habere facias Seisinam and Possessionem.*
- (D) Where the Party shall be concluded by the Election of one of them, and what further Remedy he has when he hath not received entire Satisfaction on his first Writ; and this, either against the Party or Sheriff.
- (E) Of the Authority and Jurisdiction of the Court out of which the Execution issues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.
- (F) Who are entitled unto and may sue out Execution.
- (G) Of the Persons against whom Execution may be sued out: And herein,
  - 1. *Of suing Execution where there are several Parties concerned.*
  - 2. *Of suing out Execution against the Heir and Executor.*
  - 3. *Of suing out Execution against Infants.*
  - 4. *Of suing out Execution against a Feme Covert.*
  - 5. *Of suing out Execution against privileged Persons.*
  - 6. *Of suing out Execution against a Clerk in Holy Orders.*
- (H) At what Time Execution may be sued out: And herein of the Necessity of a *Seire Facias*.
- (I) To what Time the Execution shall have Relation, so as to avoid any Alienation by the Party: And herein of the Statute of Frauds.
- (K) Of the King's Precedency in Executions.
- (L) Of the proper Officer to do Execution: And herein of the preceding and succeeding Sheriff.
- (M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy against him for Neglect of his Duty.

## (A) Of the Nature of Execution, &amp;c.

- (N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.  
 (O) Of the Offence of hindering or obstructing an Execution.  
 (P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.  
 (Q) To what he shall be restored when such erroneous Execution is set aside.

## (A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

EXECUTION is the obtaining actual possession of a thing recovered by judgment of law, and (a) is called the life of the law, and therefore in all cases to be favoured.

Co. Litt. 154 a; Carter, 194.  $\beta$  The execution must conform substantially with the judgment, but it is not essential that the utmost possible strictness should be observed in reciting the judgment. *Graham v. Price*, 3 Marsh. 522.  $\gamma$  (a) *Executio est fructus, finis et effectus legis*, Co. Litt. 289; 5 Co. 87.  $\beta$  The act of carrying into effect the final judgment of a court, or other jurisdiction, is called the execution of the judgment. The writ which authorizes the officer to carry into effect the same judgment bears the same name. *Bouv. L. D. h. t. g*—It differs from an action, which continues only till judgment is given, and therefore a release of all actions is regularly no bar of an execution. Co. Litt. 289; 2 Roll. Abr. 404.

$\beta$  The rule that the remedy for the breach of a contract is to be governed by the *lex fori*, without regard to the *lex loci contractus*, is applicable to the form of an execution to be issued on a judgment recovered.

*Woodbridge v. Wright*, 3 Conn. 523.

The validity of an execution cannot be inquired into; it is valid until reversed or set aside.

*Stewart v. Stocker*, 13 S. & R. 199; S. C., 1 Watta, 135.

But an execution upon a void judgment is void.

*Albee v. Ward*, 8 Mass. 79.  $\gamma$

And here it will be necessary to consider what things are liable to execution at common law in personal actions. These we find were only the annual profits of the land as they arose, and the goods and chattels of the debtor: for neither his body nor lands were affected by recognisances or judgment for debt or damages, except as hereinafter excepted.

*Hob. 60*; 3 Co. 12 b, *Sir William Herbert's case*; *Cro. Ja. 450*; *Plow. 440*; 2 Inst. 19; 2 Roll. Abr. 472.

The reason why the common law subjected only the personal estate to the payment of debts, seems to be, for that it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men trusted one another no further than they had visible chattels to answer the debt. The lands were not liable, because they were obliged to answer the duties to the feudal lord; and a new tenant could not be forced upon him without his consent to the alienation; and the person was not liable, because that was obliged by the tenure to serve the king in the wars, and the several lords at home, according to the distinct natures of their tenure. But though this law was well framed for a nation bred to wars, who were to extend their fame and power by arms, yet it was no ways calculated for the circumstances and constitution of a trading people, whose power and credit rise and fall in proportion to the increase or decay of trade; therefore, in such a nation, laws ought to be so contrived and framed as to invite

## (A) Of the Nature of Execution, &amp;c.

foreigners to trade with it, and bring their commodities to it; and the great encouragement to this will be to allow them all possible security in their contracts and dealings; and the way to that will be to subject all the effects of the debtor, whether in lands or chattels, and his person too, to satisfy the creditor; for otherwise it would be in the power of every bad man, by converting his chattels into land, to defraud his creditor, and against all reason and equity enjoy the profits of that land which he purchased with another's money. Accordingly we find, that towards the reign of Ed. 1, when *Magna Charta* had given the tenants a power of alienation, without acquainting their lords, if they left enough to answer the duties of their tenure, they began to subject the land to answer the debts in trade; and as they grew more and more a trading people, it was thought reasonable that the person should be liable, that a close confinement might oblige the debtor the sooner to satisfy his creditors, as also make him the more wary how he contracted debts, without the prospect of a competent fund or provision to discharge them.

Plow. 440; 3 Co. 11; 2 Inst. 19.

But even at common law we find, that the king, by his prerogative, might have execution of body, goods, and lands, but still under this restriction, that the land was not extendible while the chattels were sufficient and the debtor ready to answer the debt.

Plow. 441; 3 Co. 11.

Also, in case of a private person, the land was liable to execution, in an action of debt against an heir upon an obligation made by his ancestor; if the plaintiff had judgment, the law dispensed with the former rules, rather than that the creditor, who fairly made out his demands, should be without a remedy, and therefore gave the lands descended, in execution, to answer the debt; for since the common law allowed the action of debt against the heir, the creditor could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the heir.

3 Co. 12 a; Cro. Ja. 450; Plow. 441.

So, if A had granted for him and his heirs, to B and his heirs, such a rent out of his lands, in this case the heirs, being comprehended in the contract, are bound to make good the grant as far as they have assets by descent from the grantor; and this was allowed at common law, because the grantee of the rent had the land originally in view for his security; and by the grant itself, having it in his power to distrain the land for the rent, it was equal to the heir whether the land was to answer the rent by distress, or by an execution upon a judgment in a writ of annuity.

Roll. Abr. 226; Poph. 87; Hob. 58; Dyer, 344 b; Co. Litt. 144.

Thus stood the common law till the statute of Acton Burnell,\* and the 13 Ed. 1, *de mercatoribus*, (which last, as appears in the preamble, was for the security of merchants and encouragement of trade,) subjected not only the goods and persons, but the lands likewise of the debtor, into whose hands soever they came after the statute acknowledged.

Hob. 60; 2 Roll. Abr. 475. \*11 Ed. 1.

Also, in the same year and reign the *elegit* was given; and by this (a) statute, he who recovereth in debt or damages, may have either a *feri facias* of the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his

(B) Of the Judgment on which Execution is taken out.

plough, and the one-half of his land, until the debt be levied upon a reasonable price or extent.

(a) Viz. 13 Ed. 1, c. 18, commonly called the statute of West. 2. Vide 2 Inst. 394, 395.

The 25 Ed. 3, c. 17, subjected the person of the debtor, and gave the *capias ad satisfaciendum* in debt, detainue, &c., in the case of a common person.

Vide Dalt. Sher. 114. As to this vide *infr.* (C), 3.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognisances and Statutes which are in the Nature of Judgments: And herein,

1. *Of the Nature of Recognisances at Common Law, and on the 23 H. 8, c. 6, &c., and of the Statute Merchant and Staple.*

AN obligation by matter of record is a writing obligatory acknowledged before a judge, or other officer having authority for that purpose, and enrolled in a court of record; and of this there are two sorts, viz., recognisances or statutes.

The original of the acknowledgment of obligations in courts of record seems to be, that there might be no occasion to have the trouble and charge of the proving, which was formerly in the manner of contracting more expensive than at present; for formerly the persons under *his testibus* were joined to the jury who tried the cause, and the creditor was obliged by process to bring them in to join them to the jury, which form, as my Lord Coke has observed, made great delay in the proceedings. To save this expense, the acknowledgment was made in courts of justice, and then the court attesting the deed, there needed no proceeding or trial to make it evident.

Co. Litt. 6.

The first of these securities is the recognisance at common law, which is no more than an obligation on record, and may be acknowledged before the several judges out of term, and in any part of England, and may be entered on record, as well out, as in term. So, the (a) chancellor or keeper may take recognisances and award execution, or hold plea of *scire facias* and *audita querela* in the Chancery, to avoid execution, &c., as the case requires on all recognisances taken in that court.

Bro. *Recognisance*, 20; Vaugh. 102; Hob. 195; 4 Inst. 79. (a) But, if a person enters into a recognisance to the chancellor for a debt due to himself, it is a void recognisance; for the law will not trust him with the exercise of his power in his own case: but, if one enters into a recognisance to the chancellor and a stranger, it is a good recognisance as to the stranger; for, so far as his interest is concerned, the chancellor is a proper person to take it, and cannot be said to be a judge in his own cause. Dyer, 220; 8 Co. 118 a; Co. Litt. 141 a.

By the custom of the city of London, the mayor, aldermen, or the mayor singly, may take recognisances: for the custom is not only reasonable in itself, but, as all other customs of the city, has been confirmed by act of parliament.

4 Co. 64 b; 2 Inst. 395; Cro. Eliz. 187; Ro. Abr. 557.

The king, by special commission, may appoint any person to take a recognisance from one man to another, and such a recognisance duly certified with the commission into Chancery is of equal force with the former: and though the commission be so particular, that it only mentions a recognisance to be taken from A to B, yet, says Fitzherbert, the commissioners have a general power to take a recognisance from any other person.

Fitz. N. B. 267, A; Register, 149.

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## (B) Of the Judgment on which Execution is taken out.

But those recognisances at common law are no perfect record, till they are enrolled in some court of record ; yet if they be taken on one, and enrolled on another day, they find as reasonable provision in the law ; for since it allows any one judge out of court, and in any part of the kingdom, to take these recognisances, which are the highest security of the common law ; it was very necessary they should be enrolled to perpetuate the contract, and by that means secure the creditor his just debt, which must have been very precarious and uncertain, while the security lay in a private hand, who might either through carelessness mislay, or by ill practices be prevailed upon to suppress it.

Hob. 195.

A statute merchant is a bond of record, acknowledged before one of the clerks of the statute merchant, and mayor of the city of London, or two merchants of the said city, for that purpose assigned, or before the mayor or warden of the towns, or other discreet men for that purpose assigned. This recognisance is to be entered on a roll, which must be double, one part to remain with the mayor, and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the king, for that purpose appointed, shall be affixed, together with the seal of the debtor.

13 Ed. 1, st. 3 ; 2 Ro. Abr. 466.

The design of this security was to promote and encourage trade by providing a sure and speedy remedy for merchant strangers as well as natives, to recover their debts at the day assigned for payment, the want of which, says the statute of (a) Acton Burnell, (which first created the statute merchant,) in a great measure prevented the importation of foreign commodities, and discouraged strangers from trading with us, to the detriment not only of our own merchants, and other subjects, but of the prince himself, whose customs rise and fall in proportion to the increase and decay of trade.

(a) 11 Ed. 1.

But, though the statute merchant seems first to have been introduced, and was wholly calculated for the ease and benefit of merchants, as the name itself imports ; yet it was not long engrossed by them : for other men finding from their own observation, that it was much of the same nature with judgments given in Westminster Hall, but obtained with infinitely less trouble and expense, out of regard to their own interest and quiet, easily fell into this way of contracting, and by degrees it came to be improved into a common assurance, as we find it at this day.

Winch. 83.

The addition of the king's seal, which was never required to any contract at common law, was to authenticate and make the security of a higher nature than any other then known ; for by this the king, in the person of the mayor, &c., attests the contract, and takes consueance of the debt, and consequently, execution is to be awarded upon failure of payment at the day assigned, without any mesne process to summon the debtor, or the trouble or charge of bringing in proofs to convict him : for the judges, who are the king's representatives, for the more speedy administration of justice, require these on common contracts and specialties, to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant ; but to this contract the king himself, by the mayor, warden, &c., is a witness, and has the frank acknowledgment and confession of the debtor, that he really owes so much, which is the best and surest proof the

(B) Of the Judgment on which Execution is taken out.

law requires ; therefore the legislators of that time, out of a just regard to the prerogative and justice of the king, on those contracts, as on judgments, allowed of an immediate execution ; these being the surest means of conviction, viz., the confession of the conusor on record, which the judges at Westminster seldom have to frame their judgments on ; and thus it must be presumed from the force of them, which is equal to judgments of the superior courts, they obtained the name of pocket judgments.

3 Sheph. Abr. 318.

The seal of the king consists of two pieces, one to lie in the custody of the mayor, and the other of the clerk that enrolls the recognisance, the better to prevent any fraud or corruption this security might be liable to, if the seal lay in one hand.

Cro. Eliz. 233, 319.

The statute staple is a bond of record, acknowledged before the mayor of the staple, in the presence of all or one of the constables. To this end, says the (a) statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognisances acknowledged in the staple. This seal of the staple is the only seal the statute requires to attest this contract ; but it is no more under the power or disposal of the mayor, than that appointed by the statute merchant ; for though the statute appoints him the custody of it, yet it is in such a manner, that he cannot affix it to any obligation without their consent, it being to remain in the mayor's hands, under the security of their own seals.

2 Ro. Abr. 466. (a) 27 Ed. 3, st. 2, c. 9.\* \*Also vide c. 8, of the same statute ; and 36 E. 3, c. 7.

To understand a little of the original and constitution of the staple, and the advantage the nation had by this establishment, we must observe, that the place of residence, whither the merchants resorted with their staple commodities, was anciently called *estapel*, which signifies no more than *mart* or *market* : and this was formerly appointed out of the *realm*, as at Calais, Antwerp, &c., and other ports on the continent which were nearest to us, and whither the merchants might with safety coast it.

4 Inst. 238.

But besides these staple ports appointed abroad, there were others appointed at home, whither all the staple commodities were carried in order to their exportation, such as London, Westminster, Hull, &c. These were found to be of great use and consequence to the prince in particular, and to the interest and credit of the nation in general ; for at these staple ports were the king's customs easily collected, and by the officers of the staple, at two several payments, returned into the exchequer. Besides, at these staples, all merchants' goods were carefully viewed and marked by the proper officer of the staple : and this necessarily avoided the exportation of decayed goods, or ill-wrought manufactures, and, consequently, fixed a stamp of credit on the merchandises exported, which, upon the view, always answered the expectation of the buyer.

Maline's Lex Merc. 337, 338. Vide the 27 E. 3, c. 1.

The staple merchandises, according to Lord (b) Coke, are only, wool, wools, leather, lead, and tin ; (c) others add butter, cheese, and clothes ; but whatever they were, the mayor and constables had not only conusance of all contracts and debts relating to them, but they had likewise jurisdiction over the people and all manner of things touching the staple. This power was

## (B) Of the Judgment on which Execution is taken out.

given them, lest the merchants should be diverted and drawn from their business and trade, by applying to the common law, and running through the tedious forms of it, for a determination of their differences, and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts, without going out of the bounds of the staple.

(b) 4 Inst. 238. (c) Maline's Lex Merc. 237; 27 E. 3, c. 8.

By this it appears, that this security was only designed for the merchants of the staple, and for debts only on the sale of merchandises brought thither: yet in time others began to apply it to their own ends, and the mayor and constable would take recognisances from strangers, surmising it was made for the payment of money for merchandises brought to the staple. To prevent this mischief, the parliament, in 23 H. 8, c. 6, § 11, reduced the statute staple to its former channel, and laid a penalty of 40*l.* on the mayor and constables, who should extend the benefit of the statute to any but those of the staple. But though the statute of 23 H. 8, c. 6, deprived them of this benefit; yet it framed a new sort of security, to be used *ad libitum* by all men, known by the name of a Recognisance on 23 H. 8, c. 6, or a recognisance in the nature of a statute staple, so called, because this act limits and appoints the same process, execution, and advantage in every particular, as is set down in the statute staple.

Co. Litt. 290.

A recognisance therefore in nature of a statute staple, as the words of the act declare, is the same with the former, only acknowledged under other persons; for as the statute runs, the chief justices of the King's Bench and Common Pleas, or in their absence, out of term, the mayor of the staple at Westminster, and the recorder of London, jointly together, shall have power to take recognisances for payment of debts in the form set down in the statute. In this, as in the former cases, the king appoints a seal to attest the contract, which such of the said justices shall have the keeping of, and the said mayor and recorder another of the same print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor or recorder, must be sealed with the seal of the conusor, with the king's seal, and with the seal of the chief justice, or the mayor and recorder before whom it is taken, who are likewise obliged to subscribe their names: besides this, the clerk of the recognisance, (who is to be appointed for this purpose by the king,) or his deputy, shall make and write all obligations thus acknowledged, and enrol them in two several rolls indented, one whereof shall remain with such of the said justices, or with the mayor and recorder that take the recognisance, and the other with the clerk, who is farther obliged, at the request of the conusee, his executors, or administrators, to certify such obligations into Chancery under his seal.

Co. Litt. 290 a; 4 Inst. 238; 2 Ro. Abr. 466; Co. Ent. 12.

But now by stat. 8 G. 1, c. 25, § 1, the clerk of the recognisances, or his deputy, shall prepare three parchment rolls, and shall, at the times of acknowledging every such recognisance, fairly write or engross, instead of the heads or contents thereof, on the said rolls, the full tenor, *in hæc verba*, of every such recognisance; and one of the rolls shall contain all the recognisances taken before the chief justice of the King's Bench; another the recognisances taken before the chief justice of the Common Pleas; and the other the recognisances before the mayor of the staple at Westminster, and



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recorder of London ; and the persons before whom such recognisances shall be taken, as well as the parties acknowledging the same, are to sign their names to the roll of every recognisance under the enrolment thereof, as well as sign and seal the recognisance ; and all rolls so signed shall, at the end of every year, be fixed together, and made one roll of, and are to remain in the custody of the clerk, who is to keep a docket for searches.

## 2. Of the several Processes on these Securities when forfeited, in order to a full Execution.

But before we enter into a particular inquiry concerning these processes, it is proper to take notice, that the interest gained upon an execution of a statute or recognisance is to be followed by an actual entry of the conusee to perfect his security, and till such entry the conusee hath only a possession in law, which he cannot assign or transfer over to any other person ; therefore where the administrator of a conusee in a statute after his death sued forth an extent, and upon that a *liberate*, which was returned, and before any actual entry or recovery of the possession in ejectment, or without executing the deed upon the land, did by indenture assign over all his interest to the lessor of the plaintiff, who thereupon brought his ejectment : it was adjudged, that the assignment was void ; for by the return of the *liberate* he had accepted the possession, and was estopped to say the contrary ; then when the owner still continues in possession, this turns the possession which the administrator had accepted by the *liberate* to a right, and such right is by no means assignable ; nor is this like an *interesse termini*, which, it is true, the lessee may assign over before actual entry, because in that case the lessor is the principal agent, and hath done all on his part to transfer over an interest to the lessee, which he may execute at pleasure ; and as the person who sues the *liberate* in this case is estopped to say, that he hath not the possession ; so is the lessor in the other case estopped to say, that he hath the possession, against his own lease.

3 Lev. 312, Stephens and Hanham ; Salk. 563, S. C. ; 4 Mod. 48, S. C. ; 1 Show. 290, S. C. ; Skin. 300, S. C. See *post*, (D).

## 1. Of the Manner of Execution on the Recognisance at Common Law, and wherein it differs from the Statutes, &amp;c., and they from each other.

If the conusor be within the jurisdiction of the mayor, or other officer, before whom the statute merchant was acknowledged, and be found there, then upon the conusee's bringing the statute, &c., to the mayor, &c., and clerk, and their finding the record of it, and the day of payment lapsed, the mayor may apprehend and imprison the conusor, (if he be lay,) there to remain till he satisfies his creditor.

13 Ed. 1, stat. 3.

And although there be no day of judgment expressed in the statute, yet this omission of the clerk does not vitiate the statute ; for in this, as in obligations, where no actual day is appointed for payment, the legal day is presently, or when the conusee pleases to demand it.

Winch. 82 ; Jon. 52.

But there may be a day of payment fixed in the statute, and yet the statute void ; as, if it be payable at Michaelmas, after J S goes to Paul's, or returns from Rome ; these are void statutes, because it does not appear judicially to the mayor when to award execution ; but, if the statute be payable the first return of Michaelmas term, or before Michaelmas, there is sufficient certainty in these, and the mayor ought to take notice of them.

Winch. 83, 85.

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But, if the conusor be out of the jurisdiction of the mayor, then shall he send the recognisance under the king's seal into Chancery, after which certificate the first process is a *capias* to take his body only; and if upon this the sheriff returns a *cepi corpus*, the debtor shall remain in prison a quarter of a year, in which time he may dispose of his goods and lands to the best advantage to pay his debts. But, if the conusor either omits to satisfy his creditor in that time, or if the sheriff returns on the *capias non est inventus*, or the conusor dead, then shall the execution be granted against lands, goods, and chattels, and they be delivered to the conusee by a reasonable extent till the debt be levied; which writ of execution the sheriff is to return into one of the benches, and how he hath performed the service.

2 Roll. Abr. 473.

And here we must take notice, that the process on a statute merchant differs from that on the statute staple, and the recognisance in nature of a statute staple, in four particulars:

1. If the conusor cannot be found within the staple, nor his goods, to the value of the debt, the first process, after the certificate under the seal in Chancery, is to take body, lands, and goods all in one writ, in which respect it is preferable to the statute merchant, as being a much speedier remedy.

Bro. *Statute Merchant*, 16.

2. They differ in respect of the place of the return; for, as is before observed, the writ of execution on the statute merchant is returnable in either bench; but upon the statute staple the writ is returnable into Chancery; and 23 H. 8, c. 6, which first brought in the recognisance in nature of a statute staple, referring in this to the same process and execution established by 27 E. 3, st. 2, c. 9, on the staple, the law must be the same in both cases.

4 Inst. 79; Co. Litt. 290.

3. They differ in the substance of the writ of execution, for upon the statute merchant the sheriff may deliver the lands, &c., to the conusee, upon a reasonable extent, without the delay or charge of a *liberate*; but upon the statute staple, or recognisance in nature of it, the sheriff, after the extent, cannot deliver the lands, &c., to the conusee, but must seize into the king's hands, and the conusee must have a *liberate* to get the lands, &c., into his hands; and in this respect the statute merchant is preferable to the statute staple, or recognisance in nature of it.

2 Roll. Abr. 475.

4. A fourth difference is, that the statute merchant having the seal of the conusor besides the king's seal, the conusee may waive the execution given by the statute, and use it as an obligation, and bring an action of debt on it: so, for the same reason, may the conusee on the 23 H. 8, c. 6, the recognisance having the seal of the conusor to it: *secus* of a statute staple, because the king's seal only, without that of the party, is affixed to it, which is absolutely necessary in all obligations at common law.

Bro. *Statute Merchant*, 16; Moore, pl. 1097; Cro. Eliz. 44.

2. At what Time Execution may be granted on each of them.

For the time of execution, we must distinguish between recognisances at common law and statutes merchant, &c., for upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognisance, he was obliged to commence the suit again by original;

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the law presuming the debt might have been paid, if he did not sue execution within the year after the money became payable. But this law was (a) altered in Edward the First's time, and the conusee had a *scire facias* given him to revive the judgment, and put it in execution if the conusor cannot stop it by pleading such matters as the law judges sufficient for that end, such as a release, &c., but the conusee of a statute merchant, &c., may at any time sue execution on them without the delay or charge of a *scire facias*.

Co. Litt. 291; 2 Inst. 469; F. N. B. 296; Bro. *Recog.* 17. (a) By Westm. 2, 13 E. 1, st. 1, c. 45.

If A enters into a recognisance or statute, &c., to B, and but one day of payment is appointed for the whole debt, B may have execution upon failure of payment in the method before set down; but, if the sum be payable at three several days, as 20*l.* at each day, the whole debt being 60*l.* when the first day of payment is lapsed, the conusee may have execution for 20*l.* immediately, and so for the rest as it becomes due, without waiting for the last day of payment, as he must have done if the debt had been due by bond. And this holds as well on recognisances at common law as upon statutes; and the reason is, because these are in nature of three several judgments.

2 Ro. Abr. 468; Bro. *Execut.* 142; Co. Litt. 292; 2 Inst. 395, 471; Reg. 147; 5 Co. 81.

### 3. Who shall have Execution on them, as the Person alters.

Here we must again distinguish between recognisances at common law, and statutes and recognisances introduced by statute law: For, in the first case, if the conusee dies before execution sued, his executor shall not sue it even within the year, without bringing a *scire facias* against the conusor: the reason is, because the law presumes the debt might have been paid to the testator, and therefore would not suffer the debtor to be molested, unless it appeared he had omitted to perform the judgment; and this was to be done by *scire facias* brought by the executor, for the alteration of the person altered the process at common law. But the statute merchant, &c., being designed to encourage strangers to trade with us, in this, as in many other instances, they have the advantage of any security known in the common law; and this dilatory process is taken away in these cases by the several acts of parliament that first introduced them; and therefore upon the death of the conusee of a statute merchant, &c., his executors may come into Chancery, and upon their producing the testament and the statute, shall have execution without *scire facias*, as the testator himself might.

2 Inst. 395, 471; Bro. *Stat. Merch.* 16, 43, 50.

But the difficulty in settling this point will be, either when there are two conusees, and one of them dies after process of execution is begun, or where there is but one conusee, and he dies after process begun. In order to clear these points, it is to be observed, that that which is certified into Chancery is a transcript of the record lodged with the mayor and clerk, and upon such certificate the Chancery views the pocket security, and then proceeds to issue the process according to the statute 13 E. 1, st. 3, *de mercatoribus*; and if there be any disagreement between the pocket judgments and the certificate, there is a new *certiorari* awarded to the mayor to inspect the rolls, and make a re-certificate, as appears in the (a) register.

(a) Reg. 148 b.

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When the Chancery hath issued process in either bench, if the death of the conusor, or *non est inventus* is returned, so that it appears, that the person is not to be found to give satisfaction, the benches direct all other process, in order to give the party satisfaction. And the reason of this is, from the direction of the statute to return the process into these courts, which was upon this original policy, that all parties in interest might come in and have an opportunity to litigate where every man's property is determined.

Dyer, 180.

But, if the conusee dies after process returned into C. B., his executors cannot carry on the process there, because the statute directs a certificate of such sort of recognisance into the Chancery, and the benches have no power to proceed, but according to the authority derived from that court; and whenever that authority ceases, as by the death of the party, the process is at an end; and therefore the Court of Common Pleas cannot carry it into execution, as they could on a judgment obtained in their own court; but the suitor must go back into Chancery, as in all cases where process thence issuing is determined by the death of any of the parties. When the executor comes back into Chancery, there is a new *certiorari* awarded to the mayor to certify the record, both because the statute directs, that the Chancery shall issue process upon the recognisance returned, as also that it may appear to the court, that the security is still in being upon which the process is directed.

If the conusee of a statute merchant sues a *capias* returnable in B., and upon a *non est inventus*, an *extendi facias* is awarded by the court, and before execution executed the conusee dies, his executors cannot carry on the execution *in banco*, because that process out of Chancery which gave the court an authority to proceed, being in the testator's name, is now determined. But, when the executor comes back into Chancery, he is not put to a new *capias*, but may have a special writ upon his case, to continue the process where it determined, because the *capias* would be nugatory and contrary to the record *in banco*, by which it appears that the personal satisfaction failed, and the execution was awarded on his effects. But, if the conusee of a statute merchant sues a *capias*, and upon a *non est inventus* an *alias* is awarded, before the return of which he dies, his executor, when he comes back into Chancery, must be put to a new *capias*, because the testator died in pursuit of the personal satisfaction, and there is no record in this case, whereby it appears deficient; and therefore the executor is put to a new *capias*, that the deficiency of the personal satisfaction may appear on the return of it, according to the direction of the statute. But it seems, in both cases, by Dyer and the Register, that there ought to be a new *certiorari* and re-certificate thereon, that the existence of the security may appear at the time when the process issues.

Ro. Abr. 467; Dyer, 180 b; Reg. 148.

If two conusees of a statute merchant sue execution, and the sheriff returns the conusor dead, upon which an *extendi facias* is awarded, and one of the conusees declares in court, that the other died since the suit commenced, and therefore prays execution for himself; in this case he must have a re-certificate of the record from the mayor, and then a writ upon his case directed to the bank to continue the process where it ended at the death of the other conusee; for it would be nugatory to put him to his *capias* again, since it appeared by the return of the sheriff that the conusor was dead.

2 Roll. 467; 25 E. 3, 38.

## (B) Of the Judgment on which Execution is taken out.

If conusee of a statute staple dies, and B, his executor, sues an extent in Chancery, but before execution executed B dies, and administration *de bonis non* is granted to C, who continues the process, and after the extent returned sues out a *liberate* of the conusor's lands, which were taken in execution upon the *extendi facias* brought by B, and has them delivered to him; this is a void extent, and the conusor may recover his land in ejectment; for the *extendi facias* being sued in B's name, must by his death abate, and, consequently, all the proceedings continued after by C must fall, having no foundation to subsist on. Besides, C comes in paramount the writ of B, not as privy to himself, but as the immediate representative of A. So, if in this case B had sued an extent, and after execution and a seizure in the king's hands, had died, C shall have no *liberate*, because he, coming in paramount the extent, cannot continue the process, which abated by the death of B.

2 Roll. Abr. 467; Cro. Car. 450, 457; Jones, 385.

If a conusee of a recognisance in nature of a statute staple sue execution, and after the extent and seizure into the king's hands die, his executor shall have no *liberate*, for that were to continue the process which the testator begun, and abated by his death.

2 Roll. Abr. 467.

## 4. Against whom Execution may be granted.

If the conusor of a statute dies, the body of the heir\* is protected by the statute from execution, but the lands and goods of the conusor are extendible in his hands; for it would be most unreasonable to subject the heir to payment of his father's debts, any farther than to the value of the assets descended; nor are these extendible in his hands, if he be an infant at the death of the conusor, till he comes of age. The statute in this particular is founded on the reason, and follows the course of the common law, by which, if judgment had been given against a man for debt or damages, and the defendant died before execution sued, his heir within age was not liable to execution during his minority; but the parol demurred till he came of age. And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as, if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

Bro. Stat. Merch. 33; Co. Litt. 290; Moor, pl. 121, 203; Dyer, 239; Co. Ent. 12.

\*Where execution shall go against the heir after an alienation of lands descended, vide 3 W. & M. c. 14, § 5, 6.

So, if the conusor of a statute merchant dies, and his heir within age endows his mother, the land in dower shall not be extended during the minority of the heir.

Co. Litt. 290; Bro. Stat. Merch. 33.

In the next place, let us see how the law directs the execution, where the conusor conveys the land to several persons after the statute acknowledged. It would be very unreasonable to load one feoffee with the whole debt, when the burden ought to be on the whole land, into whose hands soever it comes after the recognisance acknowledged; and therefore the law allows of contribution against the other purchasers, by which we must not understand that they are to allow the purchaser, whose land is extended, any thing by way of contribution to the extraordinary charge, which he ought not to bear

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alone; but the person grieved must relieve himself by *audita querela*, which sets aside the execution, and restores him to the mesne profits, and obliges the conusee to sue execution of all the lands.

3 Co. 14.

And here we must consider by what rules the law has governed itself in such executions. By the words of the statute *de mercatoribus*, all the lands of the conusor are liable, and therefore the conusee may extend the execution to them all; but, if, while they continue in the hands of the conusor, he takes but part, it is a merciful execution to the conusor, because it leaves him the rest of the land for his subsistence in the mean time, and therefore he cannot set aside the execution as for partiality, since it is plainly made for his advantage. But, if the conusor aliens part of his land, then the case is very much altered; for if the conusee sues out execution of the land of the alienee, that were apparent partiality in him, and contrary to the intent of the conusor, which makes all the land equally liable; and therefore such execution may be set aside by *audita querela*, for the apparent partiality and injustice of it. And it is the same law where there are several feoffees, and execution is sued against one of them only, and this for the same reason. But, if the lands of the conusor only, after such alienation, had been taken in execution by the conusee, this execution had been good; for such conusor could not charge him with any partiality, since the debt was his own, and his person and effects still liable after such alienation, and he is supposed to receive the purchase-money from the alienee; and therefore there is no reason to bring him into the payment of the debts which such conusor had previously contracted.

Plow. 72; Pope and Ross, 3 Co. 12.

If A, seised of three acres in fee, acknowledges a statute to J S, and enfeoffs B of one acre, and C of another, if J S sues out execution against B, he may have an *audita querela* to oblige the conusee to charge the lands of A and C equally; for 13 E. 1 says, that all the lands of the conusor shall be extended, into whosoever hands they come; and therefore the acre of B shall not be liable to the whole debt, when the statute in this case subjects the other two: but, if J S had sued execution against A, the conusor only, he should have no *audita querela* to avoid it: so, if in this case the conusor had died, and execution had been sued against the heir, he should have no contribution against B and C, because the heir comes to the land without any consideration, and the conusor might bind his heir, as far as the land descended would answer his debts. And yet in some cases the heir shall have contribution; as, if the ancestor acknowledge a statute, and die, leaving issue two daughters; or, if the land which descends be of the nature of borough-english or gavelkind, the heir at law shall make the special heirs contribute, because all of them come in as heirs to the land descended, and are equally charged with his debts.

Bro. Stat. Merch. 49; 3 Inst. 396; 3 Co. 13, n.; 7 Co. 39 a; Ro. Abr. 311; 2 Ro. Abr. 472; Plow. 72; Hob. 25; Co. Litt. 376.

But, if A in the principal case had conveyed his three acres to B, C, and D, and the conusee extended the acre of B, who after the extent conveys by fine his acre to J N, in this case J N cannot avoid the extent by *audita querela*, and have contribution against C and D; for though the feoffee of a feoffee may have contribution where the conveyance is before the extent; yet in this case J N, claiming under a fine levied after the land was actually

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extended, must hold it under the encumbrance, for *transit terra cum onere*; and it is no way unreasonable that he should hold it as he purchased, since he is supposed to pay a consideration accordingly; besides, the judgment in the *audita querela* is, that the plaintiff shall be restored to all the mesne profits, which J N cannot have in this case, because the extent was sued before he purchased, and he can have no title to them but from the fine levied.

2 Bulst. 14, 15.

I A binds himself to a recognisance or statute, and after his death some of his lands descend to the heir of the part of the father, and some to the heir of the part of the mother, both heirs shall be equally charged; and if the conusee loads one only, he shall have contribution.

3 Co. 13 a; 2 Co. 25 b.

If A, B, and C bind themselves jointly and severally in a statute, the conusee may have execution against one of them alone, or against all together; but he cannot have execution against two only; for the execution must pursue the statute, which is joint or several; but execution against two is neither one nor the other.

2 Ro. Abr. 468.

3. *What Things are bound by them, and are liable to be extended for the Satisfaction of them.*

The statute of 13 E. 1, *de mercatoribus*, which, as appears in the preamble, was for the security of merchants and encouragement of trade, subjected not only the goods and person, but the lands likewise of the debtor into whose hands soever they came, after the statute acknowledged: therefore, if the person of the conusor only be taken in execution in a statute, and die, his goods and lands are still liable to the extent, because, being all due at first to satisfy the conusee, he may, at discretion, take them all at one time, or at several.

Hob. 60; 2 Ro. Abr. 475.

So, if a conusor sell all or part of his lands, after he has bound himself, the conusee may still extend it by the words of the statute; otherwise it would be in the power of the conusor to frustrate the security intended by the law: so, if the conusor purchase after he has bound himself, such lands are subject to execution; for the statute says, "All his lands shall be extended;" which still must be understood of those only which he has a power over, and may charge; and, consequently, those which he disposed of for valuable consideration before his entering into the statute are not liable in the hands of the purchaser, for they really in no sense can be called his lands.

3 Co. 12; 2 Ro. Abr. 472; Winch. 84.

If the conusor has two manors, the conusee may sue execution in which of the manors he pleases, for he may dispense with any part of the provision the statute has made for him.

2 Ro. Abr. 472.

If tenant in tail acknowledge a statute and die, and the conusor sue execution against the issue, the issue may avoid it, either by assize or *audita querela*; for no charge of the conusor's can affect the land in tail longer than his own life, by virtue of the statute *de donis*, which as to such lands repeals the other.

Bro. Execution, 85; Cro. Ja. 85.

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If in this case, tenant in tail, after he had bound himself, had enfeoffed J S, and for his further assurance had levied a fine to him, the conusee may extend the land in the hands of J S, and neither he nor the issue in tail can avoid the execution, for the issue is totally barred by the fine, and J S purchased the land under the charge, and, consequently, must hold it so.

2 Ro. Abr. 473.

But, if tenant in tail bind himself in such recognisance or statute, and die, and his issue enfeoff J S, it seems, the conusee may extend the lands in the possession of J S.

Bro. Execut. 76. Qu. \*As this does not seem to be law, nor consistent with the case next but one.\* Supr.

If a reversioner upon a lease for years acknowledge a statute, both the reversion and the rent are extendible, and the conusee may have an action of debt for the rent. So, a rent upon an estate for life may be extended for satisfaction of a statute: but the conusee in this case can have no action of debt for the rent, any more than the reversioner himself could have; because, during the continuance of the freehold, no action of debt lies for the rent.

2 Ro. Abr. 472.

If a reversioner in fee upon an estate for life acknowledge a statute, and after grant the reversion upon the death of tenant for life, the conusee may extend the land, for the reversion being a tenement is bound by the statute.

Moo. pl. 118; 2 Roll. Abr. 473.

So, if A, seised of a rent-charge, bind himself in a statute merchant, this rent is extendible; for the word *land*, which the statute subjects to the execution, includes all hereditaments extendible, and the conusee in this case may distrain and avow for the rent, though the tenant never attorned; for the law creating his estate gives him all means necessary for the enjoyment of it.

Moore, pl. 104; Co. Litt. 135. By stat. 27 E. 3, st. 2, c. 9, the conusee hath an estate of freehold. Vide post.

If the grantee of a rent-charge, after the acknowledgment of the statute, release to the tenant, by which the rent is extinguished, yet upon failure of payment the conusee may extend it; for to this purpose it has still a continuance, the statute *de mercatoribus* binding all the land (which includes all hereditaments extendible) the conusor had at the time of entering into the statute; consequently, this must be liable into whose hands soever it comes.

7 Co. 39, Lillingston's case.

If the conusor has lands in ancient demesne, they shall be extended on forfeiture of the statute; for though disputed titles to these lands are not determinable in courts of common law, (and therefore ejectment does not lie of them,) lest the tenants should be brought from the service of the plough; yet they are extendible in this case; for the extent is performed by the sheriff *in pais*, and the title of the land is not directly put in plea or dispute in the king's courts, by which the tenant might be brought from his business.

5 Co. 105; Moore, pl. 351; 2 Inst. 397; 2 Roll. Abr. 472; Hob. 47; but Dyer, 372, contr.

If a feoffment be made to A upon condition to re-enfeoff the feoffor, and A bind himself in a statute; if A continue seised of the land, or re-enfeoff the feoffor, the land in either case may be extended by the conusee: for whoever comes to the land under the feoffment of A, takes it chargeable with the statute, and, consequently, is liable to the execution. But, if the



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feoffor had entered, as he well might, because the feoffee had disabled himself to perform the condition, inasmuch as he cannot return it in the same plight it was given him, then he should not be charged; for this being a lawful entry, like an eviction in a court of record, sets aside all encumbrances. But, if in this case A had been disseised, and then bound himself in a statute, this had not charged the land during the disseisin, and, consequently, there is no disability to perform the condition; for a disseisee can no more charge his right, as such, than he can transfer it; nor is the land extendible in the hands of the disseisor; because, though his entry is tortious, yet he held it free during the disseisin, as the disseisee enjoyed it: but, if the disseisee enter or recover by action, then the land becomes chargeable with the statute.

Co. Litt. 222; 2 Co. 59, Julius Winnington's case.

If A and B be jointenants in fee, and A enter into a statute, and die before execution sued, the land is not extendible in the hands of B, because he claims the land as survivor from the first feoffment, which conveyed it to him free from any charge. But, if the conusee had sued execution before the death of A, the survivor, B, should hold it charged; for execution is equivalent to a sale, and, like a lease for years, shall bind the survivor. So, if A in this case had, after the acknowledgment of the statute, released to B, then the land would be chargeable with the statute, though A should die before execution, because the acceptance of the release prevents him from claiming by survivorship; for by the release B had the land before his companion died.

Co. Litt. 184 b; 2 Roll. Abr. 88; 6 Co. 79; Lord Abergavenny's case, Co. Litt. 185 a; 6 Co. 78, 79.

But the law is otherwise in the case of parceners; for if one of them charge the land, the other shall hold it under the encumbrance of the statute, for he comes in as heir by descent under the charge; whereas the jointenant surviving claims from the first feoffment, which is prior to the charge.

Co. Litt. 185 a.

If a conusor, at the time of acknowledging a statute, has goods and chattels to a great value, they are all liable to satisfy the conusee, if they be found in his hands when execution is sued: but, if the conusor disposes of them, they shall not be extended in the hands of a purchaser, as lands may be; for since there is no solemnity established or required, it is impossible to find in whose possession they lie, in order to extend them: besides, it must necessarily put a stop to trade and commerce, if execution was to pursue the goods wherever they were found.

2 Roll. Abr. 472.

If a husband, possessed of a term in right of his wife, acknowledge a statute, and die, the lease shall not be extended in the hands of the wife; for though the law gives him an absolute power over the term, so as to dispose of it, yet, if he does not make use of that power during the coverture, the wife shall enjoy it free as she brought it to him. But, if the execution be sued in his life, and the term extended, this will bind the wife; for the extent is a disposition in law to answer the conusee's debt, and therefore shall affect the wife as much as if he had sold the term, or granted it for years.

Roll. Abr. 346, 444; Co. Litt. 46.

## (B) Of the Judgment on which Execution is taken out.

If the husband be *seised* of lands of *inheritance* in the right of his wife, and acknowledge a statute, upon which execution is sued, the heir upon the death of the feme may enter and avoid the extent: but this must be understood of lands of which he cannot be tenant by the curtesy; for such he may as well charge as convey during his life, to bind the heir.

Bro. Stat. Merch. 18; Co. Litt. 30 a.

By what has been said, it appears what things are extendible and liable to execution for the satisfaction of statutes merchant, of the staple, and recognizances in the nature of the statute staple; and the same are also liable to satisfy all debts due on recognizances at common law, only with this difference, that in the former cases both body, goods, and lands, being all due, the conusee may take all at once, or different times; so that if he extends the lands first, he may afterwards take the body; whereas upon the recognisance at common law, if the conusee sues an *elegit*, he can have no *capias* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land.

2 Roll. Abr. 475; 2 Inst. 395; Hob. 60.

## 4. What Provision the Law has made for Tenant by Statute Merchant, &amp;c., in case of Eviction.

By the common law, after a full and perfect execution had by extent, returned and entered on record, the conusee could have no new re-extent on the effects of the conusor, because there was once satisfaction given to the creditor on record, though the lands had been recovered from him before he had levied the debt out of them. The severity of this law was laid aside in Henry VIII.'s time; for in the 32d year of his reign it was enacted, That if lands delivered in execution on just cause be recovered from the tenant by execution before he hath received his whole debt, the conusee (and, by a favourable construction of the statute, his (a) executors) may have a *scire facias* out of that court where execution is first awarded, or out of any courts where the record shall be moved by writ of error and affirmed. But this statute is to be construed under these restrictions, that where the conusee hath remedy for part of his debt in *presenti*, or *in futuro*, for the whole or for part, there he can have no aid nor benefit of this statute.

32 H. 8, c. 5. (a) 8 Co. Litt. 200.

As, if all the lands extended but one acre be recovered from the conusee, he shall have no advantage of this statute, because the act relieves those conusees only who are clearly without remedy, which the conusee cannot be said to be in this case, where he has one acre left him, though it be but a poor remedy.

Co. Litt. 289.

If A be bound to B in one statute, and to C in another, and C first sue execution, and extend the lands, and afterwards B extend and take the lands from C, as by law he may, because his statute is prior, C shall have no benefit of this statute, though he has not one acre left him, because he hath a remedy *in futuro*; for after the extent of B is ended, he shall re-enjoy the lands by force of the former execution: so, for the same reason, if the wife of the conusor recover dower against the tenant by execution, he hath no relief from this statute.

Co. Litt. 289 b; 4 Co. 67.

If a lessor oust his lessee for years, or disseise his tenant for life, and then

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acknowledge a statute, and the conusee sue execution; if the lessee in either case re-enter, the conusee is not relieved by this act, because he has a remedy *in futuro*, viz., after the death of the lessee, or the lease ended by holding over.

Co. Litt. 289.

If tenant in execution, by recognisance at common law, or by statute merchant, &c., be disseised, he may, by the express words of the statute, have an assize of novel disseisin also; and if there be no assignment by the conusee in his lifetime, they shall go to the executor, (being really but chattels,) who in case of a disseisin shall have the same remedy the testator might have had by an equitable construction of the statute.

2 Inst. 396; Co. Litt. 43 b.

Before we consider in what cases these tenants by statute merchant, &c., can hold over the time of their extent, it is first to be observed, that the sheriff is to make a reasonable extent of the land; so that, computing the debt and value of the land, it will be easily known how long the extent is to continue, and when the conusor is to have his land again.

Here we must distinguish between the act of a stranger and the act of the conusor: for in case of disseisin or any interruption by a stranger, the conusee shall not hold over the time of the extent, but is to have satisfaction for the injury done by action against the stranger: but, if the conusor himself had given the tenant by execution any interruption, or hindered him from taking the profits, there, the tenant might either hold over, or have an action against the conusor: for, as in the first case it would be unreasonable to punish the conusor for the act of a stranger, by keeping him out of his lands: so, in the last case, it would be equally unreasonable to permit the conusor, by any act of his, to turn the conusee out of the land before he has levied the debt.

4 Co. 82; 2 Ro. Abr. 478.

If land of a lessee for life, or years, be extended upon a statute, and afterwards part be recovered in an action of waste, for waste done by the conusor before the extent, the conusee shall hold the residue over the time of the extent, because no act of the conusor's shall prejudice the conusee, or hinder him from levying his just debt out of the lands. But, if the land had been recovered for what was done by the conusee, there, he should not take advantage of his own wrong, and hold over to the prejudice of the conusor.

2 Ro. Abr. 479.

So, if tenant in execution either suffers the land to lie waste, or neglects to levy the debt out of it; or, if he makes a conditional surrender of the land to him in the reversion, and enters for the condition broken; these are all his own wilful acts; and it is but reasonable he should suffer for them, and not hold over the land to the prejudice of the conusor.

3 Co. 67; 2 Ro. Abr. 478, 479.

But, on the other hand, where there is no default or negligence in the conusee, but he is prevented from making the usual profits of the land by the act of God, as where the land is surrounded by water, or rendered unprofitable by wild fire, there, the conusee shall hold over the time of the extent; for it would be unreasonable to punish him for what he could by no industry or possibility prevent.

4 Co. 82 b; 2 Ro. Abr. 478.

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7. *The several Ways of vacating and discharging these Statutes, and this either before or after Execution.*

As we find that body, goods, and lands are liable to execution, and the conusee may, at pleasure, take one or all by one writ of execution, or all at different times by several writs of execution, we shall consider,

1st, What acts of the conusee will discharge the land, or suspend the execution of it for a time; and this either before or after execution sued.

2dly, What acts of the conusee will vacate the statute, &c., by discharging both body, goods, and lands; and this either by cancelling the statute, or by defeasance, or release, which are equivalent to it; and herein of the *audita querela*, which is the proper remedy for the conusor, if execution be sued after such acts are done by the conusee.

3dly, In what cases the conusor may avoid and destroy the statute by entry or plea, and in what cases he is put to his *scire facias*.

As to the first point; if A acknowledges a statute to B, and afterwards another to C, in this B is to be first satisfied, his statute being prior in time to C's; yet, if B accepts a lease for years from A, then may C sue execution first, because B by his acceptance of the lease has suspended the execution of his statute during the term.

2 Ro. Abr. 470; Cro. Ja. 424, 477. *Infr.*

But, if a conusee accepts a feoffment of parcel of the land from the conusor, the residue in his hands is still liable; for his body being still liable, whatever remains in his hands must be so too: But, if the conusor had enfeoffed a stranger of the residue, then the conusee by his purchase of part had discharged the whole land; for the conusee, by his purchase, has discharged that part of the land from being liable to the debt, since his own lands cannot in any manner be liable to his own securities: and having discharged a part of the land by his own act, it is a discharge of the whole, since such act of his has prevented the legal execution on the whole lands, in the manner the statutes have directed, and therefore to execute it on the other alienee is partial, and to execute it on himself, together with the other purchasers, is impracticable.

Plow. 72; 2 Ro. 471; Bro. *Statute Merch.* 42; F. N. B. 104; Cro. Eliz. 756.

Thus, if a conusee extends a rent-charge, and after purchases parcel of the land out of which it issued; this frees the whole land from the statute: for, besides that the rent-charge is extinguished, and, consequently, can be no longer in extent, the conusee by his purchase, though it had continued, has discharged it, for the whole rent was extended to answer the statute; and part of it being discharged by the conusee's own act, the remainder must be liable to the whole debt, which would be contrary to the extent, or else must be discharged.

Savil, 69.

If the conusor enfeoffs the father of the conusee of part of his land, and a stranger of the remainder of it, and, upon the death of the father, that part descends to the conusee; this descent, though before execution, discharges the whole land, and the stranger shall enjoy his purchase free from that statute; for, since the lands are made liable, which were not so, to any executions at common law, the conusee must take the execution according to the statute, which in this case cannot be had, since he cannot lay any part of the debt upon the land, which he is owner of: therefore, not being able to take execution on the whole land, according to the statute, his remedy

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fails; and there can be, in this case, no provision of the common law in his favour.

2 Ro. Abr. 47.

If the conusor enfeoffs the conusee of all his lands, by this purchase the conusee has discharged the lands from the extent, because it would be most absurd to extend his own land to pay his own debt; but, if the conusor repurchases the lands, he has revived the extent against them; for the first feoffment only discharged, or rather suspended, the execution against the land, and left the body and goods still liable; and whilst the conusor is subject to execution, so long will all lands he purchases after the acknowledgment of this statute be subject.

Bro. *Statute Merch.* 25; 2 Ro. Abr. 470.

So, if the conusor, after the repurchase, had aliened to a stranger, the conusee might sue execution against him; for he purchased the lands subject to the encumbrance of the statute, since they were chargeable in the hands of the conusor.

Plow. 72.

But all these acts of the conusee, which discharge the land only, must be understood to be done before the execution sued. Let us see in the next place how far such acts will affect him after execution is sued, and we shall find them not only to discharge the land, but the body and goods also, as will appear by the following instances:

For where the body and lands of the conusor are in execution, and the conusee purchases the whole or parcel of the land; this discharges not only the land, as in the precedent cases, but the body also; for the lands are taken in execution as a real satisfaction for the debt, and therefore, as in all other cases of execution, are a discharge of the body, which is but a pledge for satisfaction: but these debts being presumed to be mercantile, are therefore to be satisfied as soon as possible, that the merchant may attend his business; for which reason the statute allows, that, where the real satisfaction is had by the extent of the lands, yet the body shall be a pledge, in order for a more sudden satisfaction, if the money can be raised: but yet if the real satisfaction by the purchase or descent of the land be discharged, as it must be when the conusee cannot have it in the manner it was extended, (as the conusee cannot have in this case, since he cannot have the term and fee simple in the land together,) it follows of course, that the body, which is only a pledge, cannot continue in execution, when that which was the real execution is discharged in the hands of the conusee. So, if the conusee surrenders part, or the whole land, this discharges both land and body; for the body being only in execution in order to oblige him the sooner to satisfy the conusee, when he by any act acknowledges himself satisfied, as he does by the surrender, the body must consequently be set at liberty.

2 Ro. Abr. 477; Plow. 72; Bro. *Stat. Merch.* 42.

Thus, if the bodies of A, B, and C be in execution, and the conusee come into court, and say, that he will discharge one of them from the execution; if this be entered of record, it shall discharge every one of them: the reason is, the debt being entire and chargeable on each of them, his acknowledgment of satisfaction by this act of one of them, shall, like a release, extend to all.

2 Ro. Abr. 477.

If A and B acknowledge a statute to C, who takes their bodies, and the

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lands of B in execution; if afterwards B die, and his land in execution descend to C, the conusee; this discharges the body of A.

Bro. *Statute Merch.* 15; 2 Ro. Abr. 477.

If a conusor be lessee for life, and his body and lands be taken in execution, and the conusee, being in by the extent, commit waste, for which the reversioner recovers the land, (as he well may, because the estate of the lessee, which was extended, was subject to the punishment of waste;) this shall discharge the body of the conusor: *secus*, if the land had been recovered for waste done by the conusor; for then the body should not be discharged, lest the conusor by his act and wrong should free himself from the execution.

Bro. *Statute Merch.* 15; 2 Ro. Abr. 477.

The next thing considerable is, what acts of the conusee will vacate the statutes, by discharging body, goods, and lands. And this may be done,

1st, By cancelling the statute, as tearing off the seals, which are so essentially necessary, that without them the statute, like common specialties, is wholly void and useless.

2dly, By defeasance, which may vacate the statute absolutely, or upon condition.

3dly, By release, which is a solemn renunciation of a man's right by deed. But it may be demanded how these statutes, which have the force and solemnity of a judgment, can be avoided by acts of less notoriety than themselves, as these acts *in pais* must be confessed to be, which overthrows the established rule, *unumquodque solvi eo ligamine quo ligatur?* The answer to this is, that notwithstanding the release, &c., from the conusee, the statute still continues in force; but the law, with reason, construing all men's deeds most strongly against themselves, by these acts, precludes the conusees from execution.

But, if the court, at the instance of the conusee, grants him execution, as they really ought, since nothing appears to them destructive of the statute, what remedy has the conusor? For after such release or defeasance he cannot stop the execution, because he has no day in court to plead this in bar; but his proper remedy in such cases is by *audita querela*, which is a writ to set aside an unjust judgment, for some injustice which could not be pleaded in bar; for if it might, then it was the party's own fault not to plead it in bar of such unjust demand, which is not relieved by this writ, that proceedings may not be endless.

F. N. B. 104; 2 Sid. 108, 109; Co. Litt. 290; Moore, pl. 693.

And if, upon a *scire facias* on a recognisance at common law, the conusor is returned summoned, he shall never avoid it by *audita querela*, because the recognisance was upon condition, which he hath performed: for by the summons he had a day in court given him to plead the performance of the condition, which would have been sufficient to stop the execution; but, if the sheriff had returned, that he found nothing whereby to summons the conusor, on which execution had been granted, then the conusor might have an *audita querela*, and then the release of the conusee, or the performance of the condition, might well be suggested therein, because he had no day in court to plead them in bar of the execution.

2 Ro. Abr. 306; Cro. Eliz. 4, 25; Sid. 55.

If A be tenant for life, remainder to B his son in tail; A enter into a recognisance, and die, C bring a *scire facias*, and B be returned heir and

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terretenant, and warned, but make default, he can have no *audita querela* to avoid this execution, because he had a day given in court to set aside the recognisance ; and it was his folly not to appear when warned.

Sid. 54 ; Sir T. Raym. 19.

If A enters into a statute to B, and pays the money at the day assigned, upon which the statute is cancelled, and after B forges a new statute in the name of A, in this case A may relieve himself by *audita querela* ; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such, till the contrary appeared, which the conusor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee.

F. N. B. 104.

If the conusee of a statute, upon agreement with the conusor, delivers up the statute in lieu of an acquittance, and after sues execution, and the conusor prays a re-extent, because that the land was extended too low, and has it granted to him, he shall never avoid the extent by *audita querela*, because by his praying the re-extent he admits the statute good and executory.

Ro. Abr. 313.

If a conusee of a statute gives a deed of defeasance to the conusor, and afterwards sues execution contrary to the form of the defeasance, the conusor may have an *audita querela*, because the defeasance precludes the execution, if the terms or condition of it be performed by the conusor ; and the conusor may have the *audita querela*, though the condition be not performed according to the defeasance, if execution was sued before the condition broken, because the conusee extended before his time ; and therefore the execution being unjustly sued, must, consequently, be an injury to the conusor.

F. N. B. 105 ; 2 Ro. Abr. 307.

In an *audita querela*, the case was this: the conusee gave a defeasance, that if he sued execution of the lands the conusor had in Kent, the statute should be void ; the conusee, contrary to this defeasance, extended the land in that county ; and it was adjudged that this writ well lay, to avoid the execution and vacate the statute ; for the defeasance was no way repugnant to the statute, because the conusee might still extend the lands of the conusor in any other county, and take his body and goods.

Moore, 811, Trot and Spurling.

If the conusee releases to the terretenant all right, interest, and demands, together with all suits and executions, and afterward sues execution, the terretenant shall have an *audita querela* to set aside this execution ; and this differs from the case of Burrows and Gray, in Cro. Eliz., for there the conusee released only all his right, interest, and demand to the terretenant, which was held not to be sufficient, because he had only a possibility, and no interest in the land before execution, and, consequently, could not release what he had not : but in the former case, though the conusee had no right to the land before execution, yet there are words sufficient to discharge the execution, since it is released by express words : and in the first case, the words of the release refer to the executions, suits, and demands upon the statute, which statute, since it was in being, the executions and demands upon it may be released at any time ; but in the other case the words *right, title, and interest* relate to the land, which the conusee had no interest in till execution sued, and therefore cannot release or transfer over what he had not : besides, in

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the first case, the conusee has released all suits, by which, says my Lord Coke, the execution is gone, because no common person can have execution without prayer and suit to the court.

Cro. Eliz. 40, 551; And. 133; Ro. Abr. 313; Co. Litt. 265, 291; 10 Co. 47 b; 2 Ro. Abr. 470.

Another method of avoiding executions is by *scire facias ad rehabendam terram*: and this writ differs from the *audita querela*, for that avoids an execution unjustly obtained at first; but the *scire facias* allows the execution just at first: but shows, that the end for which it was granted being obtained, it ought of consequence to cease.

2 Ro. Abr. 480.

If the conusor, after his land is extended, tender the money to the conusee, who refuses it; or if the debt, with all costs and damages which the statute *de mercatoribus* allows, be satisfied from any casual profit arising from the land; in these cases, the conusor is put to his *scire facias*, and cannot enter; but in case of an *elegit* on a recognisance at common law, when the conusee is answered his debt, by the perception of the certain and usual profits of the land, the debtor may enter, and is not put to his *scire facias*: yet in this case, if the creditor be satisfied by an accidental perquisite, there, the debtor cannot enter, but must have a *scire facias ad rehabendam terram*. And the reason of these distinctions is, because, in the first case, the execution issues according to the direction of the statute, not only till the principal debt be levied, but all costs and damages arising by reason thereof; and therefore, since the damages are not ascertained, the record will always oppose an entry, which is but an act *in pais*, and cannot be turned to the defeasance of a matter of record, till such damages are settled on record in the *scire facias*: but in the second case, when the debt is certain, and the value of the land ascertained in the extent, there, when such debt is paid by perception of such settled profits, there is no act on record to oppose an entry, and therefore an entry is lawful. But, where the satisfaction arises from accidental profits, which do not appear in the extent, this then is still matter of record, in opposition to the entry, since such accidental profits do not appear in the valuation of the land settled by the extent on record.

2 Ro. Abr. 479, 480; 4 Co. 67; 2 Inst. 398.

If lands be extended on a statute, and the time of the extent expired, the conusor is to be put to his *scire facias*, because the conusee may have cause to hold the land longer than the time of extent, for he may retain it till he has received his costs of suit and reasonable expenses, which the chancellor shall assess.

4 Co. 67; 2 Ro. Abr. 479.

No *scire facias* lies upon a general averment, that the conusee has levied the debt before the time of the extent expired, because this may happen by the conusee's industry in improving the land, which the debtor can take no advantage of. So, if the land taken in execution be really worth 20*l.* *per annum*, but it is extended only at 10*l.*, though by this computation it is evident the conusee might levy the debt before the time of the extent is ended; yet the conusor, upon an averment that the debt is levied, shall have no *scire facias*,<sup>(a)</sup> because that would be contrary to the record, and the court is to judge of the value according to the extent, by which it appears the debt is not yet levied. But, if the conusee has levied part by cutting wood, and has received the residue, as appears by an acquittance produced by him, in this case, he shall have a *scire facias*: the reason is, because the



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end of the extent being only to satisfy the conusee his reasonable demands, whenever it appears to the court that they are answered, whether it be by perception of the profits or otherwise, they grant a *scire facias* to avoid the extent, and reinstate the conusor in his former possession, since the end for which it was given is answered.

2 Ro. Abr. 483. (a) [But, if the conusee be satisfied by perception of the profits, though not by the extended value, the conusor may be aided in equity, and may compel the conusee to account according to the real value by him received. 2 Ventr. 338; Hardr. 136.]

If the conusee has levied part of the debt, according to the extent, the conusor, upon tender of the residue *in court*, shall have a *scire facias* to recover the lands within the time of the extent: for here it appears on record how much was due at first, how much was paid, and what remains due and in arrear; and the end of the extent being to satisfy the conusee of his just debt, whenever that appears to the court, the extent shall cease. But, if the conusor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the conusee; in neither of these cases should the *scire facias* be granted, because it does not appear on record that the debt is paid.

2 Ro. Abr. 482.

If the conusee of a statute for 100*l.* apportions the statute, and sues execution for the body and land, for several parts of it, in several counties, as for 20*l.* in Kent, 20*l.* in Surry, and the body is taken in London for 20*l.*, upon tender of this 20*l.* in court, the conusor shall have a writ to the sheriff of London to set him at liberty; for this writ of extent was to take his body, &c., till 20*l.*, not the 100*l.*, was paid, and, consequently, upon tender of the 20*l.* the sheriff has no power to keep him in prison. *Secus*, if the body had been taken before apportionment, for then it could not be discharged upon payment of 20*l.*, it being taken at first for the whole debt.

2 Ro. Abr. 482.

If A leases Black-acre for years to B, and then acknowledges a statute to C, and afterwards another to D, then C takes a lease of the reversion, and the rent from A, by which he has suspended the execution of the statute during the term, and, consequently, laid the land open to the extent of D, the second conusee, who sues execution; if therefore C should extend the reversion and rent during his own lease, B the lessee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, because C hath suspended the execution of his statute, the first in date, by the acceptance of the lease from the conusor.

Ro. Abr. 304; Cro. Ja. 424, 477. *Supr.*

If tenant in tail acknowledge a statute, and dies, and the conusor sues execution against the heir, he may avoid it by assize, without being put to his *audita querela*. So, if a disseisor acknowledges a statute, and the disseisee enters, and the conusee extends the land, the disseisee is not put to his *audita querela* to avoid the extent, because there is not the appearance of justice in this extent; the conusor having only a tortious and unlawful seisin of the land, and, consequently, no power to charge it.

Ro. Abr. 304.

[After an extent of a statute in one county, and a *liberate* returned and filed, the conusee may have an extent into another county, if the prayer for the second extent was entered at the time the first extent was taken out; otherwise not. Yet, in this last case, a court of equity will relieve him; for

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the intention and agreement of the conusor is, that all his lands (be they in never so many counties) shall be bound by the statute; and, consequently, it would be most unreasonable to confine the conusee to the lands of the conusor in any one county; for this would be to defeat that security which the party himself had agreed to give, and had actually given.

*Oates v. Robinson*, 1 Str. 461; *Fort. 373*, S. C.; 2 P. Wms. 91, S. C., in *Chancery*, where Lord Macclesfield gave the conusee leave to enter the prayer *nunc pro tunc*.]

¶ By 8 Geo. 1, c. 23, § 4, "in case it shall at any time or times before or after the filing or returning of any *liberate* or *liberates* sued out on any extent or extents upon a recognisance in the nature of a statute staple, be made appear to the Court of Chancery, that sufficient has not been extended and levied, or sufficiently extended and levied to satisfy such recognisance; or that any omission, error, or mistake has happened in making, suing out, executing, or returning any of the said writs, or any process thereupon; or it should happen that any lands, tenements, or hereditaments shall be evicted from any person or persons, who shall have extended the same by virtue of any such writ or process as aforesaid; that then, and in every such case, the said Court of Chancery shall and may award one or more re-extent or re-extents for the satisfying the same as aforesaid, and that writs of *liberate* may be sued out thereupon."

## (C) Of the several Kinds of judicial Writs which lie after Judgment: And herein,

## 1. Of the Form, Teste, and Return of such Writs.

THE form of judicial writs must be according to the approved precedents in those cases; and therefore, where on a writ of *elegit* which was *ideo tibi præcipimus quod bona et catalla* of the defendant, *quæ habuit die judicii prædicti redditu, deliberari facias*, omitting *et medietatem terrarum et tenementorum prædictorum*, the sheriff extended the lands and goods, and delivered the moiety of the lands, &c.; on motion, the court refused to amend the writ, and held, that the party must take out a new *elegit*, the inquisition herein being without warrant, the sheriff having no authority by this writ to extend the lands.

*Walker v. Riches*, Cro. Car. 162. § A suggestion of the reasons for issuing a writ of execution to the coroner, instead of the sheriff, need not be made upon the roll, previously to the writ being issued. *Bastard or Barsten v. Gutch or Trutch*, 5 N. & M. 109; 4 Dowl. P. C. 6; 1 Harr. & Woll. 321; 3 Adolph. & Ellis, 451. §

¶ But writs of execution, if informal, may be amended, as by adding or altering the teste or return, &c.

*Browne v. Hammond*, Barnes, 10; *Newham v. Law*, 5 T. R. 577; *Atkinson v. Newton*, 2 B. & P. 336; *Meyor v. Ring*, 1 H. Bl. 541; *Simon v. Gurney*, 5 Taunt. 605; 1 Marsh. 237, S. C.; *R. v. Sheriff of Monmouth*, *Ibid.* 344. § *Denn v. Laconey*, 1 Coxe, 111. §

§ A mistake in the name of the town in which the jail is situate, in an execution, does not render that execution void, nor the imprisonment thereon, in the common jail, a trespass.

*Lewis v. Avery*, 8 Verm. 287. §

Every writ of execution, in case of a common person, must bear teste in term-time, for being the process of that court in which judgment is given, they have no authority to award it at any other time: but original writs issuing out of Chancery may bear teste at any time, because that court is always open.

*Co. Litt.* 161; 2 *Inst.* 40; *Latch*, 11; *Sir T. Jones*, 150; *Vent.* 362. § It is not

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requisite in an execution to state in its date the year of Christ, if the year of the Commonwealth is stated. *Craig v. Johnson*, Hardin, 520.*g*—But, if a writ of execution bear teste out of term, the sheriff is justifiable in executing it, for he is not judge of the validity of the process, provided the court, out of which it issues, has jurisdiction of the matter. But though he is justifiable in executing such process, yet, if he lets a person escape whom he arrested on a *capias ad satisfaciendum* which bore teste out of term, no action lies against him, for the writ was void. 2 Salk. 700; 7 Mod. 29. *Per Holt*, C. J. *¶* A *capias ad satisfaciendum* is irregular when a term intervenes between its teste and return. *Gibbons v. Larcom*, 3 Wend. 303.*g*

But, if judgment be entered as of Hilary term, the party may take out execution in the vacation following, by a writ teste the last day of the precedent term; for having run through the whole course of a judicial proceeding, and his cause being ripe for execution at that time, it would be unreasonable to oblige him to wait till the ensuing term, by which he might be disappointed of the effect of his judgment.

Whether it can be averred that the writ did not issue till a day subsequent to the teste, vide *Lev. 173*; 1 Sid. 271; *Lutw. 332*; 2 Keb. 33; 2 Burr. 966.—Where it appeared that an execution was levied before the judgment was signed, though after the first day of the term to which it related, and after the teste of the *feri facias*, yet held naught. 2 Show. 494. *¶* An execution unsupported by the judgment which it counts on, is void. *Cutter v. Wadsworth*, 7 Conn. 6. See *Luddington v. Peck*, 2 Conn. 700. But when the execution is regular on its face, it is no excuse for the omission of the sheriff in not executing it, that the sum specified varies from the amount for which the judgment was rendered. *Parmelee v. Hitchcock*, 12 Wend. 96. Though the execution may be regular, yet if the judgment has been satisfied, and the sheriff has notice of the satisfaction, he cannot afterwards proceed upon the execution for his fees. He must look to the plaintiff or his attorney for them. *Jackson ex dem. Anderson v. Anderson*, 4 Wend. 474. See *Reed v. Pruyn*, 7 Johns. 426; *Sherman v. Boyce*, 15 Johns. 443; *Jackson v. Cadwell*, 1 Cowen, 622; *Jackson v. Bowen*, 7 Cowen, 1.*g*

All writs of execution which are to be executed by the sole authority of the sheriff, such as a *capias ad (a) satisfaciendum*, *habere facias seisinam* or *possessionem*, *feri facias*, *liberate*, &c., are good when duly executed, though (b) never returned by the sheriff; for the plaintiff has the effect of his suit, and there is nothing farther to be done on his part; and hence it is said, that an execution executed is the end of the law.

5 Co. 90; *Hoe's case*, 4 Co. 67. *¶* The sheriff may sell a leasehold estate, which he has seized under a *feri facias*, after the return of the writ, and without any writ of *venditioni exponas*. For the property of the sheriff continues till the execution is completed, which cannot be till sale of the things taken in execution, and payment of the money to the plaintiff. This, indeed, is shown by the common course of proceeding; the sheriff not being bound to make a return of the writ of execution, unless the party requires it. And as to the writ of *venditioni exponas*, that writ, though a proper writ, yet is not of necessity, being rather to compel the sheriff, when guilty of laches, to do what he has authority to do, than to give him any new authority. *Per Lord Hardwicke. Jeanes v. Wilkins*, 1 Ves. 195. But see *Ayer v. Aden*, *Yelv. 44*; *Langdon v. Wallis*, 1 *Lutw. 589*. *¶* (a) But a *capias* in mesne process must be returned, for the end thereof is to compel the defendant to appear, and therefore, if the writ be not returned, the arrest is tortious. 5 Co. 90 a; *Cro. Car. 447*. (b) But, if the party apprehends himself injured by an erroneous writ of execution, he may apply to the sheriff to return it, and if he refuses, an action on the case lies against him. *Keb. 551*.

But in case of an *elegit*, although it be a judicial writ, yet the sheriff must return it; for this is not to be executed by his sole authority, but by an inquest taken by him, according to the statute of Westm. 2; therefore he must return the writ, that it may appear that he hath pursued the directions of the statute.

5 Co. 90 a; 4 Co. 74; 2 Inst. 396; *Cro. Ja. 569*; *Cro. Eliz. 584*.

On this distinction it hath been held, that a *capias ad satisfaciendum* may

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be taken out, returnable the term next but one after the teste; for in this case the intervening term makes no discontinuance, it not being necessary, as in case of a *capias* in mesne process, that the defendant should have a day in court; for his cause is at an end, and he must be in prison, whether the writ be returned or not; whereas on a *capias* in mesne process, the party may be at great prejudice, by reason of the imprisonment in the mean time.

2 Salk. 700; Shirley v. Wright, 2 Ld. Raym. 775; 7 Mod. 29. ¶ If a term intervenes between the teste and return, the *ca. sa.* is irregular. Gibbons v. Larcom, 3 Wend. 303.¶

So, if a *fiery facias* issues to the sheriff of S, returnable on a common return-day, and he at the day returns *nulla bona*, a *fiery facias testatum* may issue the day following, to the sheriff of Kent, and execution by him shall be good; for though on mesne process there can be no *testatum* till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court.

Sir T. Jon. 200.

¶ When process is returnable on a particular day, it may be returned in the morning, and the officer is not responsible, though after its return he might have executed the process.

Hinman v. Borden, 10 Wend. 369.

The latest period allowed by law for the service of an execution, is the day on which it is returnable.

Vail v. Lewis, 4 Johns. 450; Devoe v. Elliott, 2 Caines, R. 243.

The sheriff cannot be compelled, but on leave given by the court, he may amend his return as to matter of fact.

Vastine v. Fury, 2 S. & R. 426.

As to the effect of a return, it has been held, that between the parties to the suit in which the writ was issued, it cannot be traversed.

Wilson v. Hurst, 1 Pet. C. C. R. 441; Diller v. Roberts, 13 S. & R. 60.

If the officer collect the money after the return-day of the execution, and make a return that he has received it, as in other cases, his act is unofficial. The plaintiff may affirm it, or proceed against the defendant.

Stephens v. Boswell, 2 J. J. Marsh. 30.

When within proper time the officer returns an execution "satisfied," the plaintiff has no remedy to recover the debt from the defendant.

Atkinson v. Farmer, 2 Murph. 391.¶

By rule of the K. B., the attorney concerned for the plaintiff in the cause, or his agent, shall upon all bailable *mesne process*, and every writ of *attachment* and *fiery facias*, and *capias ad satisfaciendum*, endorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give.

Reg. Gen. B. R., H. T., 2 & 3 G. 4; 5 Barn. & A. 560.

## 2. Of the Elegit.

An *elegit* is a judicial writ given by (a) statute, either upon a recovery of any debt or damages, or upon a recognisance in any court which had authority to take the same. The words of this law are, *Cum debitum fuerit recuperatum, vel in curia regis recognitum, vel damna adjudicata, sit de cetero in electione illius qui sequatur pro hujusmodi debito aut damnis sequi breve, quod vicecomes fieri faciat de terris et catallis debitoris, vel quod vice-*

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*comes liberet ei omnia catalla debitoris (exceptis bobus et affris carucae) et medietatem terræ suæ quousque debitum fuerit levatum per rationabile pretium vel extentam; et si ejiciatur de illo tenemento, habeat recuperare per breve novæ disseisinæ, et postea per breve redisseisinæ, si necesse fuerit.\**

(a) Viz. By Westm. 2 or 13 E. 1, c. 18; 2 Inst. 394. \* Tenant by *elegit* has but a chattel. 2 Inst. 396. Yet he shall hold *ut liberum tenementum*; and he, his executor, or administrator, shall have an assize. Ibid. Co. Litt. 436; 1 Mer. 124.

When a person has judgment in an action of debt, or any other action in which he has damages, and he chooses to take out execution by *elegit*, the entry is, *Quod elegit sibi executionem fieri de omnibus catallis et medietate terræ*, and from this election either to have a *feri facias*, or this writ, it is called an *elegit*, the form of which, being first given by this statute, (for, as has been before observed, there was no execution against the lands of a debtor at common law,) is, *Ac cum idem J S, juxta statutum inde editum elegerit sibi liberari pro prædict. 20 libris omnia catalla et medietatem terræ ipsius J D.*

2 Inst. 395; Reg. 299; Co. Litt. 189 b.

But, though by this statute the lands of a debtor are made liable, as well as his personal estate; yet, if the creditor takes out an *elegit*, and it appears to the sheriff that there are goods and chattels (a) sufficient of the debtor's to satisfy the debt, he ought not to extend the lands.

2 Inst. 395. (a) But an *elegit* executed upon goods only, is not a *feri facias*: for a *feri facias* is executed by sale by the sheriff, but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. Sid. 184; Lev. 92; Keb. 105, 261, 465, 566, 692; 1 Ld. Raym. 346.

Upon this writ the sheriff is to empanel a (b) jury who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court out of which the *elegit* issued.

(b) That it cannot be done by the sheriff without an inquest, for the words of the statute are *per rationabile pretium et extentam*, which must be found such by the oaths of twelve men, is laid down and admitted in all the books which treat of this matter, as 2 Inst. 396; Co. Litt. 389 b; Dyer, 100; 5 Co. 74 a, b, &c. [If the sheriff returns on the *elegit* that there are no lands, he need not return any inquisition. Stonehouse v. Ewen, 2 Str. 874.]

When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety (c) thereof to the plaintiff by (d) metes and bounds.

Cro. Car. 319; Sparrow v. Mattersock, so resolved, and that all the precedents were so. (c) [If he deliver more than a moiety, the execution is void. Patten v. Purbeck, 2 Salk. 563; 12 Mod. 355, S. C.] (d) If upon an *elegit* the sheriff deliver a moiety of a house without metes and bounds, such return is ill, and shall be quashed for uncertainty. Carth. 453, per Holt, C. J. [If the defendant be jointenant, or tenant in common, it ought to be specially alleged in the return. Hutt. 16.] ¶ If the inquisition be void for uncertainty, or because more than a moiety has been delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain possession of the land under it, the court, on a suggestion thereof, or on a *scire facias*, will order the writ to be vacated, and grant another, and amerce the sheriff. See the form in 1 Towns. Judgm. 129. So, where fraud, deceit, or partiality has been practised, if the writ be not filed, the court will stay the filing of it, and grant another writ. 2 Inst. 396. And (according to the opinion of Lord Hale, which seems to be well founded) they will grant another writ in either of the above-mentioned instances, whether of defect or fraud, after the first has been filed. 2 Wms.'s Saund. 69 c; Anon., 1 Ventr. 259; Pullen v. Birbeck, 1 Ld. Raym. 718; 12 Mod. 355, S. C.¶

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¶ If the execution were laid upon lands which did not belong to the conusor, or had been sold before the judgment, anciently, the *elegit* would have put the party out of possession, and driven him to his assize or ejectment; because, being a stranger to the judgment and execution, he could not traverse the execution. But, as it was thought hard on such executions to turn strangers out of possession, the practice was altered, and the sheriff, instead of *actual*, delivers only *legal* possession of the moiety of the lands; and if the plaintiff do not enter, as, it seems, he may by virtue of the *elegit*, he must proceed by ejectment, in which an examined copy of the judgment roll, (a) containing the award of the *elegit* and the return of the inquisition, is evidence of his title, without proving a copy of the *elegit*, and of the inquisition.

Gilb. Execut. 44; Tidd's Pr. 1075; 2 Eq. Ca. Abr. 381; 3 T. R. 295; 6 Taunt. 202; Marsh. 542. (a) Ramsbottom v. Buckhurst, 2 M. & S. 567. But see Gilb. Ev. by Loft, 10, 11; Running. Eject. 117; Lill. Pr. Reg. 689, *contr.*]

[But the sheriff does not now, as formerly, deliver *actual*, but only *legal* possession of a moiety of the lands: and in order to obtain actual possession the plaintiff must proceed by ejectment; (b) in which he must not only prove the judgment, and by the judgment roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit* by a true copy thereof, and the inquisition thereon; for it is the *elegit*, and inquisition upon it, which carve out the term, and give the right of entry, the judgment roll being no more than a *memorandum* that the *elegit* issued and was returned.

Tidd's Pr. 754; 2 Eq. Ca. Abr. 381; 3 Term Rep. 295. {See Addis, 203, Pennsylvania v. Kirkpatrick; 1 Johns. Rep. 42, M'Dougal v. Sitcher.} (b) Gilb. Evid. by Loft, 10, 11; Running. Eject. 117.

If the sheriff, on an inquisition upon an *elegit*, returns the defendant to have twenty acres in Dale, and twenty acres in Sale, and delivers the twenty acres in Sale for the moiety of the whole, all is void, for he ought to deliver a moiety of the twenty acres in each vill, and this may be avoided in evidence in ejectment brought for the lands.

Lev. 160, *per Curiam*, Earl of Stamford v. Needham; but vide Sid. 239; 1 Keb. 858, S. C., but not S. P. [And it hath been adjudged that the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c., making in value a moiety of the whole. Denn v. Earl of Abingdon, Dougl. 473; 1 Burt. Pr. Exch. 289.]

If A and B recover severally against C, and A sues out execution, and has a moiety of C's land delivered to him on an *elegit*, and then B sues out an *elegit*, he can only have a moiety of the lands which remained with C after the first extent, and not the whole delivered to him.

Cro. Eliz. 482, Huyt v. Cogan.

But, if A acknowledges two judgments to B, and in the same term he takes out two *elegits*; on the one he may have one moiety of A's lands delivered to him, and on the other the other moiety, and he is not restrained to a moiety of a moiety, for in judgment of law the whole term is but one day.

Hard. 23, &c.; And. 27, The Attorney-General v. Andrews.

[On lending money, therefore, if the lender take two several bonds and warrants of attorney, one for a part, and the other for the residue of the money, and enter up two several judgments thereon, of the same term, he may take the whole of the defendant's lands under them.

Gilb. Execut. 56.

If upon an inquest taken upon an *elegit*, the jury find that the party

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was possessed of a term, which commenced the 2 & 3 Ph. & Mar., when in truth it commenced the 3 & 4 Ph. & Mar., and the sheriff sells the term according to the value found by the jury, the execution is void, for the sheriff has only authority to sell or extend such things as are found to be the party's, but in this case the inquest finding one thing, and the sheriff selling another, the inquest does not warrant the sale.

Cro. Eliz. 584, *Palmer v. Humphry*; 4 Co. 74, S. C.

But, if the inquest had found, that he was possessed of such land for terms of divers years *adhuc vent.* which they had appraised at so much, without showing the certain beginning or determination thereof, it had been well enough; for they shall not be compelled to find a certainty, not having means to be informed thereof.

Cro. Eliz. 584. See Gilb. Execut. 35.

Upon an *elegit* the sheriff may either extend a term for years, that is, may deliver a moiety thereof to the plaintiff as part of the lands and tenements of the defendants, or may sell it absolutely as part of his personal estate.

2 Inst. 395; 8 Co. 171; Dalt. Sh. 137.

¶ If a term for years be extended, and valued at a certain value in gross, and delivered to the plaintiff, and the debt be more than levied out of the profits of other lands and of the term, yet he shall not account for the profits of the term, nor deliver up the same, because he had it at a stated price by the *elegit*, and the lands and the tenements were only for the remainder of the debt, and therefore the profits of them will only go towards satisfying such remainder, and for these last profits only the plaintiff shall be answerable. Therefore some of the books say, that a chattel or term for years may be sold; which is true in one sense, viz., that it may be sold to the plaintiff for the price settled by the jury; and if the defendant tenders the money to the sheriff, or to the court, before actual delivery by the sheriff, such goods are saved, and if afterwards delivered, he shall be entitled to his *audita querelu*: but, if there is no tender made, the property of the goods is altered by the delivery of the sheriff, and the plaintiff may dispose of them under the judgment.

Gilb. Execut. 33; Cro. Eliz. 584; *Comyn v. Brandlyn*, Moore, 873.

But, if a writ of error be brought, and the judgment reversed, the goods in specie shall be restored, and not the value; but upon a *feri facias*, the value and not the goods in specie. And the reason of the difference is, that on the *feri facias* the sheriff is to sell to any buyer, but in the *elegit* he is only to deliver to the plaintiff; therefore when the writ of error has reversed the judgment, in the one case the defendant is to be paid the money, in the other to be restored to the goods themselves; for he is to have what he has lost by the writ as it was awarded, which in the case of a *feri facias* was the money, but in the *elegit*, the goods themselves delivered over to the plaintiff.

Gilb. Execut. 34; Anon., Moore, 573; *Goodyer v. Junce*, Yelv. 180; Cro. Ja. 246, S. C.; Anon., Dy. 363; *Bathurst's case*, Ibid. in marg. Jenk. Cent. 264; *Palmer's case*, 4 Co. 74; *Amner and Luddington's case*, 2 Leon. 92; *Hoo's case*, 5 Co. 90 b.

But, if a term be delivered *per rationabile extentum*, at an annual value, and not at a value in gross, then the plaintiff is accountable for all the profits he receives out of the term upon such extent; and if he receives the debt out of such term before it expires, the defendant shall be restored to the term itself.

Gilb. Execut. 35.¶

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Also, it seems that a (a) rent-charge may be extended on an *elegit*, for the word *land*, which is made subject to the execution, includes (b) all hereditaments extendible; and in this case the party may distrain and avow for the rent, though the tenant never attorned; for the law creating his estate gives him all means necessary for the enjoyment of it.

Moore, 32. (a) But a rent-sock cannot be delivered on an *elegit* as *liberum tenementum*. Cro. Eliz. 656. (b) But the office of filazer cannot be extended, for a man shall not have execution of that which he cannot assign, though he may have of this an assize, *ut de libero tenemento*. Dyer, 7, pl. 10.

|| So of a reversion; for though the words of the *elegit* are *medietatem omnium terrarum et tenementorum predictorum de quibus predicto die anno regni nostri primo, quo die judicium predictum redditum fuit, vel unquam postea fuit seisisus predictus B sine dilacione liberari facias*; yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is *medietatem terræ*, which extends to reversions, and these are comprised under the name *terræ*, since they are lands returning to the defendant, when the particular estate ceases; and therefore, though this was formerly disputed, the latter resolutions have settled the law to be so.

Gilb. Execut. 38, 39; 2 Ro. Abr. 473; Sav. 34, 35.||

Land in ancient demesne upon an *elegit* may, by the sheriff, be delivered in execution, because the title of the land is not directly put in plea in the king's court.

Hob. 47; 4 Inst. 270; 2 Inst. 397; Moore, 211; Brownl. 234.

|| By 29 Car. 2, c. 3, § 10, it is enacted, that "it shall be lawful for every sheriff or other officer, to whom any writ or precept is directed, at the suit of any person or persons, of, for, and upon any statute, judgment, or recognisance, to do, make, and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons are in any manner seised or possessed in *trust* for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution is so sued, had been seised (c) of such lands, &c., of such estate as they are seised of, in trust for him at the time of the said execution sued; (d) which lands, &c., by force and virtue of such execution shall accordingly be held and enjoyed freed and discharged from all encumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued. And if any *cestui que trust* shall die, leaving a trust in fee simple (e) to descend to his heir, then and in every such case such trust shall be deemed and taken, and is hereby declared to be assets by descent; and the heir shall be liable to and chargeable with the obligations of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended."

(c) An equity of redemption, therefore, though legal assets, cannot be taken in execution on this statute. Lyster v. Dolland, 3 Br. Ch. Rep. 478; 1 Ves. Jun. 431, S. C.; Burdon v. Kennedy, 3 Atk. 739. (d) These words, "at the time of the said execution sued," are holden to refer to the seisin of the trustee; and therefore if he has conveyed the lands by the direction of the *cestui que trust* before execution, though seised in trust at the time of the judgment, the lands cannot be taken in execution. As, where a judgment was obtained against a *cestui que trust*, who afterwards borrowed a sum of money, and the trustee by his direction mortgaged the estate to the lenders, and an *elegit* being taken out upon the judgment, and a moiety of the estate mortgaged being extended and delivered to the plaintiff, he brought an ejectment, and the question



was, whether he had any title by virtue of this statute; and after argument it was determined by Mr. Justice Tracey, that the execution was not good; and Sir Edward Northey said, that ever since the act such construction had been thought agreeable to it, though he did not know it had ever been judicially determined; and a case was mentioned by Mr. Justice Tracey from Mr. Serjt. Cheshire's notes, where this opinion seemed to have been allowed by Lord Trevor, and was not contradicted by the court. *Hunt v. Coles*, Com. Rep. 226. The same point is recognised by Comyns, C. B., Dig. tit. *Execution*, (C. 14.) (c) An equitable interest in a term of years is not assets within this statute, which extends only to a trust of lands in fee, and it of course cannot be taken in execution under a *fi. facias*. *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 N. R. 461.¶

But the statute which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or consent.

3 Co. 9; Co. Cop. 149.

[An advowson in gross cannot be extended on an *elegit*, because a moiety cannot be set out by the sheriff, nor can it be valued at any certain rent towards payment of the debt.

*Gilb. Exec.* 39. But *qu.* and see *Wms.* 401, and *Cro. El.* 359.

Neither doth an *elegit* lie of the glebe belonging to an ecclesiastical benefice, or of the churchyard, for these are each *solum deo consecratum*.

*Gilb. Execut.* 40; *Jenk.* 207, pl. 36; 3 *Bos. & Pull.* 327.]

¶ But it is said, that the lands of a bishop may be extended on an *elegit* *Dalt. Sher.* 136.¶

So may the wife's lands, which the husband has during the coverture. *Dalt. Sher.* 136.

[A question having arisen in the Court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed interest beyond the penalty of a judgment, Lord Hardwicke was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but, if the creditor does not take out execution against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law, the debtor cannot upon a writ *ad computandum* insist upon the creditor's doing more than account for the extended value; but, if the debtor comes into a court of equity for relief, that court will give it him by obliging the creditor to account for the whole he has received, and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal. And he said, he remembered very well, upon Serjeant Whitaker's insisting before Lord Chancellor Cowper, that this would be repealing the statute of Westminster; his lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.

3 *Atk.* 517; *Ambl.* 520; 1 *East*, 403, 436.]

Where two *elegits* are issued the same day, upon judgments signed in the same term, the sheriff may extend on each an entire moiety of the defendant's land, although the judgments are at the suit of different plaintiffs, and the inquisition on the second *elegit* recites that a moiety has been extended on the first.

*Doe dem. Davis v. Creed*, 5 *Bing.* 327.

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*Of the Capias ad Satisfaciendum.*

This writ lay only at common law, in case of the king, (a) who by his prerogative might have execution of the body, goods, and lands of his debtor; but, by the statute of Marlbridge, c. 23, it is enacted, that if bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands nor tenements whereby they may be distrained; then they shall be attached by their bodies, so that the sheriff in whose bailiwick they be found, shall cause them to come to make their account. ¶ But the *capias* in execution is not given by this statute; it respects only mesne process, and no *capias* at all is given by it: it only ordains an attachment *per corpus* of the absconding bailiff to compel him to make his account. But by a later accomptant act, St. W. 2, or 13 E. 1, c. 11, in all cases of servants, bailiffs, chamberlains, and all manner of receivers, who were bound *ad compotum reddendum*, it is ordained, that when the lord of servants of that kind shall assign them *auditores compoti*, and they are found in arrear; their bodies shall be arrested, and they shall be sent on testimony of such auditors, and delivered to the next jail of the king in those parts, there to be kept by the sheriff or jailer *in ferris et sub bonâ custodiâ* at their own expense until they shall have satisfied all arrears, *quousque dominis suis de arreragiis plenariè satisfecerint*. If any one so delivered to custody complain that the auditors have charged him with receipts which never came to his hands, and have not allowed him reasonable disbursements, and can find friends who will become manucaptors for him, and undertake to bring him before the barons of the exchequer, he is to be delivered to them; and the sheriff, in whose prison he shall be, is in that case to give notice to the lord to appear at some certain day before the barons of the exchequer with his rolls and his tallies by which he made his account, and in the presence of the barons, or auditors whom they shall assign, the account is to be rehearsed, and justice done between the parties, so that if the receiver be found in arrear, he is to be sent to the Fleet prison. If he fly, *si diffugerit*, and will not come to account, he is, *sicut in aliis statutis continetur*, that is, according to the statute of Marlbridge, to be distrained, if he have any thing whereof distress can be made, *ad veniendum coram justitiariis ad compotum suum reddendum*; and if, upon appearing, he be found in arrear, and cannot immediately pay, he is to be committed to jail as before is mentioned. If he fly, and it be certified by the sheriff that he is *non inventus*, he is to be demanded from county to county till he be outlawed. The person imprisoned for such matter is to be irreplevisable, and the sheriff is enjoined not to permit him to go at large either upon a writ of *replegiare* or otherwise, without the assent of the lord, on pain of answering to him for the damages he has sustained by such servant, according to the amount he can make out *per patriam*, to be recovered in an action of debt.\*

¶ (a) It has been said that it lay at common law for the subject in trespass *vi et armis*,

\* In an intemperate pamphlet entitled "Liberty vindicated against Slavery," originally published in 1646, and republished by Wilkie in 1771, it is insisted, that imprisonment for debt is unlawful, for that the act of 13 E. 1, c. 11, is contrary to Magna Charta, and therefore repealed by the 42 E. 3, which confirms the great charter in all points, and declares that, *if any statute be made to the contrary, it shall be null*; and the act of 13 E. 1 being void, the subsequent acts which give the *capias*, as referring to it, and founding themselves upon it, must be void also. But as a repeal of any former acts this clause in the 42 E. 3, is wholly inoperative; the statutes intended to be repealed not being particularly set forth.

The question was raised again in the year 1770, and a Mr. James Stephen, who was

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Hob. 56. But, though this was by very high authority, one cannot help doubting whether the *capias*, which then issued in this species of action, was any other than the *capias pro fine*, which was imposed for the breach of the king's peace, whether the *capias ad satisfaciendum*, *eo nomine*, was then known. I am not aware that there is any trace of this writ in our early writers, and it would seem not improbable that the course of proceeding was, upon the prayer of the plaintiff, to detain the defendant in execution, under the *capias pro fine* until he had satisfied the plaintiff for the damage; the king in this case so far indulging the subject, as not to take his fine for the breach of his peace, until the subject had been satisfied for the damage which he had suffered by the act. See Gilb. Execut. 76, 77. The instance referred to by Lord Coke from an old record of 14 E. 3, where a defendant was discharged by an order of court from a *capias* in execution, because he was of so advanced an age, *quod penam imprisonmenti subire non potuit*, gives some countenance to this conjecture. The action in which he had been taken in execution was trespass *vi et armis*, and not debt, as Croke erroneously states it, (Cro. Ja. 356), and the authority assumed by the court, and the expression *pena imprisonmenti*, would seem to show that the writ under which he was in execution was merely the *capias pro fine*. See also 2 Ass. 24 b, pl. 43.

Although the statute of Acton Burnel, 11 E. 1, (which was enforced by 13 E. 1, st. 3,) had given the *capias* in a statute merchant, yet it is on this last accomptant act that all the subsequent statutes, which extend the use of the *capias*, in actions merely civil, are grounded: for they all refer to it either mediately or immediately.

The statute of 25 E. 3, c. 17, refers expressly to it, directing that such process shall be made in a writ of debt and detinue of chattels, and taking of beasts, by writ of *capias*, and by process of exigent by the sheriff's return, as is used in a writ of accompt, *si come est usée en brief d'accompt*: the statute of 19 H. 7, (a) c. 9, enacts, that like process be had in actions upon the case as well sued and hanging, as to be sued in the King's Bench or Common Pleas, as in actions of trespass or debt; and by the statute of 23 H. 8, c. 14, like process is to be had in actions of trespass upon the 5th R. 2, as in a common action of trespass at the common law, and like process is to be had in every writ of annuity and covenant, as in an action of debt.

(a) This statute was made, Sir William Blackstone says, for a rapacious purpose; for by extending the *capias*, process of outlawry was consequently extended, and upon outlawry the goods of the defendant became the property of the crown. 4 Comm. 429. But, with all deference to the learned judge, it would seem rather to have been the natural consequence of the great extension about this time of the action on the case.—Where the *capias* lies in mesne process, there after judgment the *capias ad satisfaciendum* lies, 3 Co. 12; for the above statute in accompt having given it generally "*si diffugerit*," which is as well in mesne process as after judgment, and the other statutes having given it in the same manner as it was in accompt; if there be a *capias* in mesne process, there will also be one after judgment. Gilb. Execut. 69, 70. Properly speaking, then, the writ of *capias ad satisfaciendum* cannot be sued out against any but such as were liable to be taken upon the former *capias*. 3 Comm. 414; 49 E. 3, 2; Br. tit. *Exigent et Capias*, pl. 54; and therefore it lies not in actions real. 2 H. 6; Br. tit. *Executions*, pl. 22; Fitzh. tit. *Execution*, 164. And the *capias* in mesne process not issuing in debt till after summons, attachment, and three distringages, if the defendant

in execution for debt in the King's Bench prison, was brought up into the Court of King's Bench by *habeas corpus*, in order that the legality of his imprisonment might be inquired into: but he had retained no counsel; and though Lord Mansfield intimated to the bar, that if any gentleman had a doubt on the subject, or thought it at all arguable, the court were ready to hear him, yet no one offered to speak: the case was considered as too desperate for gratuitous services, and Mr. Stephen was remanded without any argument. He afterwards procured a writ of *habeas corpus* returnable in the Court of Common Pleas, where he was heard, he says, with great indulgence, but that the judges declined giving any reason why he should be confined, or any relief, because he was not charged with any action in their court. The fate of these applications produced an angry and ill-digested pamphlet by Mr. Stephen, taking much the same course of reasoning with that of 1646.

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appeared on the *distringas, si non diffugerit*, so as to make the *capias* necessary, he was not liable to a *capias ad satisfaciendum* on the judgment. 49 E. 3, 2; O. N. B. 39. And the reason why a *capias* was not allowed against an archbishop, bishop, abbot, or prior, nor against an earl or baron, was, that it was presumed that such persons must have sufficient whereby they might be distrained. O. N. B. 39; 11 H. 4, 15; 26 H. 8, 7; Br. tit. *Executions*, pl. 1.

By 23 H. 8, c. 15; 4 Ja. 1, c. 3; and 8 & 9 W. 3, c. 11, this writ, as well as all other executory process, is given to defendants for the recovery of their costs, where the plaintiffs are nonsuited, or have a verdict or judgment on demurrer against them.||

On this writ the sheriff cannot take bail, nor can he return, that the party was rescued, for he may take the *posse comitatus*: and therefore if he returns, that the party was rescued, an action lies against him for the escape, or a new *capias* against the party, for an ineffectual execution is as none.

Ro. Abr. 904; Cro. Car. 240; Gilb. C. P. 23. *β* Mumford v. Armstrong, 4 Cowen, 553. See *Warne v. Constant*, 4 Johns. 32. The attorney of record cannot discharge the defendant from custody in execution without satisfaction. *Jackson v. Bartlett*, 8 Johns. 361. See *Crary v. Turner*, 6 Johns. 51.*g*

*β* When, with the consent of the plaintiff, a defendant in execution under a *ca. sa.* obtains his liberty, he cannot be retaken.

*Bryan v. Limonton*, 1 Hawks, 51; *Little v. Newburyport Bank*, 14 Mass. 447. The rule is different in Louisiana. *Abat v. Whitman*, 7 N. S. 163; *Martin v. Ashcroft*, 8 N. S. 315.

But when a defendant has been taken on a *ca. sa.* and discharged because it was irregular, he may be arrested again on a fresh writ.

*Collins v. Beaumont*, 2 Poor. & D. 363.*g*

||So, if before the return-day of the writ he receives the money due from his prisoner, and thereupon liberates him before he has paid it over in satisfaction to the plaintiff, he is answerable as for an escape; and his return under the common rule of *cepi corpus*, and that he detained the prisoner until he satisfied him (the sheriff) the levy money endorsed on the writ, which he had ready, as commanded, &c., is of no avail.

*Slackford v. Austen*, 14 East, 468.

A plaintiff is bound to accept from defendant in custody under a *ca. sa.* the debt and costs when tendered to him, and to order the sheriff to discharge him; and if he refuse, he is liable to an action on the case.

*Crozier v. Philling*, 4 Barn. & C. 26.

Where the defendant was taken on a *ca. sa.*, and the plaintiff died, and administration to him was taken out, the court refused without the authority of the administratrix to discharge defendant out of execution, although the administratrix and the assignees (the plaintiff having become bankrupt) disclaimed all interest in the action.

*Fothergill v. Walton*, 4 Bing. 711.

In point of form, this writ must pursue the judgment; (a) therefore on a judgment against several defendants, it must include them all. (b)

(a) *Philpot v. Muller*, T. 23 G. 3, K. B.; *Tidd's Pr.* 1064, 6th edit. (b) *Clark v. Clement*, 6 T. R. 526.

The writ must be signed, as well as sealed; and must be tested and returnable in term-time, in like manner as the *feri facias*.

*Tidd's Pr.* 1064, 6th edit. *β* An *alias capias* must be tested of the term to which the original was returnable, and be made returnable the next ensuing term. *United States v. Parker*, 2 Dall. 273.*g*

By 13 Car. 2, st. 2, c. 2, § 6, "in all actions of debt, and other personal

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actions, and also in all actions of ejectment, depending by original writ in the Courts of King's Bench and Common Pleas, after any judgment obtained therein, there need not be fifteen days between the teste and return of any writ of *feri facias* or *capias ad satisfaciendum*; nor shall the want thereof be assigned for error."

By § 7, "this act is not to extend to any writ of *capias ad satisfaciendum* whereon a writ of *exigent* after judgment is to be awarded, nor to a *capias ad satisfaciendum* against the defendant in order to make any bail liable."

But a *capias ad satisfaciendum* in B. R., returnable out of term, is not void as against the bail, though it may be set aside by the principal on motion for irregularity.

Campbell v. Cumming, 2 Burr. 1188.

Though the writ should regularly be returnable on a general return-day, or on a day certain, in like manner as the former proceedings; yet, where an attorney, having sued by attachment of privilege, was nonsuited, and afterwards taken upon a *capias ad satisfaciendum* returnable on a general return, the Court of Common Pleas held it to be well enough; for that the suit was quite at an end, the attorney had no day in court, and had lost his privilege to have the process returnable on a day certain.

Perrot v. Hele, 3 Wils. 58.

If a man enter into a recognisance in the Chancery, or Common Pleas, or into a recognisance on a writ of error from the King's Bench to the Exchequer Chamber, no *capias* will lie. The reason is, from the tenor of the recognisance, which is only to run by way of execution on the lands and chattels, and the *scire facias* revives the obligation according to the tenor of it; and though the statute of 25 E. 3 gave a *capias* in debt, yet it did not give a new execution on that recognisance, and therefore the execution continues as it was at common law.

Gilb. Exec. 68, 69; Ro. Abr. tit. Exec. (H.); 2 Taunt. 113; 2 Marsh. 186.

But in the King's Bench, a *capias* lies; because the persons there are supposed to be committed on some criminal prosecution, and therefore when they are bailed out, the undertaker is liable in the same manner the prisoner was, and therefore since the *capias* lies against the prisoner, it lies against the person who undertakes to bail him.

On a recognisance taken by virtue of the statute of 3 Ja. c. 8, made perpetual by 3 Car. c. 4, § 4, on bringing writs of error, it seems, no *capias* lies, though taken in the King's Bench; for this is not bailing a prisoner in their own court, but by virtue of the statute, which gives no *capias*.

Gilb. Exec. and Ro. Abr. *ubi supr.*; Moore, 274.]

§ During the confinement of the defendant, the *ca. sa.* amounts to a discharge of the debt; but when the defendant dies in jail, charged under the *ca. sa.*, the plaintiff may have execution against his lands or goods in the hands of his representatives as in other cases, by virtue of the statute of 21 Jac. 1, c. 24. And, it seems, he may have the same remedy when the defendant is discharged by act of *law*, as when he is discharged by the insolvent laws. (a) If, while the defendant is in prison under the *ca. sa.*, his lands are sold, the plaintiff loses his lien on them, and, after the defendant's discharge under the insolvent act, the plaintiff has no lien on the proceeds of the sale. (b)

(a) Sharp v. Speckenagle, 3 S. & R. 465; 1 Pet. 573; 3 Conn. 214; Loomis v. Storrs, Conn. 440. (b) Freeman v. Rustow, 4 Dall. 214.

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The return of *cepi, mortuus est*, on a *ca. sa.*, is sufficient without stating where the prisoner died.

Christie v. Goldsborough, 1 Har. & M.H. 540.

Where several writs of *ca. sa.* were in the sheriff's hands at the same time, and one of them was issued under a judgment above a year old, and not revived by *sci. fa.*, and the defendant was arrested under that writ; held that he was entitled to his discharge under that writ, but the irregularity on that writ did not invalidate the other writs, for where an arrest is made by the sheriff on one of several writs delivered to him, and it is not illegal by any wrongful act of his, it is an arrest on all.

Reynolds v. Newton, 1 Gale & D. 153.

If a debtor be committed on a writ of execution, when the officer ought to have levied on property, his remedy is by an action against the officer, but in that case he must show he acquiesced in taking his property. The commitment is not void.

Warner v. Stockwell, 9 Verm. 9.

4. Of the *Fieri facias* and *Levari facias*.

The *fieri facias* and *levari facias* are judicial writs which lay at the common law. (a) The *fieri facias*, on which the goods and chattels of the debtor only could be taken in execution, took its name, as my Lord Coke (b) observes, from the words of the writ, *quod fieri facias de bonis et catallis, &c.*; but on the *levari facias* the sheriff was commanded *quod de (c) terris et catallis ipsius A. levari facias, &c.*

(a) || This is certainly the common language of our law-books; and as Glanville and Bracton are wholly silent about execution in personal actions, there is no direct authority either to contradict or support this opinion. It seems, however, doubtful, whether these writs *eo nomine* are of such ancient date; and it is not improbable, that the latter might have obtained both its name and existence from the words of the statute of W. 2, 13 E. 1, c. 18, by which it was enacted, that when a debt was recovered or acknowledged, or damages adjudged in the king's court, the plaintiff should have his election either to have a writ *quod vicecomes FIERI FACIAT de terris et catallis*; or one commanding *quod vicecomes liberet ei omnia catalla debitoris (exceptis bobus, et affris carucis) et MEDIETATEM TERRÆ SUÆ, quousque debitum fuerit levatum per rationabile pretium vel extentum*. From the mere penning of this statute, the *fieri facias* appears as much a new regulation as the *medietatem terræ*. It is probable, that the *distringas per terras et catalla*, which was the mesne process in personal actions, was the process of execution likewise. The legislature seem to have an eye to this process in the terms *de terris et catallis*. But the writ of *fieri facias*, properly so called, never contained any thing *de terris*. This defect is supplied by the *levari facias*. Thus these two writs reach all the objects that could be touched by the old process of *distringas*; and were with that view, perhaps, framed after this act, if not upon the authority of it. 2 Reeves's Hist. of the Law, vol. 2, 187. || (b) Co. Litt. 290 b; 3 Co. 11. (c) But the sheriff cannot, by force hereof, meddle with the debtor's lands, so as to sell or deliver them to the creditor in satisfaction of the debt, but may collect the debt out of the profits of the land, as the corn or grass growing thereon, or out of the rents payable to the debtor. Godb. 290; Plow. 441 a; Finch, 101; Comb. 470. And vide 2 Inst. 453, what shall be counted the issues of the land. β In the United States generally lands are subject to be sold for the payment of debts. γ || It should seem, that a *levari facias* ought not to issue for a fee-farm rent, but that the proper remedy is by distress. Lupton v. Barker, Bunb. 348. ||

β Wheat growing in a field is a chattel and liable to be sold under an execution.

Whipple v. Foot, 2 Johns. 418; Hartwell v. Bissel, 17 Johns. 128; Penhallow v. Dwight, 7 Mass. 34.

Goods pawned for a debt, or leased for years, may be taken in execution for the interest the pawnor has in them, subject to the rights of the pawnee.

Strodes v. Caven, 3 Watts, 258. γ

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The sheriff, on these writs, cannot deliver a furnace annexed to a freehold in execution; for though the writs give the sheriff authority to levy the debt upon the goods and chattels of the debtor, and this is indeed a chattel; yet they do not give the sheriff any authority to break or disunite any thing from the freehold, which he cannot do unless particularly empowered by writ.

2 H. 7, 13; Office of Executor, 87; Owen, 70. ¶ But it hath been holden, that if a soapboiler or other trader, being an under-tenant, for the convenience of his trade puts up vats, coppers, partitions, and paves the backside, &c.; upon a *feri facias* against him, the sheriff may take them in execution in like manner as the lessee himself might have removed them during the term. *Scitis*, where such trader makes hearths and chimney-pieces to complete the house, and not for the convenience of his trade. 1 Salk. 368. *Per* Holt, C. J., at Nisi Prius.¶

Nor has the sheriff, by force hereof, any authority to sell an estate for (a) life, which being a freehold can no more be affected by these writs than any other estate of inheritance; but he may dispose of (b) leases for years, which are but chattels, be they of ever so long a continuance.

Dalt. Sh. 145; 3 Co. 13. (a) But in Comb. 391, it is said to have been admitted, that since the statute 29 Car. 2, c. 3, an estate *pur auter vie* may be sold by the sheriff on a *feri facias*. (b) But if the sheriff on a *feri facias* sells a lease or term of a house, he cannot turn the lessee out of possession, but the vendee, in such case, must bring his ejectment. 2 Show. Rep. 85, *per Cur.* [This must be understood of a forcible expulsion; for it hath been determined, that under a *feri facias*, the sheriff may justify expelling the defendant *peaceably*, in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. *Taylor v. Cole*, 2 T. R. 292.]

If the sheriff, reciting that the defendant hath a term for years, sells it by virtue of a *fi. fa.*, this sale is good; for it cannot be intended that the sheriff should certainly know the beginning and end of the term.

Cro. Eliz. 584; 4 Co. 74, Palmer's case. β Leases for ninety-nine years, made between individuals, may be levied upon and sold under execution as chattels. *Lessee of Bisbee v. Hall*, 3 Ohio, 465.¶

But if, undertaking to recite it, he mistakes, and sells the term, it is a void sale, unless there be general words, all the interest, &c., of the defendant therein.

4 Co. 74 a.

But a term cannot be extended without showing the certainty thereof, because, after the debt paid, the party is to have his term again if any part thereof remains.

4 Co. 74 a.

[In pleading the taking of a term under a *feri facias*, it is sufficient to state, that the party was possessed of a certain interest in the residue of a certain term of years.

*Taylor v. Cole*, 3 T. R.

If one be tenant for years without impeachment of waste, and a *feri facias* come out against him, the sheriff cannot cut down and sell timber; for the tenant had only a *power* so to do, and no interest, as he hath in standing corn, which, upon a *feri facias* against him, the sheriff may sell.

Salk. 368.

A person had an annuity for twenty-one years granted by Queen Elizabeth, payable by her receiver of her court of wards, which upon a *fi. fa.* upon a judgment against the grantee was extended and sold; and it was resolved the extent and sale was good; for being an annuity certain for years certain, and payable by the receiver, it is in nature of a rent-charge for twenty-one

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years, and is grantable over and vendible, and not like an annuity, which chargeth the person only.

York v. Twine, Cro. Ja. 78.

Also, on these writs the whole personal estate is liable to execution, except wearing apparel: but it hath been (a) said, that, if the party hath two gowns, the sheriff may sell one of them.

3 Co. 12. (a) Comb. 356, *per* Holt, C. J.

[But nothing can be taken in execution which cannot be sold, as deeds, writings, money, bank-notes, &c. The courts have therefore refused to order the sheriff to retain in satisfaction of a present writ of *fiery facias* money or bank-notes which he had before received for the use of the defendant in discharge of an execution levied by the defendant against another person, and which the sheriff had not paid over. So, they have refused to retain in the sheriff's hands the surplus of a former execution against the defendant at the suit of the same plaintiff, for the purpose of satisfying a new execution.

Francis v. Nash, Ca. temp. Hardw. 53; Knight v. Criddle, 9 East, 48; Fieldhouse v. Croft, 4 East, 510. An order to this effect was made in *Armistead v. Philpot*, Dougl. 231, but it was by consent.] § When money is in the possession of the defendant, it may be taken in execution under the process of *fiery facias*. *Turner v. Fendall*, 1 Cranch, 117. See *Blaine v. The Charles Carter*, 4 Cranch, 328; *Harding v. Stevenson*, 6 Har. & Johns. 264. A sheriff may set off one execution against another between the same parties, when they are both in his hands at the same time. *Culver v. Pearl*, 1 Tyl. 12; *contr.*, *Dunklee v. Locke*, 13 Mass. 525; *Dawson v. Holcomb*, 1 Ohio, 276; *Yarborough v. State Bank*, 2 Dev. 23. In Louisiana, it has been held that a *fi. fa.* may be levied on a sum of money directed by the legislature to be paid by the defendant, as a compensation for public services; and in such case, he cannot oppose to the plaintiff that this money is in the constructive possession of a third party. *Flower v. Livingston*, 2 N. S. 615. In Virginia, money lent to a sheriff, *bona fide*, and applied by him to his own use, prior to his receiving a writ of *fiery facias* against the lender, is not liable to satisfy such execution, either at law or in equity. *Price v. Crump*, 2 H. & M. 89.g

§ A mere chose in action is not subject to execution.

*Harding v. Stevenson*, 6 Har. & J. 264; *Donovan v. Finn*, Hopk. 79; 1 Bibb, 306; 2 Litt. 222; *Handy v. Dobbin*, 12 Johns. 220; *Holmes v. Nuncaster*, 12 Johns. 395; 17 Johns. 351; *Ingalls v. Lloyd*, 1 Cow. 240.

Bank-bills or money, and every thing of a tangible nature, not specially exempted by law, may be levied upon and sold under an execution.

12 Johns. 220; 12 Johns. 395; 17 Johns. 351.

Personal property which has been mortgaged, may be levied upon by virtue of an execution against the mortgagee, after a forfeiture, although it remains in the hands of the mortgagor.

*Ferguson v. Lee*, 9 Wend. 258. See 16 Mass. 345. *Sed vide* *Legg v. Evans*, 6 Mees. & W. 36.g

The absolute property of the goods must be in the debtor; and therefore, if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a trespasser; for he is obliged, at his peril, to take notice whose the goods are, and for that purpose may empanel a jury to inquire in whom the property of the goods is vested. || And this may be given in evidence to show that the sheriff has not acted maliciously, (a) and will mitigate damages in an action of trespass against him for taking the goods of a third person: (b) and as it is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury summoned by the sheriff to inquire in whom the property of goods seized by him under a



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*feri facias* is vested.(c) But this proceeding is not conclusive in any case; for inquests of office are always traversable; and therefore an inquisition by the sheriff's jury to ascertain to whom the property of goods taken under a *feri facias* belonged, though found in favour of A, is not admissible evidence in an action of trover for the goods brought by A against the sheriff:(d) nor is such an inquisition admissible for the sheriff(e) in an action on the case against him for a false return of *nulla bona*.

Gilb. Execut. 21; Keilw. 119, 120; Bro. tit. *Trespass*, 99; Farr v. Newman, 4 T. R. 633, 641; 6 T. R. 88. (a) Glossop v. Pole, 3 M. & S. 175. (b) Gilb. Exec. 21. (c) Roberts v. Thomas, 6 T. R. 88. (d) Latkow v. Eamer, 2 H. Bl. 437. (e) Glossop v. Pole, 3 M. & S. 175.||

Nor can the sheriff take in execution goods pawned or gaged for debt, nor goods demised or letten for years, nor goods distrained,(a) ||nor goods, before seized upon an execution,(b) unless the first execution were fraudulent,(c) or the goods were not legally seized under it.(d)||

Bro. tit. *Pledges*, 28; Dyer, 67 b, *in margine*. (a) Tully v. Peachey, H. 23 G. 3, cited in 4 T. R. 640. (b) Backhurst v. Clinkard, 1 Show. 173. (c) Rice v. Serjeant, 7 Mod. 37. (d) 4 T. R. 651.

In trespass the sheriff justified, that by virtue of(e) a *feri facias* out of the Exchequer for the queen's debt, he took the plaintiff's beasts, being *levant* and *couchant* upon the land of the debtor, and sold them for the queen's debt; and adjudged, that it was not lawful, for they were not to be sold as the goods of the debtor,(g) but they might have been distrained for the queen's debt.

Cro. Eliz. 431; Hil. 37 Eliz.; 2 Roll. Abr. 359, S. C.; Show. Rep. 174; 4 T. R. 640. (e) But the cattle of a stranger being *levant* and *couchant* upon the land of a person outlawed, may be taken by virtue of a *levari facias* for the king; for this writ commands the sheriff to levy this duty out of the issues and profits of the land, and these cattle being *levant* and *couchant*, are issues; and were it otherwise, it would be in the power of the party, by agisting his lands, to defeat the king of the benefit of the outlawry; but for this vide Salk. 395; Skin. 618; Comb. 469; Ld. Raym. 305; Salk. 408, pl. 4; 5 Mod. 109; Carth. 441; Comyns, 51; 12 Mod. 178; Raym. 17; Hard. 101. (g) That as to this point it must be a mistake of the printer; for that the beasts may be taken, and not sold, is a contradiction. Skin. 619. But, as to the principal point, the case is good law, being on a *feri facias*, which gives the sheriff power to dispose of the goods and chattels of the debtor only. Comb. 470.

[And as the sheriff cannot take the goods of a third person, so, if the defendant becomes bankrupt before the delivery of the writ to the sheriff, or, as it seems, before it is actually executed, the sheriff cannot legally take or dispose of them, after notice of the act of bankruptcy, and of a commission sued out or docket struck: for by Holt, C. J., if a writ of execution be delivered to the sheriff against A, who becomes bankrupt before it is executed, the execution is superseded; consequently, the property of the goods is not absolutely bound by the delivery of the writ to the sheriff.

Tidd's Pr. 1046; 1 Lev. 173; 1 Ld. Raym. 252; and see 2 Eq. Ca. Abr. 381.

But if the sheriff seize and sell the goods, before he has notice of an act of bankruptcy, he is excused,(h) and if he sell them after such notice, though he may be sued in *trover*,(i) yet he is not liable to an action of trespass.(k)

(h) 1 Bl. Rep. 205; 2 Bl. Rep. 829. (i) 1 Burr. 20; 1 Bl. Rep. 65. (k) 1 T. R. 475.

An execution taken out against the goods of a bankrupt after his certificate is signed, but before it is allowed, is good.

Cullen v. Meyrick, 1 T. R. 361, and see 1 Bl. Rep. 400.

||And where a defendant was taken in execution under similar circum-

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stances, and paid the debt and costs to the sheriff, the court on application refused to relieve him.

Neatly v. Eagleton, E. 24 G. 3, K. B.; Tidd's Pr. 1047.

But, if a *fieri facias*, issued against a bankrupt before, be not executed till after his certificate obtained, the court will order the goods to be restored, even though he has not pleaded the certificate: and if any thing be alleged to invalidate the effect of the certificate, it will direct a trial on a plea of bankruptcy.

Lister v. Mundell, 1 B. & P. 427.||

In an action against the husband, the sheriff cannot take under a *fieri facias* goods vested in trustees before marriage, for the benefit of the wife.

Cadogan v. Kennett, Cowp. 432; Jarman v. Wolloton, 3 T. R. 618. See Underwood v. Mordant, 2 Vern. 239.

||Nor, it seems, where so vested by settlement after marriage, if made in pursuance of a prior agreement, or for a good and valuable consideration, and without fraud. But, if the settlement is fraudulent, or the husband is suffered to carry on the trade intended for his wife, and his possession is not consistent with the deed, the goods are not protected.

1 Eq. Ca. Abr. 148; 8 T. R. 531; and see 6 East, 257; 3 T. R. 618; 8 T. R. 82.

A term vested in the wife before marriage, to which the husband is entitled in her right, may be taken in execution for his debt.

4 T. R. 638, 639.

If a tradesman supply a married woman, living apart from her husband, with furniture upon hire, he does not thereby divest himself of the present right of property in such goods, the married woman being legally incapable of acquiring it by any contract; and therefore if the sheriff take those goods in execution at the suit of the husband's creditor, trover lies by the tradesman.

Smith v. Plomer, 15 East, 607.

A mere equitable interest can in no case be taken in execution.

Scott v. Scholey, 8 East, 467; Metcalf v. Scholey, 2 N. R. 461; Burdon v. Kennedy, 3 Atk. 739; Lyster v. Dolland, 3 Br. Ch. Rep. 480; 1 Ves. Jun. 431, S. C. A<sup>n</sup> execution may be levied upon an equity of redemption as real estate. Punderson v. Brown, 1 Day, 93; Scripture v. Johnson, 3 Conn. 211; Waters v. Stewart, 1 Caines, Cas. Er. 47; *confr.*, Hart v. Reeves, 5 Hayw. 50; Shute v. Harder, 1 Yerg. 1; Lipe v. Mitchell's Lessee, 2 Yerg. 400. See 1 Yerg. 36, 79; Allison v. Gregory, 1 Murph. 333.

A mortgagee's estate in land before he has entered upon it, cannot be taken in execution.

Blanchard v. Colburn, 16 Mass. 345; Cooper v. Martin, 1 Dana, 24.

A pulpit in a meeting-house in which the pews belong to individuals, cannot be seized in execution.

Revere v. Garnett, 1 Pick. 169.

An execution cannot be levied upon an equitable interest.

Rhoads v. Symmes, 1 Ham. 314; Childs v. Derrick, 1 Yerg. 79; Buford v. Buford, 1 Bibb, 306; M'Dermitt's heirs v. Morrison, 1 A. K. Marsh. 174; Hendricks v. Robinson, 2 Johns. Ch. R. 312.

A resulting trust is not liable to an execution at law.

M'Dermitt v. Strong, 4 Johns. Ch. R. 690.

The interest of a *cestui que trust* in a slave is subject to execution.

Eastland v. Jordan, 3 Bibb, 187; Jones v. Langhorne, 3 Bibb, 453.

A vested remainder in fee may be seized and sold as the property of the remainderman.

Den v. Hillman, 2 Hals. 180; Hunt v. Gulick, 4 Hals. 205.

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It seems that property conveyed by deed of marriage settlement, in trust that the husband and wife shall be permitted, during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt, incurred after the marriage, for supplies furnished for the proper support of husband and wife.

Scott v. Loraine, 6 Munf. 117.g

Where the plaintiff, who had purchased a public house, for which he could not himself obtain a license, because he resided in another tavern, put B, an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the license, which was granted to B; it was holden by three judges, against Mansfield, C. J., that the sheriff was not entitled to take, under an execution against B, the plaintiff's liquors and chattels in the house committed to B's custody.

Dawson v. Wood, 3 Taunt. 256.||

[In an action against an executor for his own debt, the goods of the testator, in the hands of the defendant, cannot be taken in execution.

Farr v. Newman, 4 T. R. 621.]

|| But, where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the goods of her husband, she was not permitted to object to their being taken in execution for her husband's debt.

Quick v. Staines, 1 B. & P. 293; 2 Esp. N. P. C. 651, S. C.]]

[If there are two coparceners of goods, and a judgment is given against one of them, the sheriff, on a *fi. facias* on this judgment, must seize all, because their moiety is undivided; for if he seize but a moiety, and sell that, the other coparcener will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided; so that the vendee will be tenant in common with the other partner.

Heydon v. Heydon, 1 Salk. 392. [See Jacky v. Butler, 2 Ld. Raym. 871; Pope v. Harman, Comb. 217; Marriott v. Shaw, Comb. Rep. 277; Fox v. Hanbury, Cowp. 449; Eddie v. Davidson, Dougl. 650; Parker v. Pistor, 3 B. & P. 288; Chapman v. Koops, Ibid. 289.] β Church v. Knox, 2 Conn. 514; Brewster v. Hammet, 4 Conn. 540; Witter v. Richards, 10 Conn. 37.g

β On a judgment against a tenant in common, the creditor cannot take by execution a part of the land held in common, by metes and bounds, but must take such undivided proportion of the whole as the defendant owns.

Starr v. Leavitt, 2 Conn. 243; Hinman v. Leavenworth, 2 Conn. 244.g

Upon a writ of *fi. fa.* the sheriff cannot (a) deliver the goods of the defendant to the plaintiff in satisfaction of his debt, but the goods are to be sold, and the money in strictness is to be (b) brought into court.

Cro. Eliz. 504; Thomson v. Clerk, adjudged; Lutw. 589, S. P.—It is otherwise on an *elegit*. Sir T. Raym. 346. Where a sheriff after a *fi. fa.* delivered to him pays the plaintiff out of his own money, it is made a question by Hobart, whether the sheriff may levy the money on the defendant. Hob. 207. (a) Though they cannot be delivered to the plaintiff, they may be sold to him. Comb. 452. Admitted to be the practice to make a bill of sale of the goods to the plaintiff. Carth. 419. [But, though such be the practice, it is not part of the duty of the sheriff to execute a bill of sale to the plaintiff at an appraised value, nor is he compellable to do so, though he even promise it. For this might be very inconvenient and highly injurious if it were allowed. The legal and proper mode of compelling a sale by the sheriff, where he makes delay or refuses, is by writ of *venditioni exponas*; upon which he must return the money into court. Cameron v. Reynolds, Cowp. 406.] || For by Holt, C. J., if the sheriff seize goods to the value, and return it, he is bound to find buyers. Clarke v. Withers, 6 Mod. 293; 2 Ld. Raym. 1075, S. C. But, where the sheriff returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands for want of buyers, the

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Court of C. B. refused an attachment against him. *Leader v. Danvers*, 1 Bos. & Pull. 359. Qu.]—But the sheriff, though he pays the plaintiff out of his own money, cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. *Noy*, 107; *Lutw.* 589. (b) For it is not of record without. *Godb.* 147.—But the law seems otherwise; for though the writ be *ita quod habeas*, &c., yet the sheriff may return that he hath paid the money to the plaintiff. 2 *Show. Rep.* 87; 3 *Lev.* 904. ¶ When the plaintiff in the execution buys the goods sold by the sheriff, the latter may deliver them to him without receiving the money. *Nichols v. Ketcham*, 19 *Johns.* 84; *Russel v. Gibbs*, 5 *Cowen*, 390.g

If the defendant die after the execution awarded, and before it be served, yet it may be served upon his goods in the hands of his executor or administrator; (a) for by the execution awarded the goods are bound, and the sheriff need not take notice of his death.

*Cro. Eliz.* 181; *Mod.* 188, S. P. adjudged. (a) That this was clearly so before the 29 Car. 2, c. 3, when the goods were bound from the *teste* of the writ; but by this statute they are bound only from the time of delivery of the writ to the sheriff: but even since the statute, the execution seems good in this case, for the statute was made for the benefit of strangers, who might have a title to the goods between the *teste* of the writ of execution and time of the delivery thereof to the sheriff, and not for the benefit of the party, or his executors or administrators. ¶ *Houghton v. Rushby*, *Skin.* 257; *Comb.* 33, S. C.; *Anon.*, 2 *Ventr.* 218; *Springer v. Somerville*, *Bunb.* 271; *Dr. Needham's case*, cited *Ibid.* in the note, and also *Gill v. Parsons*, cited *Ibid.*, and in 1 B. & P. 572, notes, and 7 T. R. 21, notes; *Robinson v. Tonge*, 3 P. Wms. 399; 3d *Rea*, and *Lord Winchelsea's case*, *Ibid.* note. Hence, if a *fieri facias* be tested before the defendant's death, though not delivered to the sheriff and executed till after, the execution is regular. *Waghorne v. Langmead*, 1 B. & P. 571; *Bragner v. Langmead*, 7 T. R. 20. The case of *Walker v. Drawater*, 3 *Anstr.* 680, *contr.*, was decided on a misconception of what passed in B. R. in the case of *Heapy v. Purvis*, 6 T. R. 368; for there the plaintiff did not sue out execution on a day prior to the death of the defendant, so that it might have legal relation back, but the execution sued out after the death bore *teste* on a day posterior to the defendant's death, and, consequently, was irregular.]

So, if the plaintiff die, the execution does not abate, and the sheriff may, notwithstanding, proceed in it, because the sheriff has nothing more to do with the plaintiff; for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder; besides, an execution is an entire thing, and cannot be superseded after it is begun.

*Salk.* 322, *per Cur.*

¶ The sheriff should conform as nearly as possible, in selling chattels taken in execution, to such rules as a prudent man would observe in selling his own property for the purpose of getting the best price; he cannot, therefore, lawfully sell such goods *en masse*, which consist of various specific articles.

*M'Leod v. Pierce*, 2 *Hawks*, 110; *Den v. Twitty*, 3 *Hawks*, 44; *Den v. Hodges*, 3 *Hawks*, 51; *Cresson v. Stout*, 17 *Johns.* 116.

In order to vest the property of goods in the sheriff, an actual levy is requisite.(b) But if an execution comes to the sheriff's hands, and he levies upon the goods under it, and then a second execution comes to his hands, the levy is sufficient for both.(c)

(b) *Hotchkiss v. M'Vickar*, 12 *Johns.* 403. (c) *Cresson v. Stout*, 17 *Johns.* 116; *M'Cormick v. Miller*, 3 *Penna. R.* 230; *Wood v. Vanarsdale*, 3 *Rawle*, 401; *Burchard v. Rees*, 1 *Whart.* 377.

An execution will not be deemed fraudulent, when it is delayed, unless the delay is caused by the plaintiff.(d) But when it is so caused, it will be considered fraudulent, and a junior execution will take the precedence.(e)

(d) *Benjamin v. Smith*, 12 *Wend.* 405. (e) *Benjamin v. Smith*, 4 *Wend.* 332; *Kellog v. Griffin*, 17 *Johns.* 274; *Dickenson v. Cook*, 17 *Johns.* 332; *Farrington v. Sinclair*, 15 *Johns.* 429.

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Two executions, different in amount, were delivered to the sheriff at the same time; he levied upon personal property, which was sold under both, and purchased by each of the plaintiffs at different bids; held, that the moneys were to be equally divided between them, until the smaller execution was satisfied, the surplus to be applied to the larger, till satisfied.

Campbell v. Ruger, 1 Cowen, 215.

To constitute a levy under an execution, the officer should take actual possession of the goods; they must be brought within his view, and be subject to his control, and it seems an inventory of them should be made. His acts must be public and unequivocal, without concealing the transaction.

Beekman v. Lansing, 3 Wend. 446; Haggerty v. Wilder, 16 Johns. 288; Westervelt v. Pinckney, 14 Wend. 123; Ray v. Harcourt, 19 Wend. 495; Lewis v. Smith, 2 S. & R. 142; Barnes v. Billington, 1 Wash. C. C. R. 29; Lloyd v. Wyckloff, 6 Halst. 218.

When goods are in the possession of the defendant, it is the duty of the sheriff to levy without any indemnity whatever, for, in that case, he would not be liable as a trespasser.

Williams v. Lowndes, 1 Hall, 395.

An execution was delivered to an officer, with directions to levy it on defendant's real estate; the officer, without entering the land, immediately made a memorandum on a separate paper, (noting the day and hour,) and he then took the land in execution; afterwards he caused the land to be set off by appraisement according to law, and dated his return as of the day when he made his memorandum, and set forth in the return that he had seized the land, &c. Held, that the levy took effect, by relation, from the time when such memorandum was made.

Hall v. Crocker, 3 Metc. 245.

Goods assigned to a trustee, and in possession of the *cestui que trust* pursuant to the assignment, cannot be taken under an execution against the *cestui que trust* by a creditor knowing the goods to be property of the trustee.

Wooderman v. Baldock, 8 Taunt. 676; 1 Maule & S. 251; 3 Moo. 11; and see Doker v. Hasler, 2 Bing. 479; Leonard v. Baker, 1 Maule & S. 257; Jezeph v. Ingram, 1 Moo. 189. See notes to Twine's Ca., 3 Coke R. (ed. Thomas and Fraser.)

The sheriff may, under an execution against a tenant, sell any remaining interest of the tenant in a farm, which he is about quitting, however short.

Sparrow v. Earl of Bristol, 1 Marsh R. 10.

A sheriff under a *fiery facias* cannot seize fixtures, where the house is the freehold of the party against whom the execution issues.

Winn v. Ingilby, 5 Barn. & A. 625.

And if machinery is wrongfully severed from the soil by the tenant, it is not seizable as the tenant's goods and chattels, for the landlord is entitled to bring trover for it even during the term.

Farrant v. Thompson, 5 Barn. & A. 826; and see Gordon v. Harper, 7 Term R. 9, which does not conflict with the principal case, and tit. *Sheriff*.

Though a *fiery facias* binds the goods against the defendant from the time of delivery, yet the property is not divested out of the defendant till execution executed, and therefore a seizure and sale under a second execution will prevail; but the first plaintiff will have his remedy against the sheriff, unless he himself has been guilty of laches.

Payne v. Drew, 4 East R. 523.

In March the then sheriffs of London seized the goods of a debtor under  
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a *fiery facias*; an officer was put in possession of the goods, but the execution creditor directed the sheriffs not to sell, and the debtor continued to have the control of the goods till November, when another creditor sued out a *fiery facias*, directed to the succeeding sheriffs of London: held, that the latter were bound to levy under this second *fiery facias*, and that it was their duty, when they found the officer of the former sheriffs in possession, to inquire into the facts, and if they had done so, they would have learned that the first execution was fraudulent.

Lowick v. Crowder, 8 Barn. & C. 132.

If the sheriff seize and sell a lease under a *fiery facias* before the return, his assignment of the term is valid, though made after the return.

Doe v. Donston, 1 Barn. & A. 230.

If the sheriff seize a tenant's growing crops under a *fiery facias*, and before he sell a *hab. fac. possessionem* is delivered to him, founded on a judgment in ejectment at suit of the landlord, the demise being laid before the issuing of the *fiery facias*, the sheriff cannot sell the growing crops under the *fiery facias*, for the tenant is a mere trespasser from the day of the demise.

Hodgson v. Gascoigne, 5 Barn. & A. 88.

Where a defendant has received judgment of fine and imprisonment for a misdemeanor, a *levari facias* may issue immediately, to take his goods in execution for the fine.

Rex v. Woolf, 2 Barn. & A. 609.

By the 56 G. 3, c. 50, reciting that it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry, and the covenants and agreements between owners and occupiers of lands let to farm, it is enacted that no sheriff shall, by virtue of any process, carry off, or sell or dispose of for the purpose of being carried off, from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or turnips, or any manure, compost, &c., nor any hay, grass, tares or vetches, nor any roots, or vegetables, being the produce of such lands, in any case where, according to any covenant or written agreement for the benefit of the owner or landlord, such hay, grass, tares and vetches, roots or vegetables ought not to be taken off or withholden from such lands, or which, by the tenor or effect of such covenants, &c., ought to be used or expended thereon, of which covenants, &c., the sheriff shall have had written notice before sale: and that the tenant or occupier of lands against whose goods process shall issue, shall give written notice to the sheriff of such covenants, &c., and also of the name and residence of the owner or landlord of such lands; and the sheriff shall before sale send notice by post to such owner or landlord, and also to his steward or agent, stating the fact of possession having been taken of any crops or produce hereinbefore mentioned, and such sheriff, &c., shall, in the absence or silence of the landlord, &c., postpone the sale till the latest day he can appoint.

56 G. 3, c. 50.

Provided, that such sheriff, &c., may dispose of any such crops or produce, to any person agreeing in writing to use and expend the same on the land, according to the custom of the country, in case no agreement shall exist, or according to such agreement, where one shall be shown; and, after such sale or disposal, &c., it shall be lawful for such person to use all such

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necessary barns, &c., for that purpose, as the sheriff shall assign; and the sheriff, on request of the landlord, shall permit him to bring any action on any such agreement, in the sheriff's name, the landlord indemnifying the sheriff against all costs.

And further, that no sheriff shall by virtue of any process sell or dispose of any clover, rye-grass, or other artificial grass, which shall be newly sown and growing under any crop of standing corn.

#### 5. Of the Habere facias Seisinam and Possessionem.

The *habere facias seisinam* and *possessionem* are judicial writs, which (a) lie for the seisin and possession of lands and tenements: the first is in real actions, where the freehold is recovered; the last is founded on the (b) *ejectione firmæ*, in which the party is to be restored to the possession of his term of which he was ousted: the seisin or possession on these writs is usually performed by the sheriff, by delivering the party who recovers, a twig, bough, clod, &c., of the land; or if it be of a house, by delivery of the ring of the door, &c.

Bro. *Seisin*, 7, 14, 30; Dalt. Sheriff, 254, 255; Perk. 42. (a) But wherever the writ demands land, rent, or other things in certain, the demandant, after judgment, may enter or distrain before any seisin delivered to him by the sheriff, upon a writ of *habere facias seisinam*. Co. Litt. 34 b. || Upon a recovery of a reversion, common, &c., that lie in grant, the recoveror is not in possession until execution, entry, or claim. Co. 94 b, 97 b, 106 b; Moore, 141; Keilw. 108. || (b) For the recovery of the possession in ejectment, vide tit. *Ejectment*.

To a writ of *habere facias seisinam*, the sheriff cannot return, that another is tenant of the land by right, for of this there can be no issue taken between them, and the sheriff has nothing to do but to execute the king's writ.

6 Co. 52 a.

A man recovers several houses in an assize, and after the tenant reverses the judgment in a writ of error, and a writ issues thereupon to the sheriff, to put him in possession of those houses: in this case, though the tenants are strangers to the recovery, and therefore ought not to be ousted without a *scire facias*; yet, if the sheriff executes the writ, and so puts them out of possession by virtue of it, he is no disseisor; for he acts under the authority of the court, which he is sworn to obey, under the penalty of being fined, if he does not.

Ro. Abr. 663.

The same law in all cases, where execution is of a judgment wherein the demand is made of a thing certain; but, if an execution is to be executed without mentioning any thing in particular, there, the sheriff, at his peril, ought to make execution of the thing in demand, otherwise he will be a disseisor, for he is obliged to take notice of the thing in demand.

Ro. Abr. 664, Floyd and Bethel.

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WHEN the plaintiff has judgment, he has it in his election to sue out what kind of execution he pleases; but he cannot regularly take out two different executions on the same judgment, (c) nor a second of the same nature, unless upon failure of satisfaction on the first.

2 Ro. Abr. 475; Hob. 60; 2 Inst. 395; 1 Taunt. 55. (c) || A plaintiff may take out two different writs of execution upon the same judgment at the same time, and execute

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which he pleases; but, if he has once begun to execute one of them, he is bound by such inceptive execution, and cannot sue out another until the first has been returned; although he may have withdrawn his execution under that writ. *Miller v. Parnell*, 2 Marsh. 78. ¶ When an execution has been levied upon land, and the *fi. fa.* is so returned, a second *fi. fa.* cannot be issued before the first has been disposed of. *Arnold v. Fuller's Heirs*, 1 Ohio, 466. See *Steel v. Murray*, 1 Blackf. R. 179; *The People v. The Judges of Chataque*, 1 Wend. 73, 89. But when the property is levied on by the sheriff, and left with the defendant, who removes it out of the county, and thereby the sheriff becomes liable, the court will, on notice to the defendant, permit a new execution for the benefit of the sheriff to issue and be issued upon the real estate of the defendant, saving, however, the rights of subsequent encumbrancers, attaching after the removal of the personal property. *The People v. Onondaga*, C. P. 19; Wend. 79.

Therefore, if the plaintiff, upon a judgment or (a) recognisance at common law, sues out an *elegit*, he can have no *capias ad satisfaciendum* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land, which being entered upon the record, he is thereby estopped; and though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because in time it may come out of it.

Bro. *Elegit*, 15; Ro. Abr. 896; Hob. 2, 57; 2 Bulst. 97; 5 Co. 87; Cro. Ja. 338, S. C.; 6 Co. 46; Godb. 181; Lev. 92; Comb. 232. (b) But on statutes merchant, staple, and recognisances in nature of statutes staple, body, goods, and lands, being all liable by the several acts of parliament that create these securities, the counsels may take all at once or at different times; so that if he extends the lands first, he may afterwards take the body. Hob. 60; 2 Ro. Abr. 475.

But, though the plaintiff cannot take out a second *elegit* after the first is returned, executed, and filed; yet if, upon the first, the sheriff returns *nil*, the plaintiff may sue out a second.

Hob. 2; Cro. Ja. 339. ¶ And so it has been determined in *Beacon v. Peck*, 1 Str. 226; and *Lancaster v. Fielder*, 2 Ld. Raym. 1451. ¶

So, where in debt on a judgment of 2000*l.* the defendant pleaded that the plaintiff had sued three several *elegits* on the said judgment into several counties, on one of which the sheriff returned, that he had levied of the defendant's goods 500*l.*; on demurrer it was adjudged, 1st, That this *elegit* being executed on the goods of the party only, the plaintiff was not precluded by his election thereof from any benefit he had at the common law, by any nice construction of the word *elegit* of the statute of Westm. 2, which intended to give a farther remedy than there was at common law, and that the action well lay, otherwise the statute would be a trap to catch persons, and not a remedy to help them to their debts. 2dly, That if, as objected, any lands were extended on the other two *elegits* which were not returned, the defendant ought to have shown it in pleading. 3dly, That after this levy on the goods, he might extend the lands, and hold them till debt paid.

*Glascok v. Morgan*, adjudged, Lev. 92; Keb. 465, 496, 556, 699; Sid. 184, S. C., and same points adjudged; but there said, that the court was divided, whether the plaintiff could take out any new execution. ¶ The same point has been since holden on the authority of this case in *Hess v. Stevenson*, 1 N. R. 133, and that the defendant may be holden to bail. —But it is held by my Lord Hobart, that if upon an *elegit* the execution be on the goods only, without any lands, and they appear not to be sufficient, the party may have a *capias*, for it is in effect but a *fieri facias*, though the word be *elegit*. Hob. 58.

¶ It was formerly holden, that the praying of an *elegit* on the roll was a bar to all other executions, because they looked upon that writ as a remedy, and if the party once elected it, they thought that, coming by the statute instead of the *fieri facias*, he could never afterwards make a new election, and



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recur to the *fiery facias*. And this continued even to my Lord Coke's time, who says, that the good clerk never enters the *elegit* on the roll until he has the effect of his execution; for he thought, that though an ineffectual remedy was chosen, yet it barred the party of the other writ. But they then held, that, if there was a judgment in C. B. and an election on the roll, if it were removed by error into the King's Bench, and there affirmed, he might have a new election, because it was a new judgment of another court where the debt was recovered, and on that *debitum in curia regis recuperatum* he had never made any election before. But afterwards, on a nearer consideration of the statute, they came to a resolution, that it was not the election of the *elegit* on the roll, but it was the return of the lands delivered by the sheriff, that was a bar to a new execution; and therefore if *nil* was returned, that was no bar, which is plainly according to the very words of the statute. So, if the sheriff returns an extent of the goods, and *nil* as to the lands, this is no bar to a new execution; because the words of the statute are, *omnia catta debitoris et medietatem terræ suæ*; so that if he has not the *medietatem terræ*, which is the new thing that was to be delivered on the *elegit*, he has not that which the statute designed should be the bar to the *fiery facias*; for the delivery of the goods is of the same nature with the *fiery facias*, and therefore was not designed to come in place of it: but, if lands are delivered, though of never so little value, that will be a bar, because the sheriff has delivered the moiety according to the statute. If the sheriff returns that he has taken inquest of the land, but he could not deliver it to the plaintiff, because it was already extended, this is no bar to a new execution, for he does not deliver the lands, which are the only bar given by the statute.

Gilb. Exec. 50; Cro. Ja. 339; Knowles v. Palmer, Cro. El. 160; 1 Leon. 176, S. C.; Ro. Abr. tit. Exec. (Y.) pl. 10, S. C.

If there are several judgments against two upon a joint and several obligation, and the plaintiff has the lands of one of them extended, and the extent returned of record, he cannot now have a *capias*, or any execution against the other; because he has satisfaction according to the statute by the sheriff's delivery of the lands. So far was this carried formerly, that if the lands delivered to him under the *elegit* were afterwards evicted, he could not have a re-extent. All that he was entitled to was a writ of *novel disseisin*, or *redisseisin*, given him by the statute of Westminster. But he has now, by the statute of 32 H. 8, c. 5, a *scire facias*, in which there must be forty days between the teste and the return, to revive the judgment, and to have a new execution. But this must be where all the lands are evicted; for if part only is evicted, or the whole but for a time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute.

Crawley v. Lydeat, Cro. Ja. 338; *supr.* 678; Gilb. Exec. 57, 58.

If a man has an *elegit* for lands, which is served, and the sheriff delivers them to the plaintiff, it was long doubted, whether he should have an *elegit* into another county, or for other lands in the same county. The reason of this doubt was, that anciently they looked upon the *elegit* as the election of a remedy, and therefore when it was once executed with effect, they esteemed the plaintiff to have a term in the lands for satisfaction of his judgment, and therefore he could not afterwards sue another execution. But on better consideration of the statute, they have allowed him to have an *elegit* either in a new county, or in the same for a moiety of the land, in whatever county it lies. So, on a suggestion that the defendant has more lands in the same

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county, the sheriff can extend goods, because by the *elegit* he is to deliver *omnia bona*, as well as *medietatem terre*.

Gilb. Exec. 53; Hunger v. Frey, Moore, 341; Ro. Abr. tit. *Audita Querela*, (A.) pl. 6, S. C.; Cro. El. 310, S. C.; Strowd v. Keckwith, Styl. 454; Foster v. Jackson, Hob. 57.

If an *elegit* be returned *nihil* in one county, the plaintiff may have a *testatum writ* of *elegit* into another county. But it is said, that the writ of *elegit* must be actually sued out and returned *nihil* by the sheriff in order to warrant a *testatum elegit* into another county; for if several writs of *elegit* be awarded on the roll to different counties, and a *testatum elegit* is taken out to one of them, grounded on a supposed *elegit* issued to the county where the venue is laid, and returned *nihil*, when in truth no such writ was ever sued out, the *testatum elegit* is erroneous; therefore where there are several writs of *elegit* awarded on the roll, care must be taken that writs of *elegit* only, and not *testatum* writs be issued.

Br. Exec. 72; *Elegit*, 11; Goodyere v. Ince, Cro. Ja. 246; Yelv. 179, S. C.

Though a *fiery facias* ought not to be taken out during the existence of a *capias ad satisfaciendum*, and whilst the person is in custody under it; yet, if it be so taken out, it is not void; though the court would, probably, set it aside on motion, without putting the party to his *audita querela*. The sheriff may therefore justify a seizure of a leasehold estate under it, and convey a good title to such estate to a purchaser.

Jeanes v. Wilkins, 1 Ves. 195.

So, if the sheriff sell a term under a writ of *fiery facias*, which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the latter cannot maintain an ejectment to recover his term against the vendee under the sheriff.

Doe v. Thorn, 1 M. & S. 435.]

It was formerly held, (a) that, if a person taken on a *capias ad satisfaciendum* died in execution, the plaintiff had no further remedy, because he determined the choice by this kind of execution, which affecting a man's liberty, is esteemed the highest and most rigid in the law.

Foster v. Jackson, Hob. 52; Williams v. Cutteris, Cro. Ja. 136, 143; Ro. Abr. 903. *Sed contr.*, Blumfield's case, 5 Rep. 86 b. β The imprisonment of the defendant is no satisfaction of the debt in Massachusetts, except that under circumstances, it may operate as a satisfaction so far as the party imprisoned is liable; but it is no discharge of any other party liable with him. Porter v. Ingraham, 10 Mass. 88; Lyman v. Lyman, 11 Mass. 317. See *anté*, Execution, (C), 4. γ (a) The statute of James (which see in the next paragraph) treats this however only as a doubt; for the body is merely a pledge for the debt; it is taken not in satisfaction, but *ad satisfaciendum*. The debtor is presumed solvent, and is therefore coerced of his liberty until he makes payment. His imprisonment is not a punishment, but merely a means of getting at that property which he is supposed to possess, and fraudulently withhold. If he dies in prison without having surrendered his property, it is perfectly consistent with this proceeding that a new writ should issue attaching immediately upon the property. The judgment of the court, that he shall pay, is still unexecuted.]

But now, by the 21 Ja. 1, c. 24: "Forasmuch as heretofore it hath been much doubted and questioned, if any person being in prison and charged in execution by reason of any judgment given against him, should afterwards happen to die in execution, whether the party at whose suit, or to whom such person stood charged in execution at the time of his death, be forever after concluded and barred to have execution of the lands and goods of the person so dying: and forasmuch as daily experience doth manifest, that divers persons of sufficiency in real and personal estate, minding to deceive

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others of their just debt, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities; to prevent which deceit, and for the avoiding of such doubts and questions hereafter, be it declared, explained, and enacted, That the party or parties at whose suit, or to whom any person shall stand charged in execution for any debt or damages recovered, his or their executors or administrators may, after the death of the said person so charged, and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they, or any of them, might have had by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution."

"Provided, That this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements, or hereditaments of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold *bond fide*, for the payment of any of his creditors, and the money, which shall be paid for the lands so sold, either paid, or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or some part thereof."

[If a plaintiff consent to the defendant's being discharged out of execution upon an agreement, he cannot afterwards retake him, although the security given by the defendant on his discharge should be afterwards set aside.

Vigers v. Aldrich, 4 Burr. 2482; Jaques v. Withey, 1 T. R. 557; Thompson v. Bristol, Barnes, 205; Blackburn v. Stupart, 2 East, 243; Tanner v. Hague, 7 T. R. 420. {7 Term, 420, Tanner v. Hague; 1 Bos. & Pul. 242, Da Costa v. Davis; 2 Cain. 369, Furman v. Haskin. He cannot retake the defendant, though the latter agreed that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on. 2 East, 243, Blackburn v. Stupart; 5 Johns. Rep. 364, Yeates v. Van Rensselaer.}

So, if the plaintiff consent to discharge one of several defendants taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake such defendant, or take any of the others. *Secus*, where the discharge of one is by act of law.

Clark v. Clement, 6 T. R. 525; Nadin v. Battie, 5 East, 147.] {But if one is discharged as an insolvent debtor, this will not discharge the other; for it cannot be said to have been with the plaintiff's assent, though he might have detained him in prison by paying his daily allowance. 5 East, 147, Nadin v. Battie.}

If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him, or take any of the others.

Clarke v. Clement, 6 Term R. 525.

If a plaintiff take the note of one of two defendants taken on a *ca. sa.*, in satisfaction of the damages, it is a discharge of the other defendant.

Ballam v. Price, 2 Moo. 235.

The court will not discharge a defendant from custody under a *ca. sa.*, on the ground that he has been before irregularly taken and discharged under criminal process, at the instance of the plaintiff.

Mackie v. Warren, 5 Bing. 176.

If A has judgment against B, and he takes out a *capias ad satisfaciendum*,

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directed to the sheriff of Middlesex, who directs his precept to the bailiff of the liberty of the duchy *ad cap. B ad respond. A*, instead of *ad satisfaciend.*, and thereupon the sheriff returns *cepi corpus secundum exigentiam brevis*; though by this return the sheriff makes himself liable to the debt to the plaintiff, by not pursuing his authority, yet A may take out a new writ of execution against B, for he never was in custody by virtue of the *capias ad satisfaciendum*.

Wood v. Harburn, Yelv. 52, adjudged.

So, if a party taken on a *capias ad satisfaciendum* escapes, or is rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatús*, yet the plaintiff may take out any new execution, and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.

Cro. Car. 40, 455; Vent. 4. But for this vide tit. *Escape*.

If on a *fiery facias* all the money is not levied, the plaintiff may take out a new execution; but, as such new execution must be grounded on the first writ, such writ must be returned, and must recite, that all the money was not levied on the first. (a) But, if on the first writ all the money had been levied, it need not be returned, for no further process was necessary.

Oviat v. Vyner, Salk. 318. (a) If the execution be once begun, though it be afterwards withdrawn, the writ must be returned, before another can be sued out either against the property or person. Miller v. Parnell, 2 Marsh. 78.

If on a (b) *fiery facias* the defendant pays the money to the sheriff, he is discharged of the execution, and the plaintiff must bring his action against the sheriff.

Cro. Eliz. 208, 209. (b) *Secus*, if on a *capias ad satisfaciendum* he pays the money to the sheriff, for that writ only empowers him to take the body. 2 Lev. 203; 2 Jon. 97; 2 Mod. 214; Freem. 453; Taylor v. Baker.—2 Show. 139, S. P. adjudged bad; Slackford v. Austen, 14 East, 468, S. P.; Gilb. Execut. 72, S. P.; Langdon v. Wallis, 1 Lutw. 582, S. P.—But, if he had paid it to the plaintiff's attorney on record, it would be good. 2 Show. Ibid., admitted, for that would have been a payment to the plaintiff himself.

So, if the sheriff takes (c) goods in execution by virtue of a *fiery facias*, whether he sells them or not, yet, being taken from the party against whom the execution was sued, he may plead that taking in discharge of himself, and shall not be liable to a second execution, though the sheriff hath not returned the writ. And the reason is, because the defendant cannot avoid the execution, and he would therefore be in a very bad condition if he was to be charged the second time; and if the sheriff dies after the goods are taken in execution, his executors are liable to the plaintiff, for they have *quid pro quo*, and it is in nature of a contract raised by law.

2 Mod. 214. (c) So, if the sheriff takes a bond from the party, this is a good execution, and the sheriff shall answer for the money. Keb. 551.—But, if there be an execution against J S, and he bring 90*l.*, part of the condemnation money, to the sheriff, who refuses to take it, saying, the plaintiff in the action will not accept it, and thereupon J S desire the sheriff to keep the money till the plaintiff comes to town; if in this case the sheriff is robbed, J S must pay the money over again. 2 Show. 172. Vide tit. *Bailment*.

As therefore the defendant in these cases is discharged as to the plaintiff, hence it seems to be clearly agreed, that the plaintiff may maintain an action of debt against the sheriff; for though there is no actual contract between the sheriff and the creditor, yet the levying of the money creates a contract

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in law, which lays a lien on the sheriff; for otherwise the party would be without remedy.

Hob. 206; 4 Mod. 404; 2 Show. 79, 281.

Also, it has been held, that an action lies even by an executor against an under-sheriff for money levied on a *fieri facias*, as money received to the plaintiff's use, though before the return of the writ; for if the sheriff were permitted to stave off the action by his delay in not returning his writ, it would be allowing him to take advantage of his own wrong.

2 Show. *ubi supr.*

So, it hath been held, that such action is not within the statute of limitations; for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and hath a strong relation to it. (a)

2 Show. *ubi supr.*, Cockram v. Welbye; 2 Mod. 212, S. C., adjudged by three judges against Scroggs, Just., because the action was brought against the defendant as an officer, who acted by virtue of an execution, in which case the law creates no contract; and here was a wrong done, for which the plaintiff had taken a proper remedy, and therefore should not be barred by this statute. Mod. 245; Cro. Car. 297. (a) || But the sheriff's return to a writ of *fieri facias*, that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it in an action for money had and received. Cator v. Stokes, 1 M. & S. 599. ||

And as the law subjects the sheriff to an action in these cases, so it (b) vests such a possessory property in him in the goods taken by him in execution, that if they are taken out of his possession, he may maintain trespass or trover against the wrong-doer, at his election, (c) as well as a carrier or bailee of goods; and here he could not return a rescue, but must answer for them.

Wilbraham and Snow adjudged, 2 Saund. 47. (b) But, if the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him, but they remain in the party, and are liable to any subsequent execution for his debt. 2 Vern. 238, 239.—Where the sheriff pleaded, that he levied goods to the value of 16*l.*, and they were rescued out of his hands, and held an ill plea on demurrer. 2 Saund. 343, 344. (c) || If after the seizure the sheriff quit the premises, and leave no one in charge of the goods, he cannot maintain trespass against a person distraining, for they no longer remain in *custodia legis*. Blades v. Arundale, 1 M. & S. 711. ||

If A and B have two several judgments against C, and they take out writs of *fieri facias*, which are both delivered to the sheriff on the same day, and the sheriff executes that which was last delivered, it bearing teste before the other; and afterwards apprehending that he ought to have executed that which was first delivered, he takes the same goods and delivers them in execution on the first writ; this second execution is void; for though the sheriff ought to have executed the writ that was first delivered, yet having executed the last first, the vendee shall keep the goods, and the party must seek his remedy against the sheriff; and the reason hereof is, for the quiet of purchasers under sheriffs upon executions; for otherwise it would be dangerous to make such purchases of sheriffs; which might make writs of execution of no effect.

Smalcomb v. Buckingham, Carth. 419; Salk. 390, S. C.; Ld. Raym. 251, S. C.; 5 Mod. 176, S. C.; Comb. 429, S. C.; Com. Rep. 35, S. C.

So, where a writ of *fieri facias* is delivered to the sheriff to-day, and another to-morrow, and the sheriff executes the last first, by making sale of the goods, such sale will stand good, and the vendee shall hold the goods against him who first delivered the writ to the sheriff; and his remedy is

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only by action against the sheriff, a remedy to which he is not entitled, if the non-execution has proceeded from his own laches.

Cart. 420, *per Cur.* See stat. 29 Car. 2, c. 3.

¶ So where a party at whose prayer a sequestration had issued out of the Court of Chancery for the performance of a decree, had taken no measure to compel the execution of it in due time, and the sequestrators had not in fact possessed themselves of the goods, it was holden to be no excuse to the sheriff, to whom, at a distance of eighteen months, a writ of *fi. facias* was directed against the goods of the defendant in the Chancery suit, for not executing such writs and selling the goods, the plaintiff in the sequestration (allowing it even to have the same effect to bind the goods as a *fi. facias* at common law) having at all events lost his priority by such laches, and therefore that the sheriff, who had seized under the *fi. facias*, and on notice of the sequestration had returned *nulla bona*, was liable to the plaintiff in an action for a false return.

Payne v. Drewe, 4 East, 523.]

{For though a *fi. fa.* binds the goods, as against the defendant and those claiming from him, from the delivery of the writ to the sheriff, yet the property is not divested out of him till execution executed; and therefore an execution and sale under a subsequent writ delivered to the sheriff shall bind the goods; but the plaintiff in the first execution has his remedy against the sheriff, if the non-execution of the writ did not proceed from his own laches.

4 East, 523, Payne v. Drewe.

So, if a sequestration issue out of Chancery, and the party on whose application it is issued take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods during eighteen months, the sheriff (admitting the sequestration to bind the goods in the same manner as a *fi. fa.*) is bound to seize and sell those goods on an execution subsequently issued, and cannot return *nulla bona*; for the reason above mentioned, and also because the plaintiff in the sequestration has at all events lost his priority by his laches. "Where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed."

4 East, 523, Payne v. Drewe.]

[But, where two writs of *fi. facias* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were first made under the subsequent execution.(a) And if the person claiming under the last execution pay the sheriff the amount of the debt under the first execution, the court will not, on motion, compel the sheriff to refund that money.

Hutchinson v. Johnstone, 1 T. R. 729. But, where the sheriff had given a bill of sale to the person claiming under the second execution, that was holden to bind the sheriff. Rybot v. Peckham, B. R. M. 19 G. 3, cited. Ibid. ¶ See Lord Ellenborough's remarks on this case of Hutchinson v. Johnstone, in 4 East, 544. (a) The second writ is to be considered as operating in favour of the first. Jones v. Atherton, 2 Marsh, 375.]

If a *fi. facias* be executed fraudulently, a second *fi. facias* at the suit of another person executed afterwards shall have the preference.

Bradley v. Wyndham, 1 Wils. 44.]

(E) Of the Authority and Jurisdiction of the Court out of which the Execution issues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.

JUDGMENTS must be executed in those courts in which they are given, and by such process and means as the law allows, and are agreeable to the established practice of those courts: and therefore, in case an inferior jurisdiction refuses to execute a judgment, a writ (*a*) *de executione judicii* lies, which if they disobey, the superior courts grant an attachment.

Cro. Car. 34. (*a*) For this vide F. N. B. 20. § See Knowles v. Lynch, 4 Tyr. 477; Batten v. Squires, 4 Dowl. P. C. 53; Duckworth v. Fogg, 4 Dowl. P. C. 396; 2 C. M. & R. 736; Lord v. Cross, 2 Adol. & Ell. 81; 4 Nev. & M. 30; 3 Dowl. P. C. 4. *g*

If a man recovers in a court baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they must distrain him, and retain the distress till satisfaction.

4 H. 6, 17 b; 22 Aas. 72; Ro. Abr. 543, S. C.; Bro. Court Baron, S. C.; but a *gauger* made, for it is usual for the suitors assigned by the steward to tax the sums, and then to award a *levari facias*.—By Brownl. 81, upon a *levari* out of a court baron, goods cannot be sold without a custom to sell, &c., and Noy, 17, 20; Gilb. Execut. 27.

But it hath been held, that execution may be in a hundred court by *levari facias*, and that where the books speak of a *distringas*, they must be intended of a *levari*, for a distress infinite would be endless in an execution.

Doe v. Parmiter, 2 Lev. 81; 2 Keb. 117, 126, S. C.—It is held, that, though the process of a hundred court is a *distringas*, a *levari* may be good by custom. Comb. 124; Show. 47; 3 Danv. 304, (L), pl. 1; 2 Lutw. 1369; Carth. 53; Gilb. Execut. 29.—And in 3 Lev. 203, it is held, that the precept may issue from the sheriff, though the suitors are judges.

[In actions on a policy of assurance, where there is a verdict for the plaintiff against one of several underwriters, and the rest have entered into the consolidation rule, and agreed to be bound by it; or where on a reference to arbitration, it is agreed that a verdict shall be taken for the plaintiff's security, and an award is afterwards made in his favour—in each of these cases, execution cannot be taken out without leave of the court.

Tidd's Pr. 719; 1 Salk. 84; Barnes, 58.

So, where in ejectment the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, the lessor of the plaintiff, having succeeded, must apply to the court for leave to take out execution; and in such case, if a writ of error be brought by the landlord, it may be shown for cause, and will be a sufficient reason against taking out execution. But, if the landlord omit the opportunity of showing it for cause, the execution is regular, and cannot be set aside. (*b*)

Jones v. Edwards, 2 Str. 1241. (*b*) George v. Wilson, 2 Burr. 757.

Where there has been already an execution in an action of debt upon bond for the payment of an annuity, fresh execution may be taken out as subsequent payments become due, without a suggestion or *scire facias* under the statute of 8 & 9 W. 3, c. 11; but this must be with leave of the court.

Howell v. Hanforth, 2 Bl. Rep. 843; Ogilvie v. Foley, Ibid. 1111; Scott v. Whalley, 1 H. Bl. 297.

{If a writ of error, after it is allowed, be abated by the death of the plaintiff in error, yet execution cannot be issued on the judgment without leave of the court.

7 East, 296, Lord Kinnaird v. Lyall.}

If judgment is given in debt in C. B., and the record removed in B. R.,

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by writ of error, and judgment affirmed, (be it after *scire facias*, and appearance upon it, and errors assigned, or otherwise,) and execution awarded by *capias*, the *capias* ought to be special, reciting, that judgment was in C. B., and removed in B. R. by error, &c., for otherwise the *unde convictus est* in the *capias* shall be intended of a conviction in B. R.; and this was said by the clerks to be their course; wherefore a *supersedeas* was awarded of the execution *quia erroneè emanavit*, the writ not being returned.

Sir William Bucknall v. Sellwood, Vent. 274; 3 Keb. 522, S. C.

If a writ of error be brought here of a judgment in B. R. in Ireland, and the judgment affirmed, the method is to have a writ, reciting all the proceedings here in England directed to the judges of the King's Bench in Ireland, requiring them to issue process of execution; and by this mandatory writ the cause is restored to that court: but no writ of execution of such a judgment can issue here.

Coot v. Lynch, Salk. 321; 5 Mod. 421, S. C.; Ld. Raym. 427; 12 Mod. 255; Carth. 460; Cowp. 843.

[Where a writ of error determines in the Exchequer Chamber by abatement or discontinuance, the judgment is not again in B. R. till there be a *remittitur* entered; for without a *remittitur* it cannot appear to that court, but that the writ of error is still pending in the Exchequer Chamber: (a) and therefore, in such case, it is usual for the plaintiff to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution. (b)]

(a) 1 Salk. 261, 319; 1 Ld. Raym. 244. (b) 1 Salk. 265; 1 Cr. Pr. 369, 370.

So, if the plaintiff recover a judgment against two defendants in B. R., and one of them bring a writ of error in the Exchequer Chamber, the plaintiff cannot charge the other defendant in execution till the record be remitted, notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants.

2 T. R. 737.]

Where a verdict was taken for the plaintiff for 400*l.* damages, in an action against several defendants, subject to a point of law for the court, and in case the law was decided in favour of the plaintiff, then subject to the award of a barrister as to damages, the law being decided in favour of the plaintiff, and the arbitrator declining to proceed in the reference, and one of the defendants refusing to name another arbitrator, the court ordered judgment and execution to issue against the defendant for the damages found by the jury, unless he would consent to refer to some other arbitrators.

Woolley v. Kelly, 1 Barn. & Cres. 68.

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No person is entitled to, or can sue out execution, who is not privy to the judgment, or entitled to the thing recovered, as heir, executor, or administrator to him who has judgment.

Ro. Abr. 889. *β* An execution issued in the name of the plaintiff, who is dead, is not absolutely void, although his representatives have not been substituted by *scire facias*. Day v. Sharp, 4 Whart. 339.*g*

But, if an administrator *durante minori etate* of an executor recovers in debt, and, before execution, the executor comes of age, the executor shall have a *scire facias* on this recovery, for he is privy to the judgment.

Margaret Wright's case, adjudged, Ro. Abr. 888, 889.

|| So, if an administrator *pendente lite* obtains a judgment, the executor, on



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proving the will, which determines the administration, shall take advantage of it in the same manner.

2 P. Wms. 587.]

So, if J S makes A executor, upon condition, that if A does such an act, that the executorship shall cease, and that then B shall be executor; if A recovers in debt, and then does the act, B shall take out execution.

Walwin v. Herbert, by three judges against one, Ro. Abr. 889.

If a feme, executrix to J S, marries, and her husband and she bring an action of debt on an obligation, as executrix to J S, and have judgment, and the wife dies; in this case the husband, though privy to the judgment, shall not sue out execution, for he is not entitled to the thing recovered, but the same belongs to the succeeding representative of J S.

Beaumont and Long, adjudged, Ro. Abr. 889; Cro. Car. 208, 227, 464, S. C.

So, where A sued as administrator to J S, on an obligation entered into by the defendant to the intestate, and had judgment, and afterwards the letters of administration were repealed; though A was privy to this judgment, and took out execution thereupon, yet the court granted a *supersedeas* thereof, and held, that the administration being revoked, the suing out execution afterwards was void; for the administrator had no interest or authority, but as a ministerial officer to the ordinary.

Barnehurst v. Sir Charles Yelverton, Yelv. 83; 2 Saund. 148, 149, S. P., adjudged between Turner and Davis; for if he were permitted to sue out execution, he would, notwithstanding, be subject to the action of the rightful administrator, which would create a circuity of action, which the law abhors.

Also, it was formerly held, that if an administrator had judgment in right of his intestate, and died before execution, that the administrator *de bonis non* could not have a *scire facias*, so as to take out execution on this judgment, not being privy to the record.

Cro. Ja. 4, Yate v. Gough, adjudged by three judges against Gandy, J.; Yelv. 83, 84, S. P. *per Cur.*

But, where an executor had judgment, and sued out an *elegit*, but died intestate before the debt was levied; yet it was held that the administrator *de bonis non* should take advantage thereof, and that the *elegit* being sued out made it an interest vested, though it would have been otherwise if execution had not been sued out.

Harrison v. Bowden, Sid. 29.

And now, by the 17 Car. 2, c. 8, § 2, it is enacted, "That where any judgment, after a (a) verdict shall be had, by or in the name of any executor or administrator; in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment."

(a) For this vide 6 Mod. 290, and Salk. 323, where it is said *per Curiam* to be but reasonable, and within the equity of this act, that an administrator *de bonis non* should be permitted to perfect an execution begun by an executor or administrator, though the judgment was by default, &c. See 2 Ld. Raym. 1072; 11 Mod. 34; pl. 6. Vide *infr.*, tit. *Executors and Administrators*, (B) 2.

[But in case of an extent, and an inquisition had, the execution is not complete till a *liberate* is awarded; and if the plaintiff in the execution die before the *liberate* is awarded, the writ of *extendi facias* is abated by his death; and his representative cannot have any fruit thereof, because no right was vested by the extent.

Cleeve v. Vere, Cro. Eliz. 450, 457; Sir W. Jon. 385.]

If a man has judgment for the arrearages of rent, and dies, his executor

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shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is entitled.

46 E. 3, 25 b; Ro. Abr. 889, S. C.

So, if the demandant in a writ of coinage, or (a) other real action, in which land and damages are recovered, has judgment, and dies, the heir shall take out execution as to the land, and the executor as to the damages.

19 E. 4, 5 b; 43 E. 3, 2; Ro. Abr. 889. (a) So, of a recovery in waste, the heir shall have execution of the land, and the executor of damages. 43 E. 3; 2 Ro. Abr. 889, S. C.

If a statute be entered into to husband and wife, and the husband die, the wife shall take out execution.

48 E. 3, 12 b; Ro. Abr. 889, S. C.

So, if husband and wife recover lands and damages, and the husband die, the wife shall have execution of the damages, and not the executors of the husband.

Ro. Abr. 342, 889, 890.

If there are two executors who have judgments, and the one prays a *capias*, and the other a *fiery facias*, it is said the *capias* shall be awarded, as being best for the testator.

Hob. 61. By the opinion of Cotsmore, 7 H. 6, 6.

If the president of the college of physicians brings an action against one for practising physic in London without license, pursuant to the statute 14 & 15 H. 8, c. 5, and has judgment, and dies before execution; the successor, and not the executor of him who recovered, shall sue out execution; for this action is given to the president by an act of parliament, and the proceedings and judgment thereupon obtained by him were in his corporate capacity; and therefore the successor, on whom the law transfers the duty, shall take out execution.

Doctor Atkins v. Gardener, adjudged without argument, Cro. Ja. 156.

¶ A plaintiff who took a bill of exchange in payment of the debt and costs in action, which was afterwards dishonoured, was held to be entitled to a *ca. sa.* without delivering up the bill.

Kemp v. Gardner, 4 Dowl. P. C. 676.g

(G) Of the Persons against whom Execution may be sued out: And herein,

1. Of suing Execution where there are several Parties concerned.

If a man has judgment in an assize against any three for lands and damages, he cannot sue execution by *capias* against one only, for the damages; but the *capias* ought to be against all, for the execution ought to ensue the nature of the original.

15 H. 7, 6; Ro. Abr. 889. [That a separate *capias ad satisfaciendum* against one, on a joint judgment against two, is bad, hath been lately adjudged. Clerk v. Clement, 6 T. R. 525.] ¶ Only one execution can be issued on one judgment, at the same time, although there may be several defendants; but if several be issued, the one first acted upon is alone valid. Hudson v. Dangerfield, 2 Louis. R. 66. And a joint execution cannot issue on separate judgments. Dugat v. Babin, 8 N. S. 392. Nor a several execution against one of several defendants. Boyken v. The State, 3 Yerg. 426.g

¶ Under an execution against one partner, the sheriff seizes on the partnership property, he seizes all and not a moiety of the goods sufficient to cover the debt, and sells the moiety of the whole undivided, and the purchaser becomes a tenant in common with the other partner.

Marsereau v. Norton, 15 Johns. 179; In the matter of Smith, 16 Johns. 106.g

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So, if a man has a judgment in debt against two, he must take out joint execution against both, and (a) cannot have a *capias* against one, and an *elegit* against the other.

Ro. Abr. 888, *Beverley v. Beverley*. For this vide Cro. Eliz. 573, 574; 5 Co. 86, 87, S. P. (a) Vide Hob. 2, 59; Cro. Car. 75.

But, if a man have judgment for damages against two, and he sue out a *scire facias* against both; if one be returned summoned, and he make default, and it be returned, that the other hath (b) nothing, the plaintiff may have execution against him who made default for the whole.

1 E. 3, 13; Ro. Abr. 890, S. C. (b) So, if it be returned that one of them is dead, he shall have execution for the whole against the other. 1 E. 3, 13 b; Ro. Abr. 890, S. C.

So, if two become bail for J S, and he be condemned, and there be judgment on *scire facias* against the bail, the plaintiff may take out execution against either of them, being severally as well as jointly bound.

*Dixon v. Adams*, Ro. Abr. 888.

If there be judgment in debt against two, and one die, a *scire facias* lies against the other alone, reciting the death, and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (c) common law, the charge upon a judgment being (d) personal survived, and the statute of Westm. 2, c. 18, that gives the *elegit*, does not take away the remedy of the plaintiff at the common law; and therefore, the party may take out his execution which way he pleases, for the words of the statute are, *Sit in electione*: but, if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (e) suggestion, or else by *audita querela*.

*Edsar v. Smart*, Raym. 96; Lev. 30, S. C.; Keb. 99, 123, S. C. ¶ Execution may be issued against survivor of two joint judgment debtors, or against his personal property. *Woodcock v. Bennett*, 1 Cowen, 711. In Kentucky, when the judgment is against several, one of whom dies, and afterwards the execution issues in the name of the whole, without any suggestion of the death, the survivors cannot take advantage of it. *Johnson v. Lynch*, 3 Bibb, 334; 1 Litt. 224. So in Massachusetts: *Hamilton v. Lyman*, 9 Mass. 14; *Bowdoin v. Jordan*, 9 Mass. 160. (c) So adjudged, 1 E. 3, 13, pl. 41; 3 E. 3, pl. 37; and vide 29 Ass. pl. 37; 29 E. 3, 29. (d) For the difference between real and personal execution, and that a personal execution will survive, though a real one will not, vide 3 Co. 14; Yelv. 209; Raym. 153; 2 Keb. 3, 331; 4 Mod. 315; 3 Keb. 395; Salk. 319, pl. 9; Show. 402; Holt, 1. pl. 2; Carth. 236; Salk. 261, pl. 1. ¶ When one of two plaintiffs dies after judgment, an execution may be issued without a *scire facias* as well in ejectment as in a personal action. *Howell v. Eldridge*, 21 Wend. 678. (e) For this vide F. N. B. 166; 44 E. 3, 10. See Comb. 441; 5 Mod. 338; Carth. 404; Show. 405; Ld. Raym. 244.

¶ The imprisonment of one of several defendants on an execution issued on a judgment against them all, is as to him a satisfaction of the debt so long as it continues; and in an action on the judgment against them all, the proceeding is fatal to such a joint action.

*Chapman v. Hatt*, 11 Wend. 41; *Sunderland v. Loder*, 5 Wend. 58; *Cooper v. Bigelow*, 1 Cowen, 36; *Stewart v. M'Guire*, 1 Cowen, 99; *Osterhout v. Roberts*, 8 Cowen, 43. g

## 2. Of suing out Execution against the Heir and Executor.

If there be judgment against one who has lands in fee simple, or, if such a one acknowledge a statute, and die, and his lands descend to his heir, \*execution may be taken out against the heir, but his body is protected; for

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it would be most unreasonable to subject the heir to the payment of his ancestor's debts, any farther than to the value of the assets descended.

But for this vide tit. *Heir and Ancestor*, and vide Dyer, 81, 207, 344; Moore, 74; Co. Litt. 103, 290.—\* See the stat. 3 W. & M. c. 14, § 5, 6, where execution shall go against the heir, after an alienation of lands descended.

So, if there be judgment against J S, and he die intestate, or having made his executor, a *fieri facias*, if vested before his death, may be executed of his goods in the hands of the executor or administrator, without a *scire facias*.

|| But, if the defendant die after final judgment and before execution, a *scire facias* is necessary.||

For this vide head of *Executors and Administrators*, and vide Mod. 189; 9 Vent. 218; Skin. 257; 2 Show. 485; Salk. 392; Com. Dig. *Execution*, (F.), *Pleader*, (3 L. 7); Dy. 76; Tidd's Pr. 1056; 6 T. R. 368; 7 T. R. 24.

[Neither an *elegit*, nor a *capias ad satisfaciendum*, will lie against executors, unless a *devastavit* be returned.

1 Cr. Pr. 346; 3 Bl. Com. 414.]

¶ Where, in an action against executors, the judgment was *de bonis testatoris*, the writ commanded the sheriff to levy on the property of the defendants, *as executors*, it was held that this was not error.

*McCormick v. Meason*, 1 S. & R. 92.

Judgment against an executor *de son tort*, an execution issued on the judgment, the lands of intestate cannot be taken, the lands not being assets in the hands of such executor.

*Mitchell v. Lunt*, 4 Mass. 654.g

### 3. Of suing out Execution against Infants.

By the (a) common law, if judgment be given against a man for debt or damages, and the defendant die before execution sued, his heir within age is not liable to execution during his minority; but the parol must demur in such case till he comes of age.

Co. Litt. 290 a; Ro. Abr. 140. (a) But, though upon a judgment in debt, or upon a statute or recognisance, there can be no proceeding against an infant at common law during his minority, yet there may in Chancery, and a sequestration may issue against his lands. 2 Chan. Ca. 163, 164.—That the lands of one who enters into a statute merchant, staple, or recognisance, are not extendible in the hands of his heir, until he comes of age, vide Bro. *Stat. Merch.* 33; Co. Litt. 290; Moore, pl. 121, 203; Dyer, 239; Co. Ent. 12. Vide ante.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as, if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

Co. Litt. 290 a.

So, if the consor of a statute merchant die, and his heir within age endow his mother, the land in dower shall not be extended during the minority of the heir.

Co. Litt. 290 a; Bro. *Stat. Merch.* 33.

[But an infant seems to be liable to a *capias ad satisfaciendum*.

2 Str. 1217.]

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4. *Of suing out Execution against a Feme Covert.*

If a person recovers in trespass against baron and feme, execution may be sued out against the feme after the death of her husband.

Ro. Abr. 890. But for this vide tit. *Baron and Feme*, and Cro. Car. 518, 526; 3 Keb. 205.

So, if a recovery be in an assize against them upon a disseisin, execution shall be against the feme after the death of her husband, as well for the damages as for the principal.

39 H. 6, 45; Ro. Abr. 346, S. C.

So if, in a *quare impedit*, damages be recovered against baron and feme to the amount of two years, and the husband die, the damages may be recovered against the wife.

46 E. 3, 23; Ro. Abr. 890, S. C.

¶ After interlocutory judgment against a feme upon a contract, she married: and the court held, that the plaintiff might proceed to judgment and execution against her without joining the husband by *scire facias*; and that a *capias ad satisfaciendum* against her following the judgment, was at all events regular, though the plaintiff had notice of the marriage before.

Cooper v. Hunchin, 4 East, 521; Doyley v. White, Cro. Ja. 323.

In ejectment against a feme sole, who married before trial, and afterwards verdict and judgment were had against her by her original name; the Court of King's Bench held, that it was regular to issue an *habere facias possessionem* and *fieri facias* against her by the same name, though the *fieri facias* was wholly inoperative.

3 M. & S. 557.

In an action against husband and wife, they may both be taken in execution; and it was formerly holden, that the wife should not be discharged, unless it appeared that there was fraud and collusion between the plaintiff and her husband, to keep her in prison: but it is now the practice to discharge her when taken in execution, as well as on mesne process.

2 Str. 1167, 1237; 1 Wils. 149; Say. Rep. 149.¶

5. *Of suing out Execution against privileged Persons.*

There can be no execution taken out against a member of parliament during privilege of parliament.\*

But for this vide tit. *Privilege*. β Story, Const., §§ 856 to 862; 1 Kent, Com. 221; 1 Dall. R. 296; Bouv. L. D. *Privilege*. γ \* For preventing delays of justice, by reason of privilege of parliament, see 10 Geo. 3, c. 50, which enacts, that suits may at any time be prosecuted in courts of record, equity, or admiralty, and courts having recognition of causes matrimonial and testamentary against peers, and members of the House of Commons, and their servants. But the persons of members of the House of Commons are not to be arrested or imprisoned.

Also, no *capias* can issue against a peer; for even in the case of a private person, at common law, the body was not liable to a man's creditors; and the statute of E. 3, which subjects the body, does not extend to peers, because of the sacredness of their persons. Also, the law supposes, that persons thus distinguished by the king have wherewithal to satisfy their creditors.

6 Co. 52; Hob. 61; Cro. Car. 205; Trinder v. Shirley, Dougl. 45.

¶ If a counsellor actually attending court for the purpose of making a

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special motion be arrested on a *ca. sa.* during his attendance, he will be discharged from the arrest.

Humphrey v. Cumming, 5 Wend. 90. A suitor is also privileged. Broome v. Hurst, 4 Yeates, 124, note; S. C. 4 Dall. 387.<sup>g</sup>

6. Of suing out Execution against a Clerk, or one in Holy Orders.

If a writ of execution be taken out against a clerk in holy orders on a judgment obtained against him, or upon a statute staple, or recognisance in nature of it, which he has entered into; and the sheriff return, that he is a clerk, he ought to extend his lay fee and chattels, or return that he hath neither; but, if he return, *quod clericus est beneficiatus nullum habens laicum feodum, sed quod beneficiatus est* in such a diocese, then a writ(a) of sequestration shall issue to the bishop to sequester the living.

2 Ro. Abr. 474; Ro. Abr. 891; 2 Inst. 472; Jenk. 207. (a) That the writ in this case is like a *feri facias*, and the bishop is in nature of a temporal officer or ecclesiastical sheriff, and may, as the sheriff in other cases, seize ecclesiastical things and sell them, and must return *feri feci*, and not *sequestrari feci*, upon this writ. Mod. 257; 2 Mod. 258. [He may also be called upon by rule to return the writ; and if he make a false return, will be liable to an action. Gilb. Exec. 26; 1 Salk. 320; 1 Ld. Raym. 265.]

[Upon this writ, the bishop or his officer makes out a sequestration directed to the churchwardens, or, upon a proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tithes, and other profits of the benefice; which sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon: for where a sequestration was made out, and not published whilst the writ was in force, but was stayed in the registrar's hands, by desire of the plaintiff's attorney, the court held, that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would have taken effect, and must have been first satisfied, notwithstanding it was then returnable.]

3 Burn's E. L. tit. *Sequestration*; Legassick v. Bishop of Exeter, E. 22 Geo. 3, K. B.; Tidd's Pr. 1060.

If the conusor of a statute merchant be a clerk within orders, by the statute 13 E. 1, the sheriff cannot take the body in execution; and if he return that he is a clerk, no execution shall be granted to the sheriff to levy the debt *de bonis ecclesiasticis*, for his person is protected by the letter of the statute, and the statute doth not subject the *bona ecclesiastica* to the execution; but in this case the conusee may have execution granted out of his lay fee.

2 Ro. Abr. 468; Reg. Jud. 8; Bro. Stat. Merch. 38; Co. Entr. 13.

On a *feri facias* against a fellow of Winchester college, the sheriff returned *clericus beneficiatus nullum habens laicum feodum*, whereupon a *feri facias de bonis ecclesiasticis* issued to the bishop, who sent his mandate to the warden and fellows of the college to sequester his salary, and they refused: and it being moved in B. R. to know, whether the bishop might not compel them by ecclesiastical censures, the court thought that this was not an ecclesiastical constitution, the universities being only societies *ad studendum et orandum*, but said that a prebend is an ecclesiastical benefice; and in such case, if the prebendary have a sole distinct corps, it may be sequestered; but where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a sequestration, and therefore they left the bishop to do as he ought by law.

Salk. 320, Moreley v. Warburton; Ld. Raym. 265, S. C.

(H) At what Time Execution may be sued.

[It is said, that the writ of sequestration must be renewed every term; (a) but it seems, that if the writ be laid on and executed, before the day of the return, the mesne profits may be taken under it, after the writ is returnable, otherwise not. (b)]

(a) 1 Cr. Pr. 345. (b) 3 Burn's E. L. tit. *Sequestration*; Tidd's Pr. 746.] || It is clearly a continuing execution, and a levy under it may be made from time to time after it is returnable, until the sum endorsed be satisfied; but not after it is *actually* returned, for then the authority of the bishop is at an end. *Marsh v. Fawcett*, 2 H. Bl. 582. ||

(H) At what Time Execution may be sued out: And herein of the Necessity of a *Scire Facias*.

At common law, in real actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment, because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given; and therefore if there was no execution appearing on the roll, a *scire facias* issued to show cause why execution should not be.

2 Inst. 471; 5 Co. 88; Cro. Eliz. 416; 6 Mod. 288. β An execution cannot be lawfully issued after a year and a day, unless awarded on *scire facias*. *Ridge v. Prather*, 1 Blackf. 402; *Perkins v. Ballinger*, 1 Hayw. 367; *Fletcher v. Mott*, 1 Aik. 399. But it is voidable only at the instance of the party against whom it issues. *Den ex dem. Oxley v. Mizle*, 3 Murph. 250. g

But, if the plaintiff, after he had obtained judgment in any personal action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable by law on the judgment, because there was not a judgment for any particular thing in the personal action, with which the execution could be compared; therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, and therefore the law allowed him no *scire facias* to show cause why there should not be execution. But, if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to show how that debt, of which the judgment was an evidence, was discharged.

2 Inst. 469; Carth. 30, 31; Sid. 351. β An execution issued after a year and a day is not void in the hands of the officer, but it is void as to the plaintiff or his attorney who was privy to the issuing of such execution. *Hoskins v. Helm*, 4 Litt. 310; *Simmons v. Woods' Lessee*, 6 Yerg. 518. g

To remedy this, and make the forms of proceeding more uniform in both actions, the statute of Westm. 2, 13 E. 1, st. 1, c. 45, gave the *scire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment was obtained. The words of the act are, *Quod ea quæ inveniuntur irrotulata coram hiis qui recordum habent, vel in finibus contenta, sive sint contractus, sive conventiones, sive obligationes, sive servicia, aut consuetudines, recognita, vel alia quæcunque irrotulata quibus curia regis sine juris et consuetudinis offensa auctoritatem potest prestare, talem decetero habeant vigorem, quod non sit necesse de hiis imposterum placitare. Set cum venerint conquerentes ad curiam domini regis, si recens sit cognitio vel finis, videlicet, infra annum in brevi levatus, statim habeant breve de executione illius recognitionis facte. Et si forte a majori tempore transacto facta fuerit illa recognitio, vel finis levatus, precipiatur vicecomiti, quod SCIRE FACIAT parti de qua fit querimonia, quod sit ad certum diem ostensura, si quid sciat dicere, quare hujusmodi irrotulata vel in fine contenta executionem habere non debeant. Et si ad diem non venerit, &c.*

(H) At what Time Execution may be sued.

It hath been doubted whether a *scire facias* lay to revive a judgment in ejectment after a year and a day, either by the common law, or by force of this statute; for at common law this was looked upon as a personal action, and it was thought that the statute extended only to such personal actions in which debt or damages are recovered, and not to provide a remedy in this case, when at the time of making the act the possession was not recovered in this action: but it seems now settled and confirmed by daily practice, that a *scire facias* lies on a judgment in ejectment, for the words of the act (a) are, *Sive servitia sive consuetudines sive alia quæcunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at common law.

Okey v. Vicars, Sid. 351; 2 Salk. 600; Proctor v. Johnson, Ld. Raym. 669, S. C. || Withers v. Harris, 2 Ld. Raym. 806; 1 Salk. 358, S. C. (a) But the court, in the cases in Ld. Raymond and Salkeld, held that the *scire facias* lay at common law. And so it is laid down in Com. Dig. tit. *Pleader*, (3 L. 1.)||

Here also it may be proper to distinguish between taking out execution on judgments and recognisances at common law, and on statutes merchant and staple; that on the first a *scire facias* after the year and day is absolutely necessary; but as to statutes merchant, &c., the conusee may at any time sue execution on them, without the delay or charge of a *scire facias*.

Co. Lit. 291 a; 2 Inst. 469; F. N. B. 296; Bro. *Recognisance*, 17.

The reason why the plaintiff is put to his *scire facias* after the year is, because where he lies quiet so long after his judgment, it shall be presumed he hath released the execution, and therefore the defendant shall not be disturbed without being called upon, and having an opportunity in court of pleading the release, or showing cause, if he can, why the execution should not go.

2 Inst. 470, and admitted to be the reason in all the cases on this head.

Also, it is said in Salkeld, that, if a judgment be above ten years' standing, the plaintiff cannot sue a *scire facias* without motion in court; and if it be under ten, but above seven, he cannot have a *scire facias* without a motion at the side bar; and a note is added, that if after such motion, and judgment revived by *scire facias*, the defendant die before execution, the plaintiff may sue a new *scire facias*, but may have it without motion, for the judgment was revived before.

2 Salk. 598, pl. 3, *per Cur.*

But, though the general rule be, that the plaintiff cannot take out execution after the year and day without a *scire facias*, yet it must be understood with these restrictions.

That if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment above. Besides, while the cause is depending on the writ of error, it is still *sub judice*, whether the plaintiff shall recover or not, and the year for the execution ought to be accounted from the final judgment given.

Cro. Ja. 364; Yelv. 7; 15 H. 7, 16 b; Roll. Abr. 899; 4 Leon. 197; 5 Co. 88; Carth. 236, 237; 6 Mod. 288.

So, if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, be-



## (I) To what Time the Execution shall have relation, &amp;c.

cause the delay is by consent of parties, and in favour of the defendant ; and the indulgence of the plaintiff shall not turn to his prejudice.

6 Mod. 288; Ro. Rep. 104.

Also, if the plaintiff enters on the roll of the judgment, an award of an *elegit* of the same term with the judgment, and continues it down with *vicecomes non misit breve*, he may take out that writ at any time afterwards, without suing out any *scire facias*, though, upon debate of this matter, the judges at first inclined that the *elegit* should be actually taken out ; otherwise, such an award as this might be entered at any time, paying only for the continuances, and the party thereby tricked out of the benefit which the law gives him of pleading any matter *post factum* upon the *scire facias* : but upon examination of several of the ancient practising clerks then in court, this appeared to have been the constant practice amongst them for many years ; and therefore the court, considering the inconveniency of opening a gap to destroy so many executions for this irregularity, and because the practice had prevailed so long, that it was become the law of the court, ordered that the execution should stand good.

Seymour and Grenvill, Carth. 283, 284; and vide Ro. Rep. 104; 2 Show. 235; Comb. 346.

But, if the defendant has been tied up by an injunction out of Chancery for a year, he cannot take out execution without a *scire facias*, because the courts of law do not take notice of Chancery injunctions, as they do of writs of error. Besides, in that case, it would be no breach of the injunction to take out the execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error, because that removes the record out of the court where the judgment was ; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts.

Booth v. Booth, Salk. 322; 6 Mod. 288, S. C. ¶ Winter v. Lightband, 1 Str. 301, S. P.; Hodson v. Earl of Darlington, 3 P. Wms. 36, S. P.; Sympson v. Gray, Barnes, 197. But, where the delay has been occasioned by the defendant himself, later cases have holden that this rule does not apply. Michell v. Cue, 2 Burr. 660; Bosworth v. Phillips, 2 Bl. Rep. 784, S. C., cited by Nares, J., and S. P. ruled; Bland v. Darley, 3 T. R. 530; Watkins v. Haydon, 2 Bl. Rep. 762, S. P. ¶—If a *steri facias* be sued within the year, and *nulla bona* returned, and continued down several years, a *capias ad satisfaciendum* may issue without a *scire facias*. Air v. Hardress, Stra. 100.—If execution is not returned by the sheriff, or not filed, continuances thereon cannot be entered on the roll; and if they are, and thereupon a *ca. sa.* issues after the year, without a *scire facias*, defendant shall be discharged out of custody, and plaintiff pay costs. Blayer v. Baldwin, 2 Wils. 82; Barnes, 213, S. C.—The year shall be computed from the day of signing judgment to issuing the writ, not by the number of terms. Barnes, 197.

## (I) To what Time the Execution shall have Relation, so as to avoid any Alienation by the Party: And herein of the Statute of Frauds.

As to lands, they are bound from the time of the judgment, so that execution may be of these, though the party aliens *bonâ fide* before execution sued out: so, of statutes merchant, staple, and recognisances, which also bind the lands from the time of entering into them.

Co. Litt. 102 a, b; 8 Co. 171; Sir Gerard Fleetwood's case, Ro. Rep. 77, 78.

Therefore, if a man has judgment for debt, or is conusee of a statute, and the debtor, before execution sued, aliens by fine, and five years pass, yet the plaintiff may still sue out execution.

Mod. 217; Chan. Ca. 268.

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But here it is necessary to observe, that by the 29 Car. 2, c. 3, § 13, reciting, that "it had been found mischievous, that judgments in the king's courts at Westminster do many times relate to the first day of the term whereof they are entered; or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation time after the said term, whereby purchasers find themselves aggrieved."

§ 14. It is enacted, "That any judge or officer of any of his majesty's courts of Westminster, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paperbook, docket, or record which he shall sign; which day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered."

[This statute, it hath been resolved, is confined to purchasers, and does not apply as between the parties to the suit. Therefore, if the defendant die in the vacation, judgment may be still entered after his death, as of the preceding term, when he was living; and it will be a good judgment, at common law, as of that term, though execution cannot be sued out upon it against the representative of the defendant until it is revived by *scire facias*. *Oades v. Woodward*, 1 Salk. 87; 2 Ld. Raym. 766, 849, S. C.; 7 Mod. 2, 93, S. C.; *Duke of Norfolk's case*, 1 Salk. 401; 7 Mod. 39, S. C.; *Parsons v. Gill*, 1 Ld. Raym. 695; *Com. Rep.* 117, S. C.; *Finch v. Earl of Winchelsea*, 3 P. Wms. 399, note [E]; *Fann v. Atkinson*, Willes, 427; *Savil v. Wiltshire*, *Ibid.* 428, note; *Barnes*, 271, S. C.; *Fuller v. Jocelyn*, 2 Str. 882; *Ca. temp. Hardw.* 158, S. C.; 1 *Barnardist. B. R.* 357, 358, 404, S. C.; *Chancy v. Needham*, 2 Str. 1081; *Andr.* 53, S. C.; *Heapy v. Parria*, 6 T. R. 368; *Bragner v. Langmead*, 7 T. R. 20; *Waghorne v. Langmead*, 1 B. & P. 571; *Freckelton v. Kitson*, 2 Lill. Pr. R. 145; *Stamper v. Kinsey*, *Ibid.* β As between the parties, a *fi. fa.* relates to the teste; otherwise as to purchasers. *Center v. Billingshurst*, 1 Cowen, 33. In New Jersey, when an execution is tested in defendant's lifetime, it may be taken out and executed after his death. *Denn v. Hillmann*, 2 Halst. 180.γ But then the roll ought to be brought in and filed before the essoign-day of the subsequent term. 1 Salk. 87; 2 Ld. Raym. 850; *Hodges v. Templar*, 6 Mod. 191. And it is said, that if judgment be signed in term-time, and in the subsequent vacation the defendant sell lands, and before the essoign-day of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser. 6 Mod. 191. See *Sugd. V. & P.* 561, 4th edit.] β In North Carolina, a *fi. fa.* binds the lands, goods, and effects of the defendant from its teste. *Winstead v. Winstead*, 1 Hayw. 243; *Ingles v. Donaldson*, 2 Hayw. 57; *Williams's Adm'r. v. Bradley*, 2 Hayw. 363; *McClean v. Upchurch*, 2 Murph. 353; *Gilky v. Dickerson*, 2 Hawks, 341. In Pennsylvania, *Lewis v. Smith*, 2 S. & R. 157; 2 Binn. 174. In Louisiana, it binds from the time of coming into the sheriff's hands. *Duffy v. Townsend*, 9 Mart. R. 585.γ

And § 15, it is enacted, "That such judgments, as against purchasers *bond fide*, for valuable consideration, of lands, tenements, or hereditaments to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail."

And § 18, it is enacted, "That the day of the month and year of the enrolment of recognisances shall be set down in the margin of the roll where the said recognisances are enrolled, and that no recognisance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bond fide*, and for valuable consideration, but from the time of such enrolment."

Also, for the greater security of purchasers, by the 4 & 5 W. & M. c. 20, made perpetual by 7 & 8 W. 3, c. 36, it is enacted, "That the clerk of the essoins of the Court of C. B., the clerk of the doggets of the Court of K. B., and the master of the office of Pleas in the Court of Exchequer, shall

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make and put into an alphabetical dogget, by the defendants' names, a particular of all judgments entered in their respective courts of Michaelmas and Hilary terms, before the last day of the ensuing term; and of the judgments of Easter and Trinity terms, before the last day of Michaelmas term, under the penalty of 100*l.*; which dogget shall contain the names of the plaintiff and defendant, with the addition of the latter, (if any such be in the record of the judgment,) the debt, damages, and costs recovered, the venue and number of the judgment roll; and shall be fairly put into and kept in books in parchment, to be searched and viewed by all persons, at reasonable times, paying for every term's search 4*d.* and no more: and by § 3, that no judgment not doggetted, and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates.

[Before this statute the judgment bound the lands, and the docket was nothing more than an index to find it readily. *Gilb. C. P.* 165. But now it is deemed necessary that the judgment should be docketed in order to bind the lands: and if it be not docketed, *Flower v. Lord Bolingbroke*, 1 *Str.* 639; or not docketed within the time prescribed by the act, *Wait v. Garth*, *Barnes*, 261; *Forshall v. Coles*, *Sugd. V. & P. App.* No. 18; or if there be a false docket, which is as none, *Gilb. C. P.* 165; 1 *Wils.* 61; 2 *Str.* 1309, *S. C.*, though a right judgment, the purchaser or mortgagee will be safe; and in the latter case, the party must take his remedy against the attorney or officer for not docketing it truly. ¶ But, though a judgment be not docketed, and therefore void against a purchaser, yet, if the purchaser has notice of it, and has not paid the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay it. *Thomas v. Pledwell*, tit. *Creditor and Debtor*, (*E. pl.* 5), 2 *Eq. Ca. Abr.* 681, *pl.* 7. And although no agreement were made, yet, if a purchaser has notice of a judgment, the statute does not in equity extend to him, for he is already in possession of that which it was the object of the legislature to furnish him with, namely, knowledge of the encumbrance. *Davis v. Earl of Strathmore*, 16 *Ves.* 419, which overruled the case of *Forshall v. Coles*, *Vin. Abr.* tit. *Creditor and Debtor*, (*E. pl.* 6), and 2 *Eq. Ca. Abr.* 592, *pl.* 8, but much more fully reported in *Sugd. V. & P. ubi supr.*] [If the judgment against a testator or intestate be not docketed, the debt is put on a level with simple contract debts, and the executor or administrator may, under the plea of *plene administravit* to an action of debt upon such a judgment, give in evidence the payment of bond and other specialty debts. *Hickey v. Hayter*, 6 *T. R.* 384; 1 *Esp. Rep.* 313, *S. C.*; *Steele v. Rorke*, 1 *B. & P.* 307.] ¶ And where leave was given to enter up judgment as of a preceding term, *nunc pro tunc*, the Court of K. B., in order that it might not affect purchasers and mortgagees, directed it to be docketed of the term in which the application was made. *Baker v. Baker*, *H.* 35 *G.* 3; 2 *Tidd's Pr.* 967, 6th edit.]

[To give effect to a judgment, as against purchasers and mortgagees of lands in Middlesex and Yorkshire, it is required, that it shall be registered: for by 5 *Ann. c.* 18, § 4, and several subsequent statutes, "No judgment, statute, or recognisance (other than such as shall be entered into in the name and upon the proper account of his majesty) shall affect or bind any manors, lands, tenements, or hereditaments in those counties, but only from the time that a memorandum of such judgment, statute, or recognisance, shall be entered at the register office, in such manner as therein is directed."

6 *Ann. c.* 35, § 19; 7 *Ann. c.* 20, § 18; 8 *Geo.* 2, *c.* 6, § 1 & 18.]

¶ But none of these acts extend to copyhold estates, or to leases at rack-rent, or not exceeding twenty-one years, where the actual possession and occupation go along with the lease. Nor does the act for the county of Middlesex extend to any of the chambers in Serjeants' Inn, the Inns of court, or Inns of Chancery.

*Sugd. V. & P.* 578—580.]]

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Here also we must observe a difference as to judgments which affect the lands of an ancestor, and those which affect the heir; for as to the first, the plaintiff shall not have execution, but only of that land which the defendant had at the time of the judgment, because the action was brought in respect of the person, and not in respect of the land.

Co. Litt. 102 a.

But, if an action of debt be brought against the heir, and he alien, pending the writ; yet shall the land he had at the time of the (a) original purchased, be charged, for the action was brought against the heir in (b) respect of the land.

Co. Litt. 102 b. (a) That filing a bill in B. R. is as effectual for this purpose as an original writ. Carth. 245. (b) And therefore if the ancestor devised away the lands, creditors, whose securities were inferior to judgments, had no remedy at common law, either against the heir or devisee. Abr. Eq. 149. But now by the 3 & 4 W. & M. c. 14, it is enacted, that all wills concerning lands, or any rents, profits, term, or charge out of the same, whereof the devisor shall be seised in fee simple, in possession, reversion, or remainder, shall be deemed to be fraudulent and void against creditors upon bonds or other specialties, their executors, administrators, &c., and such creditors shall have their actions of debt against the heir at law and the devisees jointly.

Hence it hath been adjudged, that where there were two creditors, viz., A and B, of J S, whose heir was bound, and who had lands by descent, and A filed an original in C. B., and had judgment thereon in Trinity term, 2 Ja. 2, by default, and thereupon a general *elegit* issued against all the lands of the heir, and a moiety thereof was delivered to A, and B, on a bill filed in B. R., 1 & 2 Ja. 2, had a special judgment against the assets confessed by the heir in Trinity term, 3 Ja. 2, though B's judgment were subsequent to A's, yet as it appeared that his bill or original was filed before A's, the judgment should have relation thereto, and therefore he was to be first satisfied.

Gree v. Oliver, Carth. 245.

Also, in the above case it seems, that though A's judgment had been on an original actually filed before B's, that B must have been preferred, because his judgment was general against the heir, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; and therefore such a general judgment will not operate by way of relation to the original, but binds only in common cases from the time of the judgment given.

Carth. 181, 246.

As to goods and chattels, the execution at common law had relation to the time of the awarding thereof, and therefore, if after the *teste* of the writ of execution, the defendant had sold the goods, though *bond fide*, and for valuable consideration, yet were they still liable to be taken in execution, into whose hands soever they came.

8 Co. 171; Cro. Eliz. 174, 440; 2 Vent. 218.

But as this created some inconveniency with respect to trade, in making the goods still subject to execution, though in the hands of a person who came by them for valuable consideration, and without notice of any such execution; and as there was a farther inconveniency in making a writ of execution taken out in vacation, to have relation to the last day of the precedent term; for remedy thereof,

By the 29 Car. 2, c. 3, § 16, it is enacted, "That no writ of *feri facias*,

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or other writ of execution, shall bind the property of the goods against which such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and, for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ, (without fee for doing the same,) endorse upon the back thereof the day of the month or year whereon he or they receive the same."

[But neither before this statute, nor since, is the property of goods altered, but continues in the defendant, till the execution executed. The meaning of the words, *that no writ of execution shall bind the property but from the delivery of the writ to the sheriff*, is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution. 2 Eq. Ca. Abr. 381.]

[This statute protects only goods in the hands of *purchasers* where the goods are sold *bond fide*; for if the party die after the *teste*, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for this is not a change of property by sale, or for a valuable consideration.

Comb. 145.

So, if a writ of execution be delivered to the sheriff, and the defendant become bankrupt before it was executed, the execution is thereby superseded, and the goods are not bound by the delivery, for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed.

1 Ld. Raym. 252. But in such case, the sheriff shall not be made a trespasser by relation for any subsequent disposal of them; though he would be liable in trover. *Smith v. Milles*, 1 T. R. 475.

The sheriff deriving his authority from the writ, it hath been holden, that if the plaintiff die after a *feri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money. And if the plaintiff (a) has made no executor, or administration is not yet committed, the money must be brought into court, and there deposited until, &c.

Cro. Car. 459; 1 Sid. 29; 2 Ld. Raym. 1073; 1 Salk. 322. (a) *Noy*, 73; 2 Ld. Raym. 1073.]

If a sheriff having seized goods of the defendant under one execution, receives another execution against the same goods at the suit of another party, the goods are bound by the second writ from the time of its delivery to the sheriff, subject of course to the prior execution, and this without any warrant on the second writ or any further seizure.

*Jones v. Atherton*, 7 Taunt. 56; 2 Marsh. 375; and see *Hutchinson v. Johnson*, 1 Term R. 729.

If the sheriff, having two executions against a defendant's goods, seize them, and they are not sufficient to satisfy more than the first execution, and that execution is set aside by the court, and the sheriff, without giving notice to the plaintiff in the second execution, or applying to the court, pay over the money to the defendant, and on being ruled to return the second writ, return *nulla bona*, he is liable to the plaintiff on the second execution for the amount so paid over.

*Saunders v. Bridges*, 3 Barn. & A. 95.

In an action against the sheriff for a false return of *nulla bona* to a writ of *feri facias*, the sheriff proved that he had seized all the goods of the debtor under a *feri facias* in another suit before the plaintiffs' writ was delivered to him; the plaintiffs in answer proved that the judgment upon which the first execution was sued out was entered upon a warrant of attorney fraudulent.

## (K) Of the King's Precedency in Executions.

lently executed by the debtor in order to defeat the plaintiffs' execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff on the first day of the next term was served with a rule to return the writ of *fiery facias* under which he first levied. He did not give any notice to the plaintiffs by whom the second *fiery facias* had been sued out that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff at whose suit the first *fiery facias* had been sued out; held, that this was misconduct in the sheriff, and rendered him liable to the plaintiff in the second execution.

Warmoll v. Young, 5 Barn. & C. 660.

## (K) Of the King's Precedency in Executions.

It hath been already observed, that the king, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election.

Hob. 60; 2 Inst. 19; 2 Ro. Abr. 472.

And here we must observe, that the king's execution relates as to land to the time of becoming in debt to the king; for as to debts that were of record, they always bound the lands and tenements; for all lands being held mediately or immediately from the king, when any debt was returned of any person, it laid the estate as liable to such debt, as if it had been a reservation on the first grant.

8 Co. 171; 2 Ro. Abr. 156, 157.

And as to debts not of record, they bind the lands from the time they are entered into; but this is by force of the statute 33 H. 8, c. 39, § 74, by which it is enacted, "That if any suit be commenced or taken, or any process hereafter be awarded for the king, for the recovery of any of the king's debts, that then the same suit and process shall be preferred before any person or persons; and that our said sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for the said debts, before any other person or persons; so always, that the king's said suit be taken and commenced, or process awarded for the said debt, at the suit of our said sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons."

As to the king's execution of goods, the same relates to the time of the awarding thereof, which is the *teste* of the writ, as it was in the case of a common person at common law; for though by the 29 Car. 2, c. 3, "no execution shall bind the property of the goods, but from the time of the delivery of the writ to the sheriff;" yet as this act does not extend to the king, an extent of a later *teste* supersedes an execution of the goods by a former writ; because by the king's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to the private property, and the rather, because the king is supposed by public business not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to (or runs against) the king; and if he was to be prevented of his execution, by another person's coming in before him, laches must be imputed to him, which the law does not.

[Rex v. Cotton, Parker, 112; 2 Ves. 288. But the above statute of 33 H. 8 extends to executions against personal property as well as against land, and restrains the prerogative within the limitation there prescribed. Parker, 261, 262.]

## (L) Of the proper Officer to do Execution.

If the king's debt be prior on record, it binds the lands of the debtor, into whose hands soever they come, because, as has been observed, it is in the nature of an original charge upon the land itself, and therefore must subject everybody that claims under it; but, if the lands were alienated in whole or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in such case the land is not subject.

But for this vide 2 Ro. Abr. 156, 157; Moore, 126; 3 Leon. 239, 240; 4 Leon. 10.

[This statute of 33 H. 8, it hath been resolved, is not confined to bond debts only, but extends to all debts and executions at the suit of the king. But it is restrictive upon the old prerogative, and introductive of a new law, for *ita quod, so always that the king's suit, &c.*, makes a condition precedent and a limitation. Hence, therefore, a judgment and execution, executed by *elegit*, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. And, in the case of an execution against personal property, if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed. Besides, in this case, the property of the goods is changed by the subject's execution, and no longer remains in the king's debtor. It will indeed be otherwise, if an extent come after a distress, or before a provisional assignment under a commission of bankrupt, for in neither of those cases is the property of the goods divested out of the owner.

7 Co. 18 b; Attorney-General v. Andrews, Hardr. 23; Lechmere v. Thoroughgood, 3 Mod. 236; Comb. 123; Uppom v. Sumner, 2 Bl. Rep. 1251, 1294; Rorke v. Dayrell, 4 T. R. 402.

See further on this subject tit. PREROGATIVE, (E).

By the act of Congress, approved March 3, 1797, 1 Story's L. U. S. 464, it is enacted, "§ 6. That all writs of execution upon any judgment obtained for the use of the United States, in one state, may run and be executed in any other state, or any of the territories of the United States, but shall be issued from, and made returnable to, the court where the judgment was obtained, any law to the contrary notwithstanding."

## (L) Of the proper Officer to do Execution: And herein of the preceding and succeeding Sheriff.

THE sheriff or officer, who has proper authority to begin an execution, is compellable to proceed in the same.

Salk. 223; vide tit. Sheriff. When a sheriff seizes goods, and afterwards he goes out of office, he may nevertheless be compelled to go on to sell, and when he neglects, the court may compel him by *distingas*. Anon., 1 Hayw. 415.

Hence it hath been adjudged, that if a sheriff on a *fiery facias* seizes goods in his hands to the value of the debt, and pays part of the debt, and is discharged, without having sold the rest of the goods, or having returned his writ, that notwithstanding such discharge, and without any writ of *venditioni exponas*, he may sell the goods remaining in his hands, and such sale and execution shall be good by force of the writ of *fiery fucias*.

Ayre v. Aden, Cro. Ja. 73; Moore, 757, S. C.; Ro. Abr. 893, S. C.; but in Yelv. 44, the S. C. is reported, and there held contrary to the resolution in all the other books, that the sale was void, and that his authority ceased with his office; but *qu.* and vide 2 Saund. 47; Latch. 117.

If a *fiery facias* be delivered to an under-sheriff, 9 Nov., 34 Eliz., on which he levies part of the debt; and on the same day a writ of discharge be de-

## (N) Of the Sheriff's Authority in doing Execution.

livered to him, dated 6 Nov. ; yet if it be not proved, that he had notice of this discharge prior to his commencing the execution, he still remains under-sheriff, and liable to the plaintiff's action for the money levied by him.

*Boucher v. Wiseman*, Cro. Eliz. 440.

As the authority of the old sheriff continues, so the law has provided a remedy to oblige him to proceed in the execution, which is by (a) *distringas nuper vicecomitem*, either to distrain him to sell and bring in the money, or to sell and deliver the money to the new sheriff to bring into court.

Salk. 323. (a) For which vide *Theas. Brev.* 90; 34 H. 6, 36; *Rast. Ent.* 164.—That the *distringas*, which commands the new sheriff to distrain the old one to sell and bring in the money, is the most usual. 6 Mod. 299.

Although the term of his office has expired, a sheriff is authorized to serve process until he has been notified officially that his successor has been qualified.

*Curtis v. Kimbal*, 12 Wend. 275.*g*

## (M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy against him for Neglect of his Duty.

If the sheriff refuses to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted.

Vide tit. *Attachment and Sheriff*.

So, if he executes the writ, and makes a false return, the party injured may have an action on the case against him.

Salk. 323.

If a *fiery facias* be directed to the sheriff, and he return, that he levied goods to such a value, he must answer goods to that value; and in such case, if he return, that they remain in his hands for want of buyers, then a *venditioni exponas* shall be awarded; upon which, if he refuse to sell the goods, a *distringas* issues to the coroner.

7 Mod. 118; 6 Mod. 299; Salk. 323.

But, if to a *fiery facias* the sheriff return, that he seized goods to such a value, and that they were rescued out of his hands; in this case, he makes himself liable to an action of debt, or a *scire facias* may be brought against him by the plaintiff; for the sheriff having levied the goods, he can have no remedy against the defendant: also, in this case, there can be no *venditioni exponas* to the sheriff, because by his own showing it appears, that he has not the goods in his hands.

For this vide Cro. Ja. 514; Godb. 276; 2 Ro. Rep. 57; Bridgm. 53; Sly and Finch, Cro. Ja. 566; Coryton and Thomas, Cro. Car. 53; 2 Saund. 343.

## (N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &amp;c.

It is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house. This privilege, which the law allows to a man's habitation, arises from the great regard it has to every man's safety and quiet, and therefore it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; and hence it is, that every man's house is called his castle.\*

5 Co. 91, &c., *Semaine's case*; 3 Inst. 162; Moore, 668; Yelv. 28; Cro. Eliz. 906; Dalt. Sher. 350. An officer cannot lawfully break open an outer door or window to execute civil process; if the door be partly closed by those within, who are resisting the entrance of the officer, and be entirely shut, the officer is guilty of a trespass should



## (N) Of the Sheriff's Authority in doing Execution.

he oppose them with force and thereby gain entrance. *State v. Amfield*, 3 Hawks, 246. *\*In Trin. T. 17 G. 3*, in the cause of Yates and others against Delamayne, Esq., the court set aside an execution levied on defendant's goods, in his dwelling-house, because the officer forcibly broke into the house to execute the writ.

But yet, in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, this general case hath the following exceptions:

1. That whenever the process is at the suit of the (a) king, the sheriff, or his officer, may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be.

5 Co. 91 b. (a) That upon a *copias utlagatum*, though on mesne process, and at the suit of the subject, the sheriff may break open any outward doors after demand and refusal. 2 Show. 87, pl. 78.  $\beta$  When the property of a defendant in the execution is in the house of a third person, or in the smoke-house, without the curtilage of such third person, a demand for admittance must be made by the officer, and a refusal by such person, to justify the officer in breaking the door and entering the house. *Douglas v. The State*, 6 Yerg. 525. See ante, *Bailiff*, A, vol. 1, p. 600. *g*

2. So, in a writ of seisin, or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently, the sheriff must have all power necessary for this end: besides, in this case, the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered.

5 Co. 91.

3. Also, this privilege of a man's house relates only to such executions as affect himself; and therefore if a *feri facias* be directed to the sheriff to levy the goods of A, and it happen that A's goods are in the house of B, if, after request made by the sheriff to B to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house.

5 Co. 93 a; Sid. 186.  $\parallel$  In entering the house of a stranger the sheriff is not justified, unless he actually finds therein goods of the defendant, which are liable to be taken in execution. In entering the defendant's house, his justification does not depend on that event. *Cooke v. Birt*, 5 Taunt. 765; 1 Marsh. 333, S. C.; *Johnson v. Leigh*, 1 Marsh. 565; *Stanhope v. Dawson*, 2 Lutw. 1428.  $\parallel$

4. Also, this privilege extends to a man's dwelling-house or out-house adjoining thereto; and therefore it hath been adjudged, that the sheriff on a *feri facias* may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close, &c.

Sid. 189, *Penton and Browne*; *Keb.* 698, S. C.

5. So, on a *feri facias*, when the sheriff or his officers are once in the house, they may break open any (a) chamber door or trunks for the completing of the execution.

2 Show. 87, pl. 78, agreed *per Cur.*; *Cowp.* 1. (a) *Qu.* Whether this must not be after request and refusal? *Palm.* 54.  $\parallel$  This was not thought to be necessary in a late case, *Hutchinson v. Birch*, 4 Taunt. 619; but the case of *Ratcliffe v. Burton*, 3 B. & P. 223, seems *contr.*  $\parallel$   $\beta$  When the sheriff has gained peaceable admission into the house, he may break any inner door. *State v. Thackam*, 1 Bay, 358. *g*

6. So, if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door, for the enlarging and setting at liberty the bailiffs; for if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly

## (O) Of the Offence of hindering or obstructing an Execution.

inconvenient: also, it seems, that, in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it.

Palm. 52, White and Whitshire; Cro. Ja. 555, S. C.; 2 Ro. Rep. 137, S. C.

7. That if the sheriff, in executing a writ, breaks open a door where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff.

5 Co. 93 a.

[A seizure of part of the goods in a house by virtue of a *feri facias*, in the name of the whole, is a good seizure of all.

1 Ld. Raym. 725.]

8 A levy cannot be made after the return day of the writ.

Dugat v. Baben, 8 N. S. 393; Johnston's Ex'rs. v. Wall, 1 N. S. 541; Toomer v. Purkey, 1 Rep. Cons. Ct. 323; Gaines v. Clark, 1 Bibb, 608.

A levy should be made at the usual and customary hours of doing business, and not at midnight, or other improper time, except under special circumstances.

State v. Thackam, 1 Bay, 358.g

{The sheriff must actually seize the property on a *feri facias* before he can sell.

9 East, 474, Scott v. Scholey; Taylor, 131, Blount v. Mitchell.

He cannot seize after the return-day.

2 Cain. 243, Devoe v. Elliott; 4 Johns. Rep. 450, Vail v. Lewis.}

## (O) Of the Offence of hindering or obstructing an Execution.

THERE were anciently castles, fortresses, and liberties, where they resisted the sheriff in executing the king's writs, which creating great inconvenience, the statute of Westm. 2, c. 39, hindered the sheriff from returning rescuers to the king's writ of execution, the words of which statute are, *Multoties etiam falsum dant responsum mandando, quod non potuerunt ezequi preceptum regis propter resistentiam potestatis alicujus magnatis, de quo caveant vicecomites de cetero, quia hujusmodi responsio multum redundat in dedecus domini regis. Et quam cito sub-balkivi sui testificantur quod invenerunt hujusmodi resistentiam statim (omnibus omissis) assumpto secum posse comitatibus sui eat in propria persona ad faciendam executionem.*

2 Inst. 450.

The judges construed these words to extend only to executions, and not to writs on mesne process, and that the sheriff was not obliged to carry the *posse comitatibus* where the man was bailable, for they did not presume, that in such cases the king's writ would be disobeyed.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it. Hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, viz, *a qua non deliberetur sine speciali precepto domini regis*; so that, notwithstanding the statute of *magna charta*, that none are to be imprisoned *sine judicio parium vel per legem terræ*, this is one part of the law of the land to commit for contempts, and confirmed by this statute.

2 Inst. 454.

But, though the court will on affidavit grant an attachment against the

## (P) Of the Party's Remedy, &amp;c.

party, whether he be the defendant or a stranger who disturbs the execution; yet, where the sheriff delivered possession by virtue of an *habere facias possessionem* in the morning, and some hours after the sheriff was gone, and the party in possession, the defendant came and turned him out again; the court held, that if the plaintiff had been turned out immediately after he was put into possession, or while the sheriff and his officers were there, an attachment might have been granted, for this had been a disturbance to the execution, and a contempt, but being several hours after, they doubted: but it was agreed in this case, that the court might grant a new *habere facias possessionem*, if the first was not returned.

Kingsdale v. Mann, 1 Salk. 321; 6 Mod. 27, S. C.

Also, though the court will grant an attachment, yet if A be taken on a *capias ad satisfaciendum* at the suit of B, and rescued by J S, B may bring an action on the case against J S for the rescue, or the sheriff may have such action against the rescuer, because he is liable to B, but his being so liable does not prevent B from bringing his action against which of them he pleases.

Mynn v. Coughton, Cro. Car. 109; vide tit. *Actions on the Case*.

## (P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.

[If the writ of execution be irregular, the defendant may move the court to set it aside, and discharge him out of custody if taken on a *capias ad satisfaciendum*: or that the goods or money levied on a *fi. facias* may be restored to him. A third person, whose goods are taken under it, may also move the court to have them restored: but, if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain the money in court, to abide the event of the trial.

Tidd's Pr. 1069.] β An execution will not be quashed because a plurality of attorney's fees may have been included in it; it may be amended. Hubbard v. Hites, Litt. Sel. Cas. 190. See J. J. Marsh. 356.g

β A judgment creditor may sue out one writ of execution, and, when he has an election as to the several kinds of executions, he may, before his first execution has been executed, abandon it, and sue out one of a different sort; or after it has been executed and returned, if a part only of the judgment has been satisfied, he may, at his election, have another writ of the same or a different kind, for the residue.

Steel v. Murray, 1 Blackf. 179.

A second *fi. fa.* cannot be issued until after the first one has been returned.

Mackey v. Trustees of Presbyterian Church, 3 N. Ser. 391; Cumpston v. Field, 3 Wend. 392.

After a *fi. fa.* has been once levied, it cannot be withdrawn, for the purpose of enabling the plaintiff to issue a *ca. sa.*

Cutter v. Colver, 3 Cowen, 30.

When a plaintiff in an execution, by a judgment rendered against him, is compelled to refund to a third person the value of a portion of the property sold under the execution, he may issue an execution for the amount so refunded, without leave of court.

Richardson v. McDougal, 19 Wend. 80.g

## (P) Of the Party's Remedy, &amp;c.

(a) If upon an *elegit* the sheriff delivers all the party's lands, or a third part, or more than a moiety, the extent is void: but in this (b) case, it can only be made void by (c) writ of error or *audita querela*. (d)

(a) Sid. 91. (b) Carth. 453. (c) That an irregular execution may be avoided in evidence in ejectment brought for the lands. Lev. 160. (d) But the court, it seems, would now set it aside on motion.

But if, upon an *elegit* the sheriff deliver a moiety of a house without metes and bounds, such return is ill, and shall be quashed for uncertainty on (e) motion, without a writ of error or *audita querela*.

Carth. 453. (e) May for this be quashed, though it be filed and entered upon record, because it appears by the record to be void for uncertainty, *per* Hale, Ch. Just.; but Wyld, Just., held, that it being entered upon the record, there was no avoiding it, but by writ of error. Vent. 259; and vide Vent. 274; 3 Keb. 522.

So, if a *fiery facias* be not warranted by the judgment upon which it is awarded, though the sheriff shall be (g) excused, yet it is merely void as to the party.

Vent. 259. (g) Upon a *fiery facias* to the under-sheriff of the county of Bucks, who sold the goods of a poor man for 22l. 13s. 4d., the goods being well worth 80l., it appeared to the court, that the sheriff had prevailed with the jury to prize the goods at an under-value, persuading them it would be better for the poor man; whereupon they appraised them *ut supra*, and he delivered them to the plaintiff for the said sum. The court held, that it was oppression, and inquirable at the assizes by indictment, or punishable in the Star Chamber; and commanded that the under-sheriff, being an attorney, should be brought before them. Cro. Ja. 426; Sayer, Sheriff of Buckingham's case.

β A mistake made in issuing a *fi. fa.* or *vend. exp.* in the name of the plaintiff's executor as William *M<sup>c</sup>Dowell* for William *Dowell*, may be amended as a clerical error, and it does not vitiate a sale made under it.

Cluggaye v. Duncan, 1 S. & R. 111.

Where the judgment is in debt, and the execution is for damages, it is but a clerical mistake and not error.

Gano v. Slaughter, Hardin, 76. g

[If a *fiery facias* be tested, or returnable, out of term, or, in an action by bill, if it be returnable on a general return-day, it is void, or at least erroneous, and may be quashed or set aside on motion, together with the proceedings that have been had under it. But a *fiery facias* may be amended, (h) by adding or altering the teste.

2 Salk. 700; Davey v. Hollingsworth, Tr. 24 G. 3, B. R.; Tidd's Pr. 1036. β The sheriff cannot execute a writ after the return-day. Vail v. Lewis, 4 Johns. 450; Stoyel v. Cady, 4 Day, 222; Barnard v. Stevens, 2 Aik. 429. All the proceedings under an execution till the return-day, relate back to the commencement of the proceedings. Howard v. Daniels, 2 N. H. Rep. 137. g (h) 1 Wils. 155; Say. Rep. 12.]

It has been held, that in trespass against the sheriff, it is enough for his justification, to show a writ. So it is in the case of his bailiff or officer, with this difference, that the sheriff must show the writ was returned, (i) if returnable; but the bailiff need not, because it is not in his power. But in trespass against the plaintiff himself, or a mere stranger, they cannot justify themselves, unless they show there was a judgment as well as an execution, for the judgment may be reversed, and it ought to be at their peril, if they take out execution afterwards. But it seems, that if one comes in aid of the officer, at his request, he may justify as the officer may do: but such request or command of the officer is traversable.

Salk. 409, pl. 5; 3 Salk. 320, pl. 8; Ld. Raym. 632; 12 Mod. 320, 396; 5 Burr. 2631; 2 Bl. Rep. 1104; Doug. 41. ¶ 6 T. R. 35. (i) But *qu.* whether this be necessary upon *final* process issuing out of a superior court; and see Tidd's Pr. 1070, note f.]

## (P) Of the Party's Remedy, &amp;c.

So, where a man had judgment and execution executed, and afterwards the judgment was vacated for being unduly obtained, and restitution awarded, and afterwards the defendant brought (a) trespass against the plaintiff in the first action for the taking of the goods; it was adjudged, that it well lay against the party, for by the vacating of the judgment it is as if it never had been, and is not like a judgment reversed by error. But in this case it was held, that no action would lie against the sheriff, (b) who had the king's writ to warrant what he did.

Lev. 95, *Turner v. Felgate*; Raym. 73, S. C. (a) Where an action will lie for taking out execution on a judgment which the plaintiff knows to be satisfied, vide *Hob. 205, 266*. (b) [But, if the sheriff or officer incautiously joins in the same plea with the party, he forfeits his defence. 1 Str. 509.]

If after a writ of error sued out, and bail put in, the plaintiff takes out execution, the court will grant a *supersedeas quia executio erroneè emanavit*.

But for this vide tit. *Error*, letter (H), and 3 Lev. 312.  $\beta$  See *Phelps v. Landon*, 2 Day, 370; *Dutton v. Tracy*, 4 Conn. 365.

A *feri facias* directed in the first instance to the bailiff of the Isle of Ely out of the Court of King's Bench is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken.

*Grant v. Bagge*, 3 East, 128.

If an execution be issued for the penalty of a bond given for securing an annuity, when the warrant of attorney authorizing the judgment only authorizes execution to be taken out for the arrears, the court will set aside the execution *in toto*.

*Tilby v. Best*, 16 East, 163.

The Court of King's Bench refused to set aside an execution against the goods of a person who, having been discharged under an insolvent debtor's act, gave a note for that part of the debt remaining undischarged.

*Best v. Barker*, 8 Price, 533.

But an execution issued against the goods of a defendant on a judgment recovered was set aside, and the money levied restored, the defendant, pending the action, having been discharged under the insolvent act 1 G. 4, c. 199.

*Darley v. Brown*, 8 Price, 607.

Where a sheriff, under a *feri facias* against A, seized and sold the furniture in his house where he lived with a woman to whom he had been married, and to whom the goods belonged before marriage, it was held, that the woman having afterwards discovered that the marriage was void, might maintain trover against the sheriff, and recover the value of the goods, though it exceeded the price for which they were sold.

*Glaspoole v. Young*, 9 Barn. & C. 696; and see 2 Stark Ca. 396.

After verdict, and judgment affirmed on error, the court refused to stay execution till the trial of an indictment against two of the plaintiff's witnesses for perjury.

*Warwick v. Bruce*, 4 Maul. & S. 140

Where a defendant has entered into a consolidation rule, and the plaintiff has obtained a verdict in the cause tried, which is turned into a special verdict in order to bring error into the King's Bench, the Court of Common Pleas will stay execution against the defendant till the result of the writ of

(Q) To what the Party shall be restored.

error be known, on the defendant giving security to be bound by the judgment of King's Bench.

Gill v. Hinckley, 1 Moo. 79.

(Q) To what the Party shall be restored when such erroneous Execution is set aside.

If upon his judgment the plaintiff takes out a *fiery facias*, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the term was sold, and not the term itself; for by the writ the sheriff had authority to sell; and if the sale might be avoided afterwards, few would be willing to purchase under executions; which would render writs of execution of no effect.

Ro. Abr. 778; 8 Co. 966, 143; Cro. Eliz. 278; Moore, 573; 3 Leon. 89; Cro. Ja. 246; Godb. 27; Gouls. 103; 1 M. & S. 425.  $\beta$  Where an execution is issued on an erroneous judgment and property is sold under it, the sale will be valid although the judgment be afterwards reversed. *Rearson v. Searcy's Heirs*, 2 Bibb, 202.

When an execution is stayed by injunction, after a levy on chattels, the sheriff is bound to restore such chattels to the owner.

*Lesser v. Bisbee*, 3 Ohio, 464.

But, if the plaintiff takes out an *elegit* on his judgment, and the sheriff, upon this writ, delivers a lease for years, of the defendant's, to the value of 50*l.*, to the plaintiff *per rationabile pretium et extentum*, to have as his own term, in full satisfaction of 50*l.*, part of the sum recovered, and after the defendant reverses the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term on this writ, yet here is no sale to (a) a stranger, but a delivery of the term to the party that recovered by way of extent, without any sale, and therefore the owner shall be restored.

Ro. Abr. 778; Cro. Ja. 246; Yelv. 179; Brownl. 107, 108. (a) That it would be otherwise if sold to a stranger, vide Yelv. 108; Brownl. 107.

And for this reason, if personal goods were on this writ delivered to the party *per rationabile pretium et extentum*, upon the reversal of the judgment he should be restored to the goods themselves.

Ro. Abr. 778.

So, if the goods of an outlawed man are sold by the sheriff on a *copias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king.

5 Co. 90; Ro. Abr. 778; Cro. Eliz. 278.

So, if upon a *fiery facias* on a judgment against B, the sheriff takes the goods of B into his hands, but before any sale of them, B delivers to the sheriff a *supersedeas* on a writ of error, B shall have the goods again, for by this seizure no property is altered.

2 Ro. Abr. 491, *Sare and Shelton*; but for this vide Ro. Abr. 492; Cro. Eliz. 597; Moore, 542; Style, 159; Vent. 255; Comb. 389, and tit. *Supersedeas*, (G).

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